

Florida State University College of Law  
**Scholarship Repository**

---

Scholarly Publications

---

2020

## **Federalism as Legal Pluralism**

Erin Ryan

Follow this and additional works at: <https://ir.law.fsu.edu/articles>



Part of the Law Commons

---

### **Recommended Citation**

Erin Ryan, *Federalism as Legal Pluralism* *The Oxford Handbook on Legal Pluralism* 482 (2020),  
Available at: <https://ir.law.fsu.edu/articles/715>

This Book is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Scholarly Publications by an authorized administrator of Scholarship Repository. For more information, please contact [efarrell@law.fsu.edu](mailto:efarrell@law.fsu.edu).



## CHAPTER 18

---

**FEDERALISM AS LEGAL  
PLURALISM**


---

ERIN RYAN<sup>3</sup>

## Table of Contents

<b>18.1. Introduction: The Legal Pluralism Critique of Monism</b>	<b>1</b>
<b>18.2. Federalism as Legal Pluralism</b>	<b>7</b>
18.2.1. Federalism as Dual Sovereignty.	8
18.2.1.1. <i>The American Model</i>	9
18.2.1.2. <i>The European Model</i>	13
18.2.2. Federalism as Pluralism	15
18.2.3. Dynamic Federalism as Legal Pluralism	17
<b>18.3. The Shared Importance of Dialogic Process</b>	<b>19</b>
18.3.1. Negotiated Federalism and Dialogic Process	19
18.3.2. The Benefits of Dialogic Governance	22
18.3.3. Consensus Process as Best Alternative	25
<b>18.4. The Shared Rejection of Zero-Sum Governance</b>	<b>28</b>
18.4.1. Disaggregating the Positive and the Normative	28
18.4.2. The Rejection of Zero-Sum Governance	30
18.4.2.1. <i>Rejecting Zero-Sum Federalism</i>	30
18.4.2.2. <i>Rejecting Statist Monism</i>	31
18.4.3. Contending with Zero-Sum Realities?	32
<b>18.5. Conclusion</b>	<b>35</b>

<sup>3</sup> I am very thankful to Paul Berman, Maks Del Mar, and the participants of the Global Legal Pluralism Conference at Queen Mary University of London for inviting me into the Legal Pluralism discourse, to Barbara Kaplan for invaluable research support, and to Taylor Schock and Jill Bowen for their assistance preparing this project for publication.



## 18.1 INTRODUCTION: THE LEGAL PLURALISM CRITIQUE OF MONISM

This chapter uses the dynamic federalism model of constitutional dual sovereignty as an analytic window into the larger legal pluralism discourse that has emerged in recent decades. Legal pluralism explores the significance of the multiple sources of legal authority and identity with which individuals simultaneously engage.<sup>1</sup> These overlapping sources of normative authority range from local, national, and international institutions of government to private sources of “quasi-legal” norms generated by tribal, religious, commercial, professional, or other associations.<sup>2</sup> Scholarly advocates of legal pluralism challenge the tradition of legal monism—so entrenched that its presumptions often go unnoticed—which views legitimate legal authority as deriving only from an established source of sovereign or natural authority that unambiguously trumps all competing forces.<sup>3</sup>

The broadest conceptions of legal pluralism considers not only the authority rooted in formal state sovereignty but also normative forces deriving from international trade practice, indigenous law, religious norms, corporate social responsibility, private arbitral procedures, engineering standards, and others.<sup>4</sup> The growing overlap between them is a byproduct of the increasingly complex infrastructure of legal, political, and private norm generation within which we all operate.<sup>5</sup> Nevertheless, while the vocabulary of

<sup>1</sup> Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge: Cambridge University Press, 2012), 11–12 (arguing for a cosmopolitan pluralist approach, which recognizes that “we are all fundamentally members of multiple communities, both local and global, territorial and epistemic,” and that “our conception of law must include more than just officially sanctioned governmental edicts or formal court documents” because “law does not reside in the coercive commands of a sovereign power . . . [but] is constantly constructed through the context of these various norm-generating communities.”).

<sup>2</sup> See generally John Griffiths, “What Is Legal Pluralism?,” *Journal of Legal Pluralism and Unofficial Law* 24 (1986): 1–56; Sally Engle Merry, “Legal Pluralism,” *Law and Society Review* 22, no. 5 (1988): 869–96, 872–73; Gunther Teubner, “The Two Faces of Janus: Rethinking Legal Pluralism,” *Cardozo Law Review* 13 (1992): 1443–62; Berman, *Global Legal Pluralism*, *supra* note 1, at 168; Nico Krisch, “The Pluralism of Global Administrative Law,” *European Journal of International Law* 17 (2006): 247–78; Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010); Judith Resnik, “Dependent Sovereigns: Indian Tribes, States, and the Federal Courts,” *University of Chicago Law Review* 56, no. 2 (Spring 1989): 671–760.

<sup>3</sup> See, e.g., Alexander Somek, “Monism: A Tale of the Undead?,” in *Constitutional Pluralism in the European Union and Beyond*, eds. Matej Avbelj and Jan Komárek, 344 (Hart, Oxford, 2012) (defining “monism” as “the belief that there is only one legal system,” while pronouncing it a dead concept). Martin Loughlin, “Constitutional Pluralism: An Oxymoron?,” *Global Constitutionalism* 3 (Mar. 2014): 9, 11–14 (discussing the idea of monism in terms of the positivist model of modern public law and sovereignty, which holds that there can be no plurality or hierarchy of laws because the sovereign state is the sole and exclusive source of all law).

<sup>4</sup> See *supra* note 1. See especially Berman, *Global Legal Pluralism*, *supra* note 1, at 13, 39, 163–66.

<sup>5</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 5 (describing the normative influences from all forms of society that influence us and our legal structure).



legal pluralism may be new, the analysis applies to normative overlap that has been with us for some time. For example, private commercial norms can rival the importance of international law in business and trade contexts, especially when conflicts undermine state-based legal infrastructure—as occurred after World War II, when the International Chamber of Commerce harmonized stranded international business transactions.<sup>6</sup> And for some groups, especially indigenous and religious minorities, the lived experience of many features associated with legal pluralism is long familiar.<sup>7</sup>

Constitutional federalism, also characterized by multiple sources of authority within a single geographical territory, reflects important features of legal pluralism's positive account, but avoids the more controversial features of legal pluralism's normative account. Indeed, since at least the 1980s, the legal pluralism discourse has generated considerable scholarly debate over both the positive and normative power of the model. As a descriptive matter, proponents contend that legal pluralism more accurately captures the full scope of political contest in pluralist societies, including that within federal systems,<sup>8</sup> and the full array of normative forces operating on individual actors.<sup>9</sup> Many also tout the normative value of legal pluralism, arguing that more purposefully

<sup>6</sup> Graf-Peter Calliess and Insa Stephanie Jarass, "Private Uniform Law and Global Legal Pluralism: The Case of ICC's Incoterms and the UCP," *TLI Think!* (2018), 12.

<sup>7</sup> Jennifer Hendry and Melissa L. Tatum, "Justice for Native Nations: Insights from Legal Pluralism," *Arizona Law Review* 60 (Spring 2018): 91–114, 93; Resnik, "Dependent Sovereigns," *supra* note 2; Dalia Tsuk, "The New Deal Origins of American Legal Pluralism," *Florida State University Law Review* 29 (Fall 2001): 189–268; Moraes Godoy, "Globalism, State Law and Legal Pluralism in Brazil," *Journal of Legal Pluralism and Unofficial Law* 36, no. 50 (2004): 61–69, 67; Patrick Macklem, "The Constitutional Identity of Indigenous Peoples in Canada: Status Groups or Federal Actors?," in *Forms of Pluralism and Democratic Constitutionalism*, eds. Jean L. Cohen, Andrew Arato, and Astrid von Busekist (New York: Columbia University Press, 2018); Joel A. Nichols, "Religion, Family Law and Competing Norms," in *Negotiating State and Non-State Law: The Challenge of Global and Local Legal Pluralism*, ed. Michael A. Helfand (New York: Cambridge University Press, 2015), 197–214.

<sup>8</sup> See, e.g., Paul Schiff Berman, "Federalism, International Law, and Legal Pluralism," *Missouri Law Review* 73, no. 4 (Fall 2008): 1149–84 (analyzing federalism through the lens of legal pluralism).

<sup>9</sup> See, e.g., Griffiths, "What Is Legal Pluralism?," *supra* note 2 (describing legal pluralism as "the presence in a social field of more than one legal order"); Merry, *Legal Pluralism*, *supra* note 2, at 872–73 (noting that "plural normative orders are found in virtually all societies" in Europe and the United States and that "legal pluralism moves away from questions about the effect of law on society or even the effect of society on law toward conceptualizing a more complex and interactive relationship between official and unofficial forms of ordering"); Teubner, *supra* note 2 (noting that "legal pluralism rediscovers the subversive power of suppressed discourses," and advocating for institutions that "bind law to diverse social discourses... suggest[ing] a 'resonance' of law with civil society"). Turkuler Isiksel, "Global Legal Pluralism as Fact and Norm," *Global Constitutionalism* 2, no. 2 (July 2013): 160–95, 173–75 (describing "value pluralism," which acknowledges that diverse cultural, religious, and ethical values will not always fit under one normative framework); Paul Schiff Berman, "How Legal Pluralism Is and Is Not Distinct from Liberalism: A Response to Alexis Galán and Dennis Patterson," *International Journal of Constitutional Law* 11, no. 3 (July 2013): 801–808 (defending the claim that legal pluralism promotes legal discourse between multiple normative communities with hope of converting potential "enemies" into negotiable adversaries.).



engaging these multiple sources of norm generation and legal identity will provide a better framework for inclusive and deliberative policymaking.<sup>10</sup>

Yet legal pluralism has also been met with robust opposition. Skeptics critique the concept for failing to provide a coherent definition of “law” that can distinguish between legitimate and illegitimate normative forces.<sup>11</sup> They warn that the unresolved analytical foundations of legal pluralism will foment intractable political conflicts between irreconcilable underlying principles—especially when the liberal principles that undergird most western democracies collide with the illiberal principles of competing tribal or religious rules.<sup>12</sup> They argue that embracing legal pluralism will threaten the hard-fought accomplishments of national and international institutions, by weakening the presumed prerogatives of nation-states.<sup>13</sup>

The legal pluralism literature is itself marked by a plurality of views about how best to operationalize its normative insights. For example, constitutional pluralism, an important subset of the wider pluralism discourse, sidesteps some anxiety about the threat pluralism may pose to statehood by focusing exclusively on the relationship between heterarchical sources of sovereign authority in realms of territorial overlap, especially the European Union.<sup>14</sup> Constitutional pluralism challenges legal monism less forcefully

<sup>10</sup> See, e.g., Berman, “How Legal Pluralism Is and Is Not Distinct,” *supra* note 9, at 801 (recommending that state and nonstate communities “consciously consider designing procedural mechanisms, institutions, and discursive practices that at least attempt to maximize the opportunity for plural voices to be heard . . . provid[ing] more ports of entry for more alternative law-making communities.”); Krisch, *Beyond Constitutionalism*, *supra* note 2 (proposing “to conceptualize and develop the postnational order in a pluralist vein, characterized by a multiplicity of legal sub-orders, not connected through an overarching frame but interacting in often political modes”); Krisch, *Pluralism of Global Administrative Law*, *supra* note 2.

<sup>11</sup> See, e.g., Brian Z. Tamanaha, “The Folly of the ‘Social Scientific’ Concept of Legal Pluralism,” *Journal of Law and Society* 20, no. 2 (Summer 1993): 192–217, 192–93 (arguing that “the inability of legal pluralists to locate agreed definition of ‘law’” leads to unstable theoretical foundations, because “no attempt to formulate a single scientific cross-cultural definition of law can succeed,” and that this “fundamental ambiguity . . . cuts against legal pluralists’ own expressed interests and concerns.”); Brian Z. Tamanaha, “A Non-Essentialist Legal Pluralism,” in *A General Jurisprudence of Law and Society*, ed. Brian Z. Tamanaha (Oxford: Oxford University Press, 2001) (criticizing the “essentialist approach to law” held by legal pluralism’s primary supporters).

<sup>12</sup> Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review* 30, no. 3 (Sept. 2008): 375–411, 375 (critiquing the failure by the pluralism discourses to define “law” and articulating an alternative approach); Alexis Galán and Dennis Patterson, “The Limits of Normative Legal Pluralism: Review Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders*,” *International Journal of Constitutional Law* 11, no. 3 (July 2013): 783–800 (critiquing the pluralism as disguised liberalism).

<sup>13</sup> See Berman, “How Legal Pluralism Is and Is Not Distinct,” *supra* note 9 (summarizing the critique of legal pluralism). The sources cited in notes 11–12, *supra*, provide further support.

<sup>14</sup> See, e.g., Neil MacCormick, *Questioning Sovereignty: Law State, and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999) (introducing the term “constitutional pluralism” in his analysis of the European Union); William Twining, *Globalisation and Legal Theory* (Cambridge: Cambridge University Press, 2000), 139 (mapping the global law framework); Neil Walker, “The Idea of Constitutional Pluralism,” *Modern Law Review* 65, no. 3 (May 2002): 317–59 (drawing on political theory to critique “constitutional fetishism” and its “liberal nationalist” bias in favor of a pluralist alternative); William Twining, “Normative and Legal Pluralism: A Global Perspective,” *Duke*



than wider legal pluralism, because it is concerned only with sources of state-based, sovereign authority—avoiding thornier questions about commensurability between state-based and nonstate sources of law. Still, even constitutional pluralism remains subject to criticism by those skeptical of the mechanics of heterarchical legal pluralism in any form.

By each of these views, however, legal pluralism has framed a powerful critique of the hegemonic monist vision of law that provoked it. Even if the legal pluralists' normative proposals never satisfy their critics, they have indelibly reshaped the way that the scholarly community reflects on competing normative forces within society. Legal pluralism forces us to consider whether the traditional monist model is, at best, overly simplistic, and at worst, harmfully divorced from the intersecting personal and political dynamics that challenge the overall legal enterprise. While debate continues over the workability of nonhierarchical pluralism as a normative project, even legal pluralism skeptics have acknowledged that the pluralist critique provides an important descriptive account of the normative complexity within cosmopolitan societies.<sup>15</sup>

Without engaging the full debate over legal pluralism, this chapter explores the realm in which legal pluralism is least controversially and most undeniably made manifest—constitutional federalism. Federal systems are founded on the premise that multiple sources of sovereign authority create simultaneous normative forces on the legal actors within them, including individuals, businesses, municipalities, and other associations. Just as constitutional pluralism is less fraught than wider legal pluralism, considering only sovereign authority, hierarchical systems of federalism are yet one step further removed from the fray, resolving some of the heterarchical uncertainty created by constitutional pluralism through the ordering device of federal supremacy.

For that reason, acknowledging the legal pluralism inherent within federal systems of government does not resolve legal pluralism's larger challenge to "statism" and the

*Journal of Comparative and International Law* 20, no. 3 (Spring 2010): 473–518, 505–506; Berman, *Global Legal Pluralism*, *supra* note 1 (arguing for a "cosmopolitan pluralist approach" for navigating global legal spaces); Loughlin, *supra* note 3, at 9 (examining the origins of the constitutional pluralism discourse, critically assessing its claims, and contending that it is ultimately an oxymoronic concept); Paul Schiff Berman, "Jurisgenerative Constitutionalism: Procedural Principles for Managing Global Pluralism," *Indiana Journal of Global Legal Studies* 20, no. 2 (2013): 665–96 (proposing a model of "jurisgenerative constitutionalism," a middle ground between strict territorialism and universalism, to "manage, without eliminating, the plural voices clamoring to be heard"); Neil Walker, "Constitutional Pluralism Revisited," *European Law Journal* 22, no. 3 (May 2016): 333–55 (arguing that constitutional pluralism offers a better account of the European Union than purely monist or federalist alternatives).

<sup>15</sup> See, e.g., Berman, "How Legal Pluralism Is and Is Not Distinct," *supra* note 9 (in responding to Galán and Patterson's critique of his pluralism normative proposals, first noting the significance of the fact that they accepted his pluralism descriptive account). He writes: "Galán and Patterson, in their thoughtful review of the book, largely accept the [descriptive] first argument and reserve most of their critique for the [normative] second... treat[ing] this argument as sufficiently self-evident, or 'commonplace' (to use their word) that it does not even merit much discussion. That is remarkable in and of itself, and it represents a sea change from the status quo circa 2000 when... there were no mainstream international law scholars in the United States at that time advocating legal pluralism as a descriptive framework." *Ibid.*, 801.



questions it raises about the relationship between state and nonstate sources of normative authority.<sup>16</sup> Nonetheless, the structural features of federalism can provide valuable platforms for cross-jurisdictional deliberation and policymaking that resonate with pluralist good-governance proposals. Normative legal pluralists argue that governance architects should endow institutions with more inclusive procedural mechanisms that encourage dialogue and engagement, providing multiple ports of entry for normative communities seeking to be heard.<sup>17</sup> When more normative interest groups are enabled to participate in rule generation, goes this argument, the resulting order will be more robust and representative of the overall society's concerns.

Many of these are the precise benefits touted by proponents of the dynamic model of federalism describing American governance,<sup>18</sup> where the mechanics of dual sovereignty

<sup>16</sup> See, e.g., Walker, "Constitutional Pluralism Revisited," *supra* note 14, at 344 (noting the statist roots of federalism that distinguishes it from fuller pluralism).

<sup>17</sup> See Berman, *Global Legal Pluralism*, *supra* note 1, at 237; Judith Resnik, "Law's Migration American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry," *Yale Law Journal* 115, no. 7 (May 2005): 1564–671, 1579 (referring to multiple ports of entry).

<sup>18</sup> See, e.g., Robert M. Cover, "The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation," *William and Mary Law Review* 22, no. 4 (Summer 1981): 639–82 (discussing the benefits of jurisdictional overlap, including more robust error correction, norm articulation, and creative innovation). Indeed, the literature on American federalism has exploded in recent years with interesting new perspectives on dynamic and innovative federalism theory. While all sources are too numerous to list, a worthy tour of books would include: Erin Ryan, *Federalism and the Tug of War Within* (Oxford: Oxford University Press, 2012), 7–8; John D. Nugent, *Safeguarding Federalism: How States Protect Their Interests in National Policymaking* (Norman: University of Oklahoma Press, 2009); Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (Chicago: University of Chicago Press, 2009); Erwin Chemerinsky, *Enhancing Government: Federalism for the 21st Century* (Stanford, CA: Stanford University Press, 2008); Edward L. Rubin and Malcolm Feeley, *Federalism: Political Identity and Tragic Compromise* (Ann Arbor: University of Michigan Press, 2008); and Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutionalism Enterprise: A Historical Inquiry* (New Haven: Yale University Press, 2007).

A similarly lengthy (though incomplete) tour of law review articles would include Heather K. Gerken, "Federalism as the New Nationalism: An Overview," *Yale Law Journal* 123, no. 6 (Apr. 2014): 1889–919; Richard H. Fallon, Jr., "Federalism as a Constitutional Concept," *Arizona State Law Journal* 49, no. 3 (Fall 2017): 961–84; Jessica Bulman-Pozen, "Partisan Federalism," *Harvard Law Review* 127, no. 4 (Feb. 2014): 1077–146; Jessica Bulman-Pozen and Heather Gerken, "Uncooperative Federalism," *Yale Law Journal* 118, no. 7 (May 2009): 1256–311, 1258–60; David E. Adelman and Kirsten H. Engel, "Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority," *Minnesota Law Review* 92, no. 6 (June 2008): 1796–850 (rejecting the static optimization model of federalism for the emerging trend of dynamic federalism); William W. Buzbee, "Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons," *Emory Law Journal* 57 (2007): 145–66; Kirsten H. Engel, "Harnessing the Benefits of Dynamic Federalism in Environmental Law," *Emory Law Journal* 56 (2006): 159–88; Heather K. Gerken, "The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down," *Harvard Law Review* 124 (Nov. 2010): 4–74, 34–44; Abbe R. Gluck, "Our [National] Federalism," *Yale Law Journal* 123, no. 6 (Apr. 2014): 1996–2043; Judith Resnik, Joshua Civin, and Joseph B. Frueh, "Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)," *Arizona Law Review* 50 (2008): 709–86; Hari M. Osofsky, Jessica Shadian, and Sara Fechtelkotter, "Arctic Energy Cooperation," *U.C. Davis Law Review* 49, no. 4 (Apr. 2016): 1431–510; Hannah Wiseman, "Moving Past Dual Federalism to Achieve Electric Grid Neutrality," *Iowa Law Review* 100 (2015): 97–108; Franita Tolson, "Election Law 'Federalism' and the Limits of the Antidiscrimination Framework," *William and Mary*



provide multiple opportunities for interest groups and stakeholders to participate in legal policymaking at different points of jurisdictional scale.<sup>19</sup> These “multiple ports of entry,” a hallmark of legal pluralism,<sup>20</sup> ensure that resulting legal policies are better informed by the full panoply of values and interests at stake than they could under a fully centralized (or monist) approach. Arguably inefficient and rife with uncertainty, federalism—like legal pluralism—nevertheless allows a creative space for contestation and dialogue, enabling the various tensions within the system to play themselves out within the structure of the system itself.

This chapter thus uses federalism as a lens to explore the pluralist critique and its proposals for inclusive norm generation. It presents federalism as a “vanilla” example of legal pluralism at work, so tame by comparison to full pluralism that it threatens to bore even the constitutional pluralists.<sup>21</sup> Even so, there are noteworthy parallels between the positive and normative claims of legal pluralism and federalism, especially the dynamic model federalism. Probed here, these include a shared emphasis on the creation of systemic spaces for dialogue, contestation, and negotiation between competing interest groups (normative interests in the case of pluralism, and jurisdictional interests in the case of federalism). Both models embrace procedural tools for generating consensus when substantive agreement is unforthcoming, and both reject the “zero-sum” models of governance that preceded them. The analogy between dynamic federalism and legal pluralism also raises interesting questions about the wider relationship between state-based law and nonstate normative authority.

*Law Review* 59, no. 5 (Apr. 2018): 2211–84; Hari M. Osofsky and Hannah Wiseman, “Dynamic Energy Federalism,” *Maryland Law Review* 72, no. 3 (2013): 773–843; Hari M. Osofsky, “Diagonal Federalism and Climate Change: Implications for the Obama Administration,” *Alabama Law Review* 62, no. 2 (2011): 237–304; and many others.

More traditional and historical perspectives are also an important part of the recent federalism discourse. See, e.g., Jenna Bednar, *The Robust Federation: Principles of Design* (Cambridge: Cambridge University Press, 2009); Michael S. Greve, *The Upside-Down Constitution* (Cambridge, MA: Harvard University Press, 2012); Ernest A. Young, “Federalism as a Check on Executive Authority: State Public Litigation, Executive Authority, and Political Polarization,” *Texas Review of Law and Politics* 22, no. 2 (Winter 2017–2018): 305–16; and equally many others as well.

<sup>19</sup> Much of my own federalism scholarship has been devoted to this point. See generally Ryan, *Federalism and the Tug of War*, *supra* note 18; Erin Ryan, “Secession and Federalism,” *Oregon Law Review* 96 (2017): 123–84; Erin Ryan, “Negotiating Federalism,” *Boston College Law Review* 52 (Jan. 2011): 1–136; Erin Ryan, “Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure,” *University of Colorado Law Review* 81 (2010): 1–96; Erin Ryan, “Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area,” *Maryland Law Review* 66, no. 3 (2007): 503–667. See also Erin Ryan, “Environmental Federalism’s Tug of War Within,” in *Law and Policy of Environmental Federalism: A Comparative Analysis*, ed. Kaylani Robbins (Cheltenham, UK: Edward Elgar Publishing, 2015), 355–418; Erin Ryan, “The Once and Future Challenges of American Federalism: The Tug of War Within,” in *The Ways of Federalism in Western Countries and the Horizons of Territorial Autonomy in Spain*, eds. Alberto López Basaguren and Leire Escajedo San Epifanio, vol. 1 (Heidelberg, Germany: Springer, 2013), 267–302.

<sup>20</sup> See Resnik, *supra* note 17; Berman, *supra* note 1.

<sup>21</sup> Walker, “Constitutional Pluralism Revisited,” *supra* note 14, at 342.



The analysis proceeds as follows. Section 18.2 introduces federalism as system of dual sovereignty, briefly reviewing the American and European models. It presents federalism as an example of simple pluralism, characterized by overlapping sources of sovereign authority, and explores the convergence between normative legal pluralism and dynamic federalism. Section 18.3 considers examples of negotiated governance in American federalism to assess the claims by normative pluralism for more inclusive dialogic governance. After cataloging various forms of negotiated federalism in the United States, it considers the benefits that dialogic processes can confer on governance and explores the legitimizing values of bargained-for consensus as a procedural impasse tool. Finally, section 18.4 considers three meta-phenomena shared by legal pluralism and dynamic federalism: their disaggregable positive and normative accounts, their rejection of the categorical zero-sum assumptions that weakened their predecessors, and the challenges they each face contending with circumstances in which the zero-sum analysis may hold currency.

## 18.2 FEDERALISM AS LEGAL PLURALISM

Federalism provides a working model of legal pluralism in its simplest form, one that seems as uncontroversial as it is incontrovertible. Pioneered in the United States and evolved in the European Union and other nations around the world,<sup>22</sup> federalism is a system of government that divides power between a central administration and regional subunits, each with separate authority to directly regulate their mutual citizens.<sup>23</sup>

In the late eighteenth century, the American invention of dual sovereignty represented a revolutionary break with the monist, monarchical norms of the contemporary European powers and other monist orders around the world, such as the great dynastic reigns of East Asia.<sup>24</sup> At the time, the possibility that multiple sovereigns could operate within the same geographic territory was a truly radical idea.<sup>25</sup> Hundreds of years later, the contemporary federalism discourse mirrors the newer legal pluralism discourse in important ways, especially regarding the emerging model of dynamic federalism.

This section reviews federalism as system of dual sovereignty, briefly exploring the American and European models. It presents federalism as an example of simple pluralism, characterized by multiple sources of sovereign authority. It then explores the convergence between normative legal pluralism and dynamic federalism, especially revealed in their shared emphasis on dialogic processes and negotiation as a path toward good governance.

<sup>22</sup> "Countries," Forum of Federations, <http://www.forumfed.org/countries/> (accessed Mar. 30, 2019).

<sup>23</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 7.

<sup>24</sup> See generally Alison L. Lacroix, *The Ideological Origins of American Federalism* (Cambridge, MA: Harvard University Press, 2010); Purcell, *supra* note 18.

<sup>25</sup> See Lacroix, *supra* note 24.



### 18.2.1 Federalism as Dual Sovereignty

At its heart, federalism provides a mechanism for allocating authority that assesses which kinds of policies should be set centrally—yielding the same answer throughout the federation, and which should be decided more locally—enabling different answers in different parts of the federation.<sup>26</sup> Accordingly, the basic inquiry in federalism is usually: *who should get to decide?*<sup>27</sup> Should the local<sup>28</sup> or central government be entitled to make a final policy decision?<sup>29</sup> (Or indeed, some level between or beyond the two?) Dual sovereignty focuses constitutional attention on the local and national levels, and this duality gave rise to the traditional model of “dual federalism,” which views the two levels of government as working in relative isolation.<sup>30</sup> However, this separationist model has been challenged by a newer, “dynamic federalism” model that recognizes the many ways in which the agents of multiscale governance cross porous jurisdictional boundaries to collaborate, compete, and negotiate for influence over the direction of shared policy concerns.<sup>31</sup>

Today, twenty-five nations containing some 40 percent of the world’s population have crafted domestic systems of governance based on the principles of federalism.<sup>32</sup> Other nations, some of them with their own domestic federal systems, also participate in transnational federations, such as the twenty-eight nations that are currently member states within the European Union.<sup>33</sup> Every system of federalism developed in response to unique historical circumstances, so no federalism is the same as any other.<sup>34</sup>

<sup>26</sup> Erin Ryan, “Negotiating Environmental Federalism: Dynamic Federalism as a Strategy for Good Governance,” *Wisconsin Law Review Forward* 2017: 17–39.

<sup>27</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at xi–xii.

<sup>28</sup> In this broad discussion of federal, I frequently use “local” to refer to the constitutionally subfederal units, and “central” or “national” to refer to the federation. In the United States, the local units are the fifty states, whereas in the European Union, they are the twenty-eight member nations. There are often even more local levels of government within the local units of a federal system, such as municipal or regional governments (or even the nested subfederal units of an EU member state with domestic federalism, such as the sixteen German *Laender*), but I group them together for the purposes of this discussion, as they are not usually endowed with separate sovereign authority cognizable under the larger federation.

<sup>29</sup> And by extension, who should get to decide that? The judiciary? The legislature? Someone else? In the United States, the federalism safeguards debate continues to probe this question at length. See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 273–76; Ryan, “Negotiating Federalism,” *supra* note 19, at 14–19.

<sup>30</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 109–44.

<sup>31</sup> *Ibid.*, xxvi–xxvii (discussing the emergence of the dynamic federalism model); Erin Ryan, “Negotiating Environmental Federalism,” *supra* note 26, at 37 (discussing the entrenchment of dynamic federalism model). See also sources cited *supra* note 18. Dynamic federalism is further discussed later, *infra* notes 83–91.

<sup>32</sup> “Countries,” Forum of Federations, <http://www.forumfed.org/countries/> (accessed Mar. 30, 2019).

<sup>33</sup> “European Union,” Citizens Information, [https://www.citizensinformation.ie/en/government\\_in\\_ireland/european\\_government/european\\_union/european\\_union.html](https://www.citizensinformation.ie/en/government_in_ireland/european_government/european_union/european_union.html) (accessed Mar. 30, 2019).

<sup>34</sup> Douglas Laycock, “Protecting Liberty in a Federal System: The U.S. Experience,” in *Patterns of Regionalism and Federalism: Lessons for the UK*, eds. Jörg Fedtke and Basil S. Markesinis (Oxford, UK: Hart Publishing, 2006), 119–48, 119.



Accordingly, while this chapter focuses on the American system with which I am most familiar, important distinctions prevent it from serving as a representative for European federalism, or that of any other nation.<sup>35</sup> Still, most federal systems are similarly characterized by the presence of multiple levels of government empowered with distinct sources of sovereign power, such that none can fully displace the others within their specifically designated realms of authority.<sup>36</sup>

### 18.2.1.1 *The American Model*

In the United States, for example, separately sourced authority is vested in the national government and fifty regional states. As I have described in previous work,<sup>37</sup> the U.S. Constitution confers a set of sovereign powers on the national government, while reserving to the states the residual sovereign authority associated with their preconstitutional police powers to regulate for the public health, safety, and welfare.<sup>38</sup> The list of “enumerated” powers delegated to the central administration includes both specific powers (such as those over postal roads, copyrights, and war)<sup>39</sup> and comparatively open-ended powers (to tax and spend for the public welfare, to regulate interstate commerce, and to regulate as “necessary and proper” for carrying out other enumerated powers).<sup>40</sup>

Where legitimate national governance conflicts with state or local law, the central (or “federal”) law has preemptive force under the Constitution’s Supremacy Clause.<sup>41</sup> However, the Constitution’s Tenth Amendment clarifies that those powers not delegated to the national government are reserved to the states (or to the people), indicating their retention of this separately sourced sovereign authority.<sup>42</sup> The dividing line between local and national authority is not always clear,<sup>43</sup> nodding toward the uncertainties of constitutional pluralism.<sup>44</sup> Accordingly, American federalism is sometimes portrayed as a brute force contest between state and federal power, but it is better characterized as

<sup>35</sup> Ryan, “Secession and Federalism,” *supra* note 19, at 163–64 (noting the limitations of an analysis of American federalism as a model for other federalisms).

<sup>36</sup> See, e.g., *ibid.*, 149–51 (discussing the American model of federalism).

<sup>37</sup> The following summary of American federalism first appeared in Erin Ryan, “Secession and Federalism,” *supra* note 19, at 149.

<sup>38</sup> *Ibid.* “The states further disseminate their power locally among municipal agencies, and occasionally laterally, in partnerships with other states by constitutionally permissible interstate compacts.” *Ibid.*, 50.

<sup>39</sup> U.S. Const. art. I, § 8, cl. 7, 8, 11.

<sup>40</sup> *Ibid.* cl. 1, 3, 18. See also Ryan, *Federalism and the Tug of War*, *supra* note 18, at 8–10.

<sup>41</sup> U.S. Const. art. VI, cl. 2. <sup>42</sup> *Ibid.* amend. X.

<sup>43</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 145–80.

<sup>44</sup> Leonardo Pierdominici, “The Theory of EU Constitutional Pluralism: A Crisis in a Crisis?,” *Perspectives on Federalism* 9, no. 2 (2017): 119–53, 127 (noting that “in a system of constitutional pluralism ‘it is possible that each [constitutional order] acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another’”) (quoting Neil MacCormick, *Questioning Sovereignty: Law, State and Nation in the European Commonwealth* (Oxford: Oxford University Press, 1999), 102).



“a site of negotiation in which political actors at various levels of government work out a continually shifting balance between competing good governance values.”<sup>45</sup>

In previous work, I have argued that the interpretive touchstone for allocating contested authority in zones of jurisdictional overlap should be the advancement of the good-governance principles that undergird federalism,<sup>46</sup> such as maintaining checks and balances, fostering transparency and accountability, balancing autonomy and interdependence, and harnessing distinctly local and national governing capacity:

Federalism is, at its heart, a strategy for good governance—based on a set of clear values that we hope federalism will help us accomplish[:] the maintenance of (1) checks and balances between opposing centers of power that protect individuals, (2) governmental accountability and transparency that enhance democratic participation, (3) local autonomy that enables interjurisdictional innovation and competition, (4) centralized authority to manage collective action problems and vindicate core constitutional promises, and finally (5) the regulatory problem-solving synergy that federalism enables between the unique governance capacities of local and national actors for coping with problems that neither can resolve alone.<sup>47</sup>

Governance in pursuit of these values channels the normative forces of competing sovereign authority toward worthy ends. Hewing closely to these directives, good governance:

advances individual dignity within healthy communities. It enhances democratic governance principles of self-determination while recognizing the responsibilities that group members hold toward one another. It creates a laboratory for innovations in governance from multiple possible sources and facilitates multiple planes of negotiation among competing interests and interest groups. It appropriately honors both sides of the subsidiarity principle—the directive to solve problems at the most local level possible—which notably couples its preference for local autonomy in governance with the expectation of effective regulatory problem-solving (and by implication, at whatever level will achieve it).<sup>48</sup>

That said, good governance values can conflict in a given instance,<sup>49</sup> opening possibilities for multiple sovereign decision makers to reach different conclusions about how

<sup>45</sup> See Ryan, “Secession and Federalism,” *supra* note 19, at 153–54.

<sup>46</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at xxvi–xxvii, 34–67 (specifically detailing the values of checks, transparency, localism, and synergy and dealing more holistically with the nationalism values necessarily implied by a federal system).

<sup>47</sup> Ryan, “Secession and Federalism,” *supra* note 19, at 154 (summarizing the values outlined in Ryan, *Federalism and the Tug of War*, *supra* note 18, and explicitly adding the value of centralized authority).

<sup>48</sup> Ryan, “Secession and Federalism,” *supra* note 19, at 154.

<sup>49</sup> *Ibid.*, 155–56 (“Nevertheless, identifying what federalism is designed to accomplish is only the first part of the puzzle. The harder task is figuring out how these goals fit together. The core federalism values are doubtlessly all good things in and of themselves, and American governance has long aspired to realize each of them independently. Yet our success has been complicated by the fact that each individual value is suspended in a web of tensions with the others. No matter how we may try, the hard



best to move forward. Productively navigating conflicts among different good-faith interpretations of what good governance demands is the greatest challenge for all multi-level systems of government.

Nevertheless, the unbridled constitutional pluralism that federalism might unleash is tempered in nations like the United States by use of a hierarchical preemption directive—here, the U.S. Constitution’s Supremacy Clause—to regulate jurisdictional overlap. A preemption directive is a constitutional ordering device that explicitly privileges the authority of one sovereign authority over another in a potential zone of jurisdictional conflict. For example, in the United States, most state and municipal government authority extends broadly to whatever is required to protect the public welfare, while the national government may act only to specifically enumerated powers.<sup>50</sup> However, the U.S. Constitution’s Supremacy Clause gives priority to legitimately exercised national power over state or municipal authority where they conflict.<sup>51</sup> Thus, in realms of legitimate jurisdictional overlap, the federal decision maker may hierarchically override conflicting decisions by a state or local authority.

Preemption directives cut against the heterarchy of pure constitutional pluralism, but they affirm the essential legal pluralism inherent within federalism by anticipating the conflicts that will arise by the simultaneous operation of distinct sources of sovereign authority. They are designed to mitigate the difficulties that arise when competing sovereign agents come to contrasting conclusions about how to use their authority in shared regulatory arenas, a problem that has grown in tandem with the expansion of shared regulatory arenas.<sup>52</sup> These controversies have intensified as growing national (and international) interdependence widens the scope of jurisdictional overlap,<sup>53</sup> together with increasing regulatory competition from sources of normative authority that lack constitutional parity in places like the United States, such municipal governance, regional partnerships between states,<sup>54</sup> and separately sovereign indigenous peoples.<sup>55</sup>

truth is that they all cannot always be satisfied simultaneously in any given context. The regulatory choices we make inevitably involve tradeoffs, in which one value may partially eclipse another.”).

<sup>50</sup> See Ryan, “Environmental Federalism’s Tug of War Within,” *supra* note 19, at 387–88 (observing the origins of state power in the traditional police powers of government to protect the public health, safety, and welfare); Ryan, *Federalism and the Tug of War*, *supra* note 18, at 8–10 (discussing constitutionally enumerated federal powers).

<sup>51</sup> U.S. Const. art. IV (“This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”).

<sup>52</sup> See Ryan, “Secession and Federalism,” *supra* note 19, at 151–52.

<sup>53</sup> See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 355–57. This zone of overlap, an “interjurisdictional gray area,” arises whenever both the local and national levels of government have simultaneous interests or obligations. *Ibid.*, 145–80.

<sup>54</sup> See, e.g., Gerken, “Federalism All the Way Down,” *supra* note 18, at 34–44 (discussing the dynamics of jurisdictional overlap at multiple levels); Resnik, Civin, and Frueh, “Ratifying Kyoto,” *supra* note 18; Hari M. Osofsky, “Diagonal Federalism and Climate Change: Implications for the Obama Administration,” *Alabama Law Review* 62, no. 2 (2011): 237–304.

<sup>55</sup> Indeed, unresolved aspects of the relationship between the sovereign authority of the United States and Canada and that of the Native American tribal nations that preceded them have prompted



Yet expanding overlap does not necessarily imply more preemption, as the benefiting sovereign often yields its constitutional privilege for political or prudential reasons. In the United States, for example, federal regulators routinely cede authority to state or local partners within programs of cooperative federalism,<sup>56</sup> and federal courts routinely yield their supremacy to state courts under various abstention and preclusion doctrines.<sup>57</sup>

Moreover, although the Supremacy Clause favors national authority where there are legitimate conflicts, the structure of American dual sovereignty ensures that no level of government possesses absolute power, so neither the national nor local level can fully displace the other. In congruence with the principle of subsidiarity, regulatory matters are generally governed at the most local level with capacity to resolve them.<sup>58</sup> In the United States, the constitutional enumeration of powers tracks those regulatory arenas in which central governance is presumed necessary, and leaves other matters to the competence of state or local governance.<sup>59</sup> As such, the fifty American states deal separately with issues that fall within their exclusive regulatory purviews (for example, most issues of family law, education, land use, health-care, and criminal law), and they variously engage with the national government and one another to cope with issues that straddle jurisdictional boundaries (often including environmental law, public health, national security, and many aspects of commercial law).<sup>60</sup>

the most important legal pluralism movements in North America. See Resnik, “Dependent Sovereigns,” *supra* note 2; Hendry and Tatum, *supra* note 7, at 92; Tsuk, *supra* note 7, at 199; Frank Pommersheim, “‘Our Federalism’ in the Context of Federal Courts and Tribal Courts: An Open Letter to the Federal Courts’ Teaching and Scholarly Community,” *University of Colorado Law Review* 71 (2000): 123–90, 134–35.

<sup>56</sup> See Ryan, “Environmental Federalism’s Tug of War Within,” *supra* note 19, at 393 (“The Constitution’s Supremacy Clause affirms that the legitimate exercise of federal authority can always trump conflicting state law, but federal law often leaves purposeful space for local participation even when Congress could theoretically preempt an entire regulatory field—especially in environmental law. Notwithstanding enumerated federal authority over commerce and the channels of interstate commerce, international treaties and foreign relations, federal property, military readiness, national security, and others, Congress usually leaves space for local participation to engage regulatory expertise or capacity that local governments have, but the federal government does not. For that reason, the more difficult preemption question in these contexts is not whether the federal government could preempt, but whether (and to what degree) it should.”).

<sup>57</sup> Mathew D. Staver, “The Abstention Doctrines: Balancing Comity with Federal Court Intervention,” *Seton Hall Law Review* 28, no. 4 (1998): 1102–54, 1115 n.84; David L. Shapiro, “Jurisdiction and Discretion,” *New York University Law Review* 60, no. 4 (Oct. 1985): 543–89, 549–50, 581 (noting that Younger is “[t]he present-day heir” to a tradition in which “comity concerns . . . led English courts to refuse to enjoin proceedings in Scotland, even though Scottish and English courts are tribunals of the same sovereign”).

<sup>58</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 59–60. <sup>59</sup> *Ibid.*, 61–63.

<sup>60</sup> See *ibid.*, xii–xvi (discussing jurisdictional overlap in the United States); *ibid.*, 265–70 (discussing various ways that state and federal actors negotiate their way through the tangle of jurisdictional overlap).



### 18.2.1.2 *The European Model*

There are similarities in the allocation of central and regional authority within the European Union,<sup>61</sup> but also important differences from the American model. To begin with, it operates from a less settled constitutional order, and from a far less settled theory of federal hierarchy (or heterarchy, as the case may be).<sup>62</sup> The constitutional pluralism discourse first arose in response to the problem of defining and defending the operation of the European Union in the absence of a fully theorized account of the relationship between its legal system and that of its individual member states—especially after the jurisdiction of the Union was expanded in the early 1990s under the Maastricht Treaty.<sup>63</sup> For example, Germany is one of the primary champions of the European Union, but the German Constitutional Court has sparred with the EU Court of Justice in resisting the preemptive force of EU institutions when efforts to protect the fiscal health of the union conflicted with German economic sovereignty.<sup>64</sup>

As Professor Neil Walker has explained, the very nature of the EU federation remains contested among legal theorists.<sup>65</sup> While most commentators are satisfied to categorize the European Union as a federal system, given its defining characteristics as a central administration with regional subunits possessed of separate authority,<sup>66</sup> other theorists point to unresolved problems with the federal designation—including the muddiness of the federal constitution,<sup>67</sup> the unresolved preemptive force of its legal system,<sup>68</sup> and the

<sup>61</sup> “FAQ on the EU Competences and the European Commission Powers,” The European Citizens’ Initiative, <https://ec.europa.eu/citizens-initiative/public/competences/faq> (accessed Mar. 30, 2019).

<sup>62</sup> See Walker, “Constitutional Pluralism Revisited,” *supra* note 14. <sup>63</sup> *Ibid.*, 339–40.

<sup>64</sup> See *Brunner v. European Union Treaty*, [1994] 1 C.M.L.R. 57 (Ger.) (decision by the German Constitutional Court demonstrating that even where it accepts the preemptive force of EU law, it will continue to review the actions of European institutions to ensure they remain within the proper limits of their authority); but see the German Constitutional Court on the German Ratification of the Lisbon Treaty, BVerfG, Judgment of the Second Senate of 30 June 2009–2 BvE 2/08 (decision by the German Constitutional Court finding no constitutional objections to the Lisbon Treaty, which affirmed and clarified the scope of EU authority by amending the two treaties that form its constitutional basis). More recently, see *Case C-62/14, Gauweiler v. Deutscher Bundestag*, 2015 (in the first ever case referred to the European Court of Justice by the German Constitutional Court, holding that an EU agency was authorized to selectively purchase Eurozone government bonds in secondary markets). See also Walker, “Constitutional Pluralism Revisited,” *supra* note 14 (discussing these difficulties); Daniel Kelemen, “On the Unsustainability of Constitutional Pluralism: European Supremacy and the Survival of the Eurozone,” *Maastricht Journal of European and Comparative Law* 23 (2016): 136–50.

<sup>65</sup> See Walker, “Constitutional Pluralism Revisited,” *supra* note 14, at 342–47. <sup>66</sup> *Ibid.*, 343.

<sup>67</sup> At present, EU authority arises from a series of treaties that, taken together, serve as a constitution. In 2004, the EU parliament attempted to consolidate the constitution in a single document, the Treaty Establishing a Constitution for Europe, but only eighteen of the twenty-five member states at the time ratified it. After voters in France and the Netherlands rejected the Constitutional Treaty, the remaining states canceled their referenda. In 2007, the Lisbon Treaty entered force, including many of the changes sought by the Constitutional Treaty, but formulated as amendments to the existing treaties. Stephen Weatherill, *Cases and Materials on EU Law*, 12th ed. (Oxford: Oxford University Press, 2016), 18–19 (describing the history of the treaties that made up the Constitutional makeup of the European Union, concluding with the Lisbon Treaty that amended the two prior treaties forming the constitutional basis for the European Union after the failure of the proposed Constitutional Treaty).

<sup>68</sup> Walker, “Constitutional Pluralism Revisited,” *supra* note 14, at 348 (discussing EU preemption conflicts in Germany).



lack of a consistent consensus among key constituencies to identify as a federal union.<sup>69</sup> European pluralists argue that a more heterarchical brand of constitutional pluralism better describes the European Union today, one that emphasizes the separate constitutional integrity of the member states and the federation, without asserting the constitutional superiority of one over the other.<sup>70</sup>

Walker observes that successful constitutional pluralism in Europe requires a heavier theoretical lift than most pluralists have thus far provided, but he makes a credible attempt. Comparing it to a purely federal model, he reflects on two critical features that an EU pluralist constitutional order must achieve: “Like the federal solution, its settlement should enjoy a deeper and wider endorsement across its various constituencies; yet unlike the federal solution, that endorsement should not be such as to undermine the order’s basic condition of duality.”<sup>71</sup> The constitutional pluralism that Walker aspires to on behalf of the European Union contrasts with the U.S. model of federalism in restraining federal supremacy but reflects it in recognizing that jurisdictional overlap can strengthen the operation of independent sovereign authorities, rather than undermine them.<sup>72</sup>

### 18.2.2 Federalism as Pluralism

While federalism departs from pure legal pluralism and even constitutional pluralism in important ways,<sup>73</sup> its endemic pluralism is most apparent in the overlapping jurisdictional reach of the local, national, and even international institutions within which its denizens function—and the multiple legal identities such jurisdictional overlap creates for them. For example, an American living in Houston is, at the bare minimum, both a Texan and an American (and as any Texan will tell you, there is plenty of friction

<sup>69</sup> *Ibid.*, 343, 345–47.

<sup>70</sup> *Ibid.*, 352. See also Pierdominici, *supra* note 44, at 127 (“[N]ot only does the question of final constitutional authority remain open in the EU, but it ought to be left open, since heterarchy . . . is superior to hierarchy as a normative ideal in circumstances of competing constitutional claims of ultimate authority . . . for here the fact is that the recognition of the legitimacy of the EU constitutional claim, and the idea that competing constitutional claims such as the supranational and the national ones are of equal legitimacy or, at least, cannot be balanced against each other once and for all. As MacCormick put it, in a system of constitutional pluralism ‘it is possible that each [constitutional order] acknowledge the legitimacy of every other within its own sphere, while none asserts or acknowledges the constitutional superiority over another.’”).

<sup>71</sup> Walker, “Constitutional Pluralism Revisited,” *supra* note 14, at 346.

<sup>72</sup> *Ibid.*, 352 (“While any new constitutional settlement cannot be a constitution of the whole without seeming to beckon a full-blown federal state, unless that new settlement nevertheless succeeds in standing autonomously from the state constitutions within its own common sphere of competence, and so on an equal footing with these state constitutions, the authoritative sense and commitment of its being an independent act of collective authorship by the European people acting together is lost. And in this way, we can finally envisage how the overlap of heterarchically related constitutional authorities of the common part and the local parts, rather than undermining or eroding the legitimacy of each such authority, becomes a condition of legitimacy of the combined whole.”).

<sup>73</sup> *Ibid.*, 342–46.

between those two legal identities).<sup>74</sup> At a minimum, a German citizen of Munich is simultaneously Bavarian, German, a member of the European Union, subject to the NATO Alliance, and under the jurisdiction of the International Criminal Court.

As federalism scholars have noted, these overlapping legal identities become constitutive factors for individuals within federal systems.<sup>75</sup> They impel citizens in complex, sometimes conflicting, often confusing directions—as for the Scottish citizens who overwhelmingly opposed Brexit, but must prepare to leave the European Union with the rest of the United Kingdom.<sup>76</sup> However, complex legal identities can also be enlightening. They promote cosmopolitanism, enabling those engaged with them to better appreciate the breadth of conflicting values so often at stake in difficult policy contexts.<sup>77</sup> As Professor Jean Leclair has described in the Canadian context, “In Canada, federalism makes it possible for citizens, who so desire, to refuse to be instrumentalized by nationalist programs, all of which have the common denominator of flattening the teeming complexity of their lives; it can be used to undo the clasps of the cultural straightjackets that people are forced into.”<sup>78</sup>

Other aspects of federalism cut against pluralism.<sup>79</sup> As noted, strong federal supremacy in the American model moderates the challenges of heterarchical pluralism by subjecting jurisdictional conflicts to a hierarchy that privileges national authority. National preemption is a feature of many federal systems that cuts against both the advantages and disadvantages of full pluralism. When national authority reflexively preempts conflicting local authority, any benefits of the dialogic process touted by pluralists will be lost. Nevertheless, enabling preemption also resolves some of the uncertainty created by pluralism that its skeptics assail. Preemption appropriately curbs potential excesses of pluralism in contexts where the need for decisive action—perhaps to respond in an emergency or to resolve unsurmountable collective action

<sup>74</sup> Cf. Ryan, “Secession and Federalism,” *supra* note 19, at 132–33 (discussing the semi-regular, mostly rhetorical calls for Texas to secede from the United States).

<sup>75</sup> See Jean Leclair, “Federalism as Rejection of Nationalist Monisms,” in *The Trust/Distrust Dynamic in Multinational Democracies: Canada in Comparative Perspective*, eds. Dimitrios Karmis and François Rocher (Montreal and Kingston: McGill-Queen’s University Press, 2018), 210–47, 217 (arguing that legal monism, compellingly framed as “methodological nationalism,” obscures the way in which “Canadian federalism is—and always has been—the place of confrontations between two mutually exclusive nationalist programs” and political identities).

<sup>76</sup> “EU Referendum: Northern Ireland Votes to Remain,” *BBC*, June 24, 2016, <https://www.bbc.com/news/uk-northern-ireland-36614443> (reporting that 62 percent of Scotland voted to remain). The conflict between these legal identities on this point may yet produce a divorce. “Brexit Could Sway Scottish Voters toward Independence from UK: Poll,” *Reuters*, Sept. 2, 2018, <https://www.reuters.com/article/us-britain-eu-scotland/brexit-could-sway-scottish-voters-toward-independence-from-uk-poll-idUSKCN1LloUK>.

<sup>77</sup> Cf. Nuraan Davids and Yusef Waghid, “Cosmopolitanism, Tolerance and Educational Encounters,” in *Tolerance and Dissent within Education: On Cultivating Debate and Understanding*, eds. Nuraan Davids and Yusef Waghid (Cham, Switzerland: Palgrave Macmillan, 2017), 151–66; Jacques Derrida, *On Cosmopolitanism and Forgiveness* (London: Routledge, 2001).

<sup>78</sup> *Id.* at 233–34.

<sup>79</sup> But see Berman, “Federalism, International Law, and Legal Pluralism,” *supra* note 8, at 1153 (analyzing federalism and international law through a pluralist rather than a sovereigntist lens).



problems—outweighs the need for additional deliberation.<sup>80</sup> From the perspective of most federal nations, it is a worthwhile trade-off in most contexts.

Moreover, other features within federalism moderate the dialogic costs of preemption by facilitating local input to federal policymaking. For example, most federal legislatures are composed of local representatives, providing a straightforward path for local input into national deliberation.<sup>81</sup> The American model further enables agents at all levels of government to wield significant influence in the making of interjurisdictionally relevant policy, even where local authority is validly subject to federal preemption.<sup>82</sup> As I have previously observed, “many of the most interesting preemption debates in the United States have shifted from questions about whether the national government *could* preempt local involvement to whether it *should* preempt,” given the many benefits of engaging multiscalar input.<sup>83</sup> The relationship between multiple sources of sovereign authority in the European Union are even more complex, given that member states have taken inconsistent positions on nature of the hierarchy between EU legal authority and the conflicting domestic authority of the member states.<sup>84</sup>

### 18.2.3 Dynamic Federalism as Legal Pluralism

Synergy between the ideals of pluralism and the practice of federalism are especially salient in federal systems characterized by the dynamic model of federalism that has disrupted the American discourse in recent years.<sup>85</sup>

Dynamic federalism emphasizes fluidity and overlap between multiple sources of authority in advancing the good-governance principles that undergird federalism.<sup>86</sup> As noted, the new model departs from its separationist predecessor, dual federalism, which guards an idealized boundary between distinct spheres of local and national jurisdiction, minimizing overlap and cross-fertilization in policymaking.<sup>87</sup> Yet just as

<sup>80</sup> Ryan, “Secession and Federalism,” *supra* note 19, at 152–53; Edward Millican, *One United People: The Federalist Papers and the National Idea* (Lexington: University Press of Kentucky, 1990).

<sup>81</sup> These “political safeguards” of federalism have been copiously digested by the Federalism Safeguards literature. See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 273–76; Ryan, “Negotiating Federalism,” *supra* note 19, at 14–19; Herbert Wechsler, “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government,” *Columbia Law Review* 54, no. 4 (Apr. 1954): 543–60, 588.

<sup>82</sup> See Ryan, “Negotiating Federalism,” *supra* note 19; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 265–338. The interjurisdictional dynamics American governance are also reviewed in many of the sources cited *supra* in note 18.

<sup>83</sup> See Ryan, “Negotiating Federalism,” *supra* note 19, at 26–27; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 387–98 (untangling jurisdictional separation and overlap).

<sup>84</sup> See *supra* note 64 and accompanying text (describing conflicts between the German Constitutional Court and EU Court of Justice over the scope of federal preemption in economic contexts).

<sup>85</sup> See *supra* note 31.

<sup>86</sup> See *supra* notes 46–47 (discussing the good governance principles underlying federalism).

<sup>87</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 109–44.



traditional monist assumptions have come under assault by the pluralist critique, American federalism scholars and participants have increasingly recognized that the enterprise is marked more by competitive and collaborative dynamics than the mutually exclusive tracks of the old model.<sup>88</sup> Analogous to the positive account of pluralism, the dynamic model describes a federalism thick with exchange among multiple stakeholders whose values and interests become more salient at different points of jurisdictional scale.<sup>89</sup> And analogous to the normative account of pluralism, dynamic federalism affirmatively recognizes the value of this rich, multiscale exchange.<sup>90</sup>

Systems of dynamic federalism converge with the more normative visions of pluralism at the structural level, by enabling multiple platforms in governance for competing interest groups to vie for influence over the direction of policymaking.<sup>91</sup> In creating multiple ports of entry for deliberative policymaking at different levels of government, federalism increases valuable opportunities for participation, exchange, and negotiated policymaking between competing interests and values—just as the normative pluralism proponents advocate.<sup>92</sup> Moreover, claims in support of both dynamic federalism and legal pluralism contend that consensus-based dialogic processes are often the best available option for shepherding sustainable governance outcomes in the absence of substantive agreement.<sup>93</sup>

A key assumption shared by the proponents of pluralism and federalism is that governance proceeds best when decisions are taken with the benefit of as much stakeholder input as is feasible. For example, Professor Paul Schiff Berman has argued that providing alternative lawmaking communities more formal access to policymaking deliberations will lead not only to more informed substantive decisions but to greater tolerance, inclusion, and respect for governance outcomes by participants who will feel that

<sup>88</sup> See, e.g., Morton Grodzins, *The American System: A New View of Government in the United States*, ed. Daniel J. Elazar (New Brunswick, NJ: Transaction Books, 1984), 8, 60–153 (famously rejecting the separationist “layer cake” model of American federalism for a “marble cake” model, with entangled swirls of interlocking local and national input).

<sup>89</sup> See sources cited *supra* note 18. <sup>90</sup> *Ibid.*

<sup>91</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 8, 237 (arguing “that pluralism provides a helpful framework for understanding a hybrid world where normative assertions of multiple entities—both state and nonstate—compete for primacy” with reference to Judith Resnick’s claim that federalism creates multiple ports of entry for participation by various legal actors). See also Berman, “How Legal Pluralism Is and Is Not Distinct,” *supra* note 9, at 803 (“As such, successful mechanisms, institutions, or practices will be those that simultaneously celebrate both local variation and international order, and recognize the importance of preserving both multiple sites for contestation and an interlocking system of reciprocity and exchange.”).

<sup>92</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 294 (“for both state-to-state disputes and disputes among state and nonstate communities, a cosmopolitan pluralist approach permits a more direct engagement with the issues of jurisdictional overlap and a far more nuanced and explicit effort to negotiate among normative communities. Thus, the choice-of-law inquiry can itself become a mechanism for managing, without eliminating, hybridity.”).

<sup>93</sup> *Ibid.*, 11 (calling for spaces to promote productive interaction among multiple, overlapping legal systems by developing procedural mechanisms and institutions that aim to manage legal pluralism, which would facilitate recognition of the interests of multiple communities and agreement among competing norms); Ryan, *Federalism and the Tug of War*, *supra* note 18, at 339–76; Ryan, “Negotiating Federalism,” *supra* note 19, at 102–27. See *infra* section 18.3.2. (discussing the use of procedural consensus tools to overcome the lack of substantive consensus).



their concerns have been taken seriously—even when their own views did not prevail.<sup>94</sup> He advocates for the conscious design of “jurisgenerative” procedural mechanisms, institutions, and discursive practices that maximize the opportunity for plural voices to participate in societal decision-making.<sup>95</sup>

Such calls for dialogic processes as a means of good governance resonate profoundly with the benefits touted by the champions of dynamic federalism, who make similar claims in support of federal systems that encourage intersovereign dialogue and negotiation.<sup>96</sup> For example, I used remarkably similar language to describe the promise of dynamic federalism for improving governance in pluralist societies, pointing to the mechanisms it enables for fostering negotiation, balancing stakeholder input, and navigating the contested values that so often underlie governance conflicts.<sup>97</sup> Federalism enables “multiple sites for political contest and innovation,” which have fortified the United States against the forces of pluralist fragmentation, “effectively rechannel[ing] regional frustration away from calls for secession and into a more cohesive fabric of vibrant multilevel governance.”<sup>98</sup> Discussed further in section 18.3, much of this exchange takes place through various forms of intergovernmental bargaining by agents from competing sources of sovereign authority.

### 18.3 THE SHARED IMPORTANCE OF DIALOGIC PROCESS

Paralleling claims by the proponents of dynamic federalism,<sup>99</sup> the proponents of normative pluralism maintain that redesigning governance to account for multiple sources of legal identity and authority will improve pluralist governance by creating shared deliberative spaces that can more effectively channel normative conflict.<sup>100</sup> Distilled, the shared argument is that widening the circle of participation in negotiated decision-making will better account for key differences of perspective among citizens—which may ultimately lead to better substantive decision-making and will at least encourage greater investment by participants in the outcome.<sup>101</sup>

<sup>94</sup> Berman, “Jurisgenerative Constitutionalism,” *supra* note 14, at 669 (“Yet, we may find that the added norms, viewpoints, and participants produce better decision-making, better adherence to those decisions by participants and nonparticipants alike, and ultimately better real-world outcomes.”).

<sup>95</sup> *Ibid.* (offering “principles that would undergird a more jurisgenerative constitutionalism, one that seeks to manage, without eliminating, the plural voices clamoring to be heard”).

<sup>96</sup> See *supra* notes 17–18.

<sup>97</sup> E.g., Ryan, *Federalism and the Tug of War*, *supra* note 18, at 368; Ryan, “Secession and Federalism,” *supra* note 19, at 153–68; Ryan, “Negotiating Federalism,” *supra* note 19, at 3–11.

<sup>98</sup> Ryan, “Secession and Federalism,” *supra* note 19, at 150, 162–69.

<sup>99</sup> See sources cited *supra* note 18 and text accompanying *supra* notes 89–90.

<sup>100</sup> See sources cited *supra* notes 1–2 and text accompanying *supra* note 17.

<sup>101</sup> Berman, “Jurisgenerative Constitutionalism,” *supra* note 14, at 669 (“Yet, we may find that the added norms, viewpoints, and participants produce better decision-making, better adherence to those decisions by participants and nonparticipants alike, and ultimately better real-world outcomes.”).



Putting flesh on the bones of these bold claims, this section considers the extent to which American federalism successfully promotes dialogic, negotiated governance, and then reflects on the implications for normative pluralism's claim for more inclusive negotiated governance. First, it reviews the various ways in which dynamic federalism fosters negotiated governance in the United States. Then, it considers the benefits that dialogic processes confer on governance, using the example of Negotiated Rulemaking in the United States. Finally, it explores the legitimizing values of bargained-for consensus as a procedural impasse tool for good governance when substantive agreement on policy content cannot be achieved by other means.

### 18.3.1 Negotiated Federalism and Dialogic Process

In the United States, intergovernmental bargaining between local and national actors is virtually endemic in areas of jurisdictional overlap, or those policy realms in which both local and national actors hold legitimate regulatory interests or obligations.<sup>102</sup> Broadly understanding negotiation as “an iterative process of joint decision-making”<sup>103</sup>—that is, any outcome resulting from multiple minds after some back-and-forth communication—negotiated federalism encompasses a wide range of interjurisdictional governance in the United States,<sup>104</sup> and presumably elsewhere.

In *Federalism and The Tug of War Within* and preceding scholarship, I began the process of cataloging the largely uncharted landscape of federalism bargaining in the United States, building a taxonomy of at least ten different types of opportunities for intergovernmental negotiation available within various constitutional and statutory frameworks.<sup>105</sup> The taxonomy is organized into overarching categories of conventional bargaining, negotiations to reallocate authority, and joint policymaking bargaining.<sup>106</sup>

<sup>102</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 145–80.

<sup>103</sup> See, e.g., Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, ed. Bruce Patton, 2nd ed. (New York: y, 1991), xvii (describing it as “back-and-forth communication designed to reach agreement” whenever parties have both shared and differing interests); G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (New York: Penguin Books, 1999), 6 (describing it as the “interactive communication process” that takes place when parties want things from each other).

<sup>104</sup> See generally Ryan, “Negotiating Federalism,” *supra* note 19; Ryan, *Federalism and the Tug of War*, *supra* note 18.

<sup>105</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 27; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 282 (“The final and most theoretically interesting category draws elements from the prior two, partnering local and national actors in negotiations that lead to new substantive policies. Joint policymaking forms include: (7) negotiated rulemaking under the Administrative Procedure Act; (8) policymaking laboratory negotiations, by which federal laws create ‘fill-in-the-blank’ state policymaking zones and otherwise invite state proposals to modify federal law; (9) iterative policymaking negotiations, which create a limited forum for shared state-federal policymaking over time; and (10) intersystemic signaling negotiations, by which separately deliberating state and federal actors trade influence over the direction of shared policy.”).

<sup>106</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 27; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 282.



The conventional group includes examples in which the iterative process most resembles colloquial understandings of bargaining as a simple exchange, or a purposeful and time-bounded collective deliberation. These include: (1) interest group representation bargaining, by which state actors lobby federal lawmakers; (2) enforcement negotiations, including those over individual enforcement cases, state-federal enforcement partnerships, and enforcement matters within programs of cooperative federalism; and (3) negotiations over more administrative details, resource allocation, or settlement of litigation . . . .

Negotiations to reallocate authority, or to depart from an otherwise established legal order, take place in contexts of overlap in which a constitutional or statutory provision provides an initial answer to the question of who gets to decide, but the parties choose to bargain around that line. Examples include: (4) spending power bargains, in which the federal government negotiates to extend its regulatory reach into zones otherwise constitutionally reserved to the states [through the use of conditional federal funding]; (5) bargained-for encroachment and commandeering, two closely related (but occasionally unconstitutional) forms in which states bargain to assume federal power or become bound by federal law; and (6) negotiations for various exceptions and permissions within frameworks of statutory law.

The final and most theoretically interesting category draws elements from the prior two, partnering local and national actors in negotiations that lead to new substantive policies. Joint policymaking forms include: (7) negotiated rulemaking under the Administrative Procedure Act; (8) policymaking laboratory negotiations, by which federal laws create “fill-in-the-blank” state policymaking zones and otherwise invite state proposals to modify federal law; (9) iterative policymaking negotiations, which create a limited forum for shared state-federal policymaking over time; and (10) intersystemic signaling negotiations, by which separately deliberating state and federal actors trade influence over the direction of shared policy. Negotiations within this final category receive the most sustained attention because they hold the most meaningful promise for bilaterally balanced federalism interpretation.<sup>107</sup>

This positive account of “federalism bargaining” describes negotiations between competing sovereign agents that range from conventional political haggling, as over the terms of proposed legislation;<sup>108</sup> formalized methods of collaborative policymaking, as created by various federal statutes, including the Medicaid health insurance program or Coastal Zone Management Act;<sup>109</sup> and more remote signaling processes by which state

<sup>107</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 282; Ryan, “Negotiating Federalism,” *supra* note 19, at 27.

<sup>108</sup> “State-federal negotiations that follow the conventional model are easily recognizable. For example, state and federal executive actors frequently negotiate in a conventional manner over the details of federal law that may impact the states, about law enforcement matters in which both hold interests, and over administrative details within cooperative programs that include state and federal participation.” Ryan, *Federalism and the Tug of War*, *supra* note 18, at 280, 282–87; Ryan, “Negotiating Federalism,” *supra* note 19, at 28–36.

<sup>109</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 296, 311; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 50–69.



and federal actors share responsibility for evolving public decision-making over time, for example, over medical marijuana enforcement.<sup>110</sup>

Some forums for conventional intergovernmental negotiation are purposefully created within other legal frameworks. For example, within some programs of cooperative federalism, premised already on a bargained-for exchange of conditional federal funds, Congress invites additional bargaining by inviting state participants to propose innovations to federal baselines, the details of which are often heavily negotiated with the overseeing federal agencies.<sup>111</sup> In addition, federal agencies sometimes invite state stakeholders to negotiate the terms of administrative rulemaking early in the process, affording them more influence than under the traditional model, in which stakeholders may comment on an agency's proposed rule only after work has neared completion.<sup>112</sup>

Other forms of bargaining depart even further from the conventional model. These include forums for long-term, iterative sharing of policymaking authority with states that may not even register at first as negotiation—such as the Clean Air Act's formal creation of a two-track vehicular emissions program, in which EPA sets one standard but allows states to choose between that one or a competing standard set by California, resulting in dynamic regulatory competition between the two standard-setters.<sup>113</sup> Another example might be the intersystemic signaling that unfolds between state and federal policymakers over issues like marijuana and immigration enforcement, which effectively partners them in a subtle pattern of call and response, even as they are nominally acting independently.<sup>114</sup>

### 18.3.2 The Benefits of Dialogic Governance

Writ large, then, American federalism is a negotiated dialogue among the various levels and branches of government,<sup>115</sup> balancing multiscalar input and the distinctive

<sup>110</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 311–14; Ryan, “Negotiating Federalism,” *supra* note 19, at 69–74.

<sup>111</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 282; Ryan, “Negotiating Federalism,” *supra* note 19, at 27.

<sup>112</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 282; Ryan, “Negotiating Federalism,” *supra* note 19, at 27. See also Ryan, *Federalism and the Tug of War*, *supra* note 18, at 297–300; Ryan, “Negotiating Federalism,” *supra* note 19, at 51–57 (discussing Negotiated Rulemaking); Bertram I. Spector, “Negotiated Rulemaking: A Participative Approach to Consensus-Building for Regulatory Development and Implementation,” Technical Notes, no. 10 (May 1999): 1–7. See David M. Pritzker and Deborah S. Dalton, *Negotiated Rulemaking Sourcebook* (Washington, DC: U.S. Government Printing Office, 1995).

<sup>113</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 281; Ryan, “Negotiating Federalism,” *supra* note 19, at 26.

<sup>114</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 281; Ryan, “Negotiating Federalism,” *supra* note 19, at 26.

<sup>115</sup> See Erin Ryan, “Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers Both Vertically and Horizontally (A Response to Aziz Huq),” *Columbia Law*



functional capacities of legislative, executive, and judicial decision-making.<sup>116</sup> Negotiated federalism affords opportunities for these multiple stakeholders to voice their concerns, participate in governance, compete in policymaking, and renew their commitment to the system that affords them these opportunities. Similar benefits of dialogic process are also claimed by the champions of legal pluralism, who advocate for more normatively inclusive dialogic processes in pluralist governance. If negotiated multiscale governance delivers on this promise, it might support the call for more normatively inclusive negotiated governance. This section considers whether Negotiated Rulemaking, an example of administrative bargaining in the American system, substantiates claims in favor of negotiated governance—concluding that it can, at least in some instances.

The myriad examples of negotiated federalism support the assertion that dynamic federalism provides a structural forum for intersovereign contestation and dialogue. The most successful examples suggest that it can lead to more effective interjurisdictional governance than a less consultative process, especially in areas of intense jurisdictional contest, such as environmental<sup>117</sup> and national security law.<sup>118</sup> It is difficult to produce statistically satisfying comparisons of negotiated governance and the alternative, because it is almost never possible to run the same governing dilemma through both governance methods in a scientific fashion. However, some evidence of the dialogic benefits of negotiated governance can be found in the literature reviewing negotiated rulemaking,<sup>119</sup> a structured form of negotiated governance that partners multiple stakeholders in complex administrative rulemaking.<sup>120</sup> Comparisons between negotiated rulemaking and the traditional notice-and-comment method, which involves much less negotiation, indicate that the dialogic benefits predicted by legal pluralism and dynamic federalism can be realized in appropriate contexts.

Negotiated Rulemaking is a tailored form of interest group bargaining in which stakeholders and agency personnel work together to produce the elements of an administrative regulation early on in the process of rulemaking.<sup>121</sup> It stands in contrast to traditional notice-and-comment rulemaking, in which stakeholders are invited to

*Review Sidebar 115* (2015): 4–38, 5 (discussing negotiated governance across both the vertical federalism dimension and horizontal separation of powers dimension of American constitutionalism).

<sup>116</sup> See generally Ryan, “Negotiating Federalism,” *supra* note 19; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 265–367.

<sup>117</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18.

<sup>118</sup> See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 301–302; Ryan, “Negotiating Federalism,” *supra* note 19, at 56–58 (discussing the failure of the REAL ID federal mandate in the absence of prior state consultation).

<sup>119</sup> Negotiated Rulemaking Act, 5 U.S.C. §§ 561–70 (2018). See also Ryan, *Federalism and the Tug of War*, *supra* note 18, at 297–300; Ryan, “Negotiating Federalism,” *supra* note 19, at 51–55 (discussing Negotiated Rulemaking).

<sup>120</sup> Spector, *supra* note 112, at 2; Pritzker and Dalton, *supra* note 112; Cornelius M. Kerwin and Laura I. Langbein, “Regulatory Negotiation Versus Conventional Rule Making: Claims, Counterclaims, and Empirical Evidence,” *Journal of Public Administration Research and Theory* 10, no. 3 (July 2000): 599–632.

<sup>121</sup> This analysis first appeared in Ryan, “Negotiating Federalism,” *supra* note 19, at 52–53 and Ryan, *Federalism and the Tug of War*, *supra* note 18, at 298–99.



provide responses to the agency's proposed rule much later in the process, after the agency has already invested substantial time and effort in its proposal.<sup>122</sup> Participants in negotiated rulemaking generally report that the process is usually more subjectively satisfying than traditional rulemaking—even for the government representatives who are voluntarily ceding their primary rulemaking authority to the negotiated rulemaking process.<sup>123</sup> Participating agency personnel and regulated parties form more cooperative relationships, facilitating both the future implementation and enforcement of the rules created by the process.<sup>124</sup> This affirms the intuitions of legal pluralists that dialogic processes build stronger relationships within a polity, even among opposing interest groups.

In many ways, the results of negotiated rulemaking are also more efficient. The final regulations are clearer to stakeholders and usually include fewer technical errors, so that less overall time, money, and effort are expended on enforcement.<sup>125</sup> Shepherding a proposed rule through public comment takes more time under negotiated rulemaking than the traditional alternative, but negotiated rules receive fewer and more moderate public comment during the public comment process and are less frequently challenged in court by regulated entities.<sup>126</sup> The final products of negotiated rulemaking are therefore implemented more quickly and with greater compliance from stakeholders than the results of traditional rulemaking.<sup>127</sup> Researchers report that the process also confers valuable learning benefits on participants, who come to better understand the concerns of other stakeholders.<sup>128</sup> The process encourages participants to become more invested in the consensus they help create, and they often go on to campaign for the success of the regulations they help create with their constituent communities.<sup>129</sup>

Nevertheless, the literature also reports on the limitations of the Negotiated Rulemaking model. Fair representation is critical to the success of negotiated rulemaking, but it can be difficult to ensure proper representation of all interest groups at the negotiating table.<sup>130</sup> The transparency characteristic of good governance can be compromised by prenegotiation consultations among the parties.<sup>131</sup> Not all subject matter is

<sup>122</sup> Jody Freeman and Laura I. Langbein, "Regulatory Negotiation and the Legitimacy Benefit," *New York University Environmental Law Journal* 9 (2000): 60–151, 60–64; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 298.

<sup>123</sup> Pritzker and Dalton, *supra* note 112, at 3–5; Spector, *supra* note 112, at 2.

<sup>124</sup> Cf. Freeman and Langbein, *supra* note 122, at 62; Kerwin and Langbein, *supra* note 120, at 610, 625.

<sup>125</sup> Pritzker and Dalton, *supra* note 112, at 3–5; Spector, *supra* note 112, at 2.

<sup>126</sup> Spector, *supra* note 112, at 2. <sup>127</sup> *Ibid.*

<sup>128</sup> Gerard McMahon and Lawrence Susskind, "The Theory and Practice of Negotiated Rulemaking," *Yale Journal on Regulation* 3 (Fall 1985): 133–66, 161–65.

<sup>129</sup> *Ibid.*

<sup>130</sup> Cary Coglianese, "Assessing Consensus: The Promise and Performance of Negotiated Rulemaking," *Duke Law Journal* 46, no. 6 (Apr. 1997): 1255–350, 1261, 1321–34. But see Philip Harter, "Assessing the Assessors: The Actual Performance of Negotiated Rulemaking," *New York University Environmental Law Journal* 9 (2000): 32–59, 39–44, 54–57 (challenging Coglianese's methodology and arguing that negotiated rulemaking has lived up to its promise).

<sup>131</sup> Anonymous Interview, U.S. EPA, Office of the Administrator, Wash., D.C., Jan. 4, 2010 (noting that the most protracted part of all state-federal bargaining is about "what the opening gambit will be" when the formal negotiation begins, but also that this facilitates progress and that, "when we're doing



appropriately subject to negotiation, such as those matters impacting fundamental rights, especially those of insular minorities.<sup>132</sup> Finally, there is the impossibility of achieving consensus when interests insufficiently overlap.<sup>133</sup>

Similar limitations can hamstring negotiated governance in all contexts, and they are likely to hamper the seamless deployment of normative legal pluralism as well. In the context of negotiated federalism, depending on the circumstances, the need to break a deadlock may justify the use of preemptive authority. It is not as clear how legal pluralism should cope. But as in all cases of negotiation, questions of preferable alternatives loom large. American federalism also demonstrates examples where the choice to preempt without engagement led to total failures of governance, as in the case of the REAL ID Act, enacted to improve identification after the 9/11 attacks—in which the states simply declined to comply with federal mandates after having been cut out of the policymaking process.<sup>134</sup> Accordingly, the architects of governance must query whether it is preferable to risk deadlock in pursuit of consensus or risk the backlash that can follow a failure to consult at all.

### 18.3.3 Consensus Process as Best Alternative

Dynamic federalism and legal pluralism also herald the value of bargained-based consensus as a procedural impasse tool in policymaking arenas where substantive agreement cannot be procured by other means. Bargained-for consent, when it is genuine, can procedurally legitimize negotiated results in the absence of substantive agreement on content. Mutual consent ensures fairness, “on the theory that no deal is reached unless all parties agree, and reasonable negotiators will not bargain for results that contravene their best interests.”<sup>135</sup> Genuine consent is procured when bargainers who can be trusted to (1) understand their own interests and (2) faithfully represent their principals (3) reach a bilateral agreement that each side genuinely prefers to no agreement.<sup>136</sup> Through the iterative process of communication, compromise, assessment, and agreement, bargainers regularly substitute mutual consent for substantive agreement on the merits.<sup>137</sup>

our job, there are lots of conversations like these early on in the process”); Ryan, *Federalism and the Tug of War*, *supra* note 18, at 299.

<sup>132</sup> Cf. Owen Fiss, “Against Settlement,” *Yale Law Journal* 93 (1983–1984): 1073–90, 1076.

<sup>133</sup> Coglianese, *supra* note 130, at 39–44, 54–57.

<sup>134</sup> National Security Intelligence Reform Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638. See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 301–302 (discussing the failure of the Act); Ryan, “Negotiating Federalism,” *supra* note 19, at 56–58.

<sup>135</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 343; Ryan, “Negotiating Federalism,” *supra* note 19, at 105.

<sup>136</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 342–47; Ryan, “Negotiating Federalism,” *supra* note 19, at 105–10 (“If negotiators truly understand their own interests and pursue them faithfully, then we can trust that they will not consent to terms that undermine their interests. And as long as they can truly walk away from the bargaining table when no beneficial deal is possible, then we can trust that the terms they negotiate benefit all parties more than no agreement at all.”).

<sup>137</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 342–47; Ryan, “Negotiating Federalism,” *supra* note 19, at 105–10.



Scholars in both fields argue that bargaining is often the best (and sometimes, the only) available alternative for bridging pluralist dissensus.<sup>138</sup> When parties cannot reach substantive consensus about why an outcome is legitimate, they substitute procedural consensus by agreeing to defer to the results of a fair bargaining process, legitimized by the above principles of mutual consent.<sup>139</sup> As I explained in *Federalism and the Tug of War Within*,

For thousands of years, human cultures worldwide have turned to procedurally-based negotiated outcomes when mired in substantive disagreement, essentially substituting procedural consensus for the missing substantive consensus. Negotiators defer to bargained-for results on the simple grounds that, even without a more convincing substantive rationale, the results must hold merit if all parties are willing to abide by them. In other words, even if the parties cannot agree on a rationale that explains why the negotiated result is the right outcome, if they can actually agree on some outcome that they all prefer to a stalemate—then, goes the wisdom of bargaining, that outcome must be a worthy choice. If it was reached through a fair process of exchange, then it holds decisional gravity that exceeds random chance or a forced alternative, and warrants deference in the future.<sup>140</sup>

Wisely crafted forums for negotiated governance should include procedural mechanisms to help ensure that bargaining will be consistent with the consent principles that legitimize bargaining in general, and I have recommended opportunities to engineer legitimizing procedures into state-federal bargaining at the level of regulatory design.<sup>141</sup>

The value of negotiated governance can go beyond the mere accomplishment of any agreement. In the federalism context, I suggest that negotiation is not just a de facto response to regulatory uncertainty about who should decide, but can itself be a constitutionally legitimate way of deciding, especially when other governance mechanisms have failed.<sup>142</sup> Competing sovereign agents frequently use consent-based process to navigate federalism dilemmas that other means of constitutional interpretation have failed to clarify—for reasons of political gridlock, regulatory abdication, litigation, or other

<sup>138</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 11 (calls to create spaces for productive interaction among multiple, overlapping legal systems by developing procedural mechanisms and institutions that aim to manage the legal pluralism that is all around us, which facilitates recognition of the interests of multiple communities and agreement among competing norms); Ryan, *Federalism and the Tug of War*, *supra* note 18, at 339–76; Ryan, “Negotiating Federalism,” *supra* note 19, at 102–27.

<sup>139</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 343; Ryan, “Negotiating Federalism,” *supra* note 19, at 106 (“Lacking substantive consensus about why the outcome is legitimate, the parties thereby substitute procedural consensus in agreeing to defer to the results of fair bargaining.”).

<sup>140</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 342; Ryan, “Negotiating Federalism,” *supra* note 19, at 105.

<sup>141</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 362–67; Ryan, “Negotiating Federalism,” *supra* note 19, at 128–35.

<sup>142</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 339–42; Ryan, “Negotiating Federalism,” *supra* note 19, at 102–104.



obstacles.<sup>143</sup> I argue that these negotiated results warrant deference if both the legitimizing principles of bargained-for consent are honored<sup>144</sup> and the negotiation process is consistent with the procedural expressions of the core federalism values that constrain good multiscalar governance in any context.<sup>145</sup>

Not all federalism bargaining will satisfy these criteria.<sup>146</sup> But when it does, bilaterally negotiated outcomes warrant interpretive deference as a means of implementing constitutional federalism directives,<sup>147</sup> when we understand federalism interpretation as a means of constraining public behavior to be consistent with constitutional values.<sup>148</sup> Indeed, surveying the landscape of jurisdictional overlap yields many instances in which the very process of intergovernmental bargaining proves more able to balance competing constitutional values than judicial or legislative decisions alone.<sup>149</sup>

Legal pluralist Paul Schiff Berman similarly advocates for the deployment of dialogic, consensus-based processes to bridge normative divides in which the prospect of forging substantive agreement is daunting. He argues that pluralism recognizes the inevitability of normative conflict, but rather than attempting to erase it, a pluralist framework “seeks to manage it through procedural mechanisms, institutions, and practices that might at least draw the participants to the conflict into a shared social space.”<sup>150</sup> He observes that this approach “draws on Ludwig Wittgenstein’s idea that agreements are reached principally through participation in common forms of life, rather than through agreement on substance.”<sup>151</sup> Better still, dialogic processes afford participants the opportunity to learn more about the concerns of their counterparts, opening greater possibilities for forging consensus on even the substance.<sup>152</sup>

<sup>143</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 339–42; Ryan, “Negotiating Federalism,” *supra* note 19, at 102–104.

<sup>144</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 342–47; Ryan, “Negotiating Federalism,” *supra* note 19, at 105–10.

<sup>145</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 347–56; Ryan, “Negotiating Federalism,” *supra* note 19, at 110–21.

<sup>146</sup> See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 349; Ryan, “Negotiating Federalism,” *supra* note 19, at 113–14 (“Bargaining that allocates authority through processes that weaken rights, threaten democratic participation, undermine innovation, and frustrate problem-solving is not consistent with federalism values, and warrants no interpretive deference.”).

<sup>147</sup> See Ryan, *Federalism and the Tug of War*, *supra* note 18, at 349; Ryan, “Negotiating Federalism,” *supra* note 19, at 113–14 (“Bargaining that procedurally safeguards rights, enhances participation, fosters innovation, and harnesses interjurisdictional synergy accomplishes what federalism is designed to do—and what federalism interpretation is ultimately for. As such, it warrants interpretive deference from a reviewing court, or any branch actor interrogating the result. Of course, not all federalism bargaining will do so. . . . The more consistency with these values of good governing process, the more interpretive deference is warranted; the less procedural consistency with these values, the less interpretive deference is warranted.”).

<sup>148</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 272–73; Ryan, “Negotiating Federalism,” *supra* note 19, at 11–14.

<sup>149</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 367; Ryan, “Negotiating Federalism,” *supra* note 19, at 5.

<sup>150</sup> Berman, “Jurisgenerative Constitutionalism,” *supra* note 14, at 665, 675–76. <sup>151</sup> *Ibid.*

<sup>152</sup> See Berman, “Federalism, International Law, and Legal Pluralism,” *supra* note 8 (arguing that “jurisdictional redundancy operating in the transnational, international, and federalist realm . . . show



Berman suggests that building these shared social spaces will require the creation of “procedural mechanisms, institutions, and practices for managing pluralism” that will inspire participants to wrestle with the difficult questions of multiple affiliation rather than shunting aside normative difference.<sup>153</sup> He advocates for constitutional mechanisms for managing global legal pluralism that capitalize on the use of procedural constraints to shepherd pluralist deliberation in healthy directions of inclusion, tolerance, and engagement.<sup>154</sup> He proposes a variety of such mechanisms to encourage dialectical legal interactions between competing normative interests, including many that resonate with the procedural tools of dynamic federalism, such as subsidiarity schemes, preserved spaces for local variation, hybrid participation agreements, and purposeful jurisdictional redundancy.<sup>155</sup>

## 18.4 THE SHARED REJECTION OF ZERO-SUM GOVERNANCE

In addition to their shared emphasis on dialogic processes as a tool of good governance, the legal pluralism and dynamic federalism discourses share three meta-phenomenal features, explored in this section. First, both contain positive and normative elements that are markedly disaggregable, in that interpreters might subscribe to both accounts, or they might accept the positive account while rejecting the normative account. More importantly, both models begin by rejecting the zero-sum assumptions that left their respective predecessors unable to account for the full dynamics of on-the-ground governance. Finally, both models must nevertheless contend with the possibility of circumstances where the zero-sum analogy holds.

### 18.4.1 Disaggregating the Positive and the Normative

As discussed earlier, legal pluralism and dynamic federalism include both positive and normative elements, with distinctive roles in the discourse. The positive elements are devices of description, by which each attempts to convey an accurate, working model of the elements of governance on which they focus. The positive account takes no position on whether the picture it paints is attractive or unattractive, or desirable or undesirable; it simply tells a story. By contrast, the normative elements are value-judgment based proposals, asserting how good governance should work, and what must be done to accomplish that. In both discourses, these elements are frequently disaggregated.

how the existence of multiple fora can both empower voices that might otherwise be silenced and effect changes of legal consciousness over time”).

<sup>153</sup> *Ibid.*, 677.

<sup>154</sup> *Ibid.*, 680–94.

<sup>155</sup> *Ibid.*



Again, each discourse begins with a positive account of the status quo that, it claims, better captures the complex dynamics of actual governance than the preexisting model. Legal pluralism describes the simultaneous normative force of multiple sources of authority and the complex dynamics this creates for the individuals and entities within cosmopolitan societies.<sup>156</sup> Dynamic federalism describes the richness of intersovereign engagement in the negotiation of interjurisdictional governance, and the interpretive possibilities it creates.<sup>157</sup> In both cases, the positive account is persuasive, because it conveys a reality that, once described, is hard to discount. Multiple sources of authority do exert normative force in pluralist societies, and modern federalism is clearly marked by intergovernmental engagement.

AQ1

The two discourses then advance normative accounts, both of which prove more controversial than their descriptive counterparts.<sup>158</sup> Legal pluralism shifts from describing the fact of normative overlap to advocating for the institution of more inclusive dialogic processes to improve governance by engaging all communities of interest.<sup>159</sup> Similarly, dynamic federalism moves from the observation that intersovereign engagement abounds to the assertion that it leads to better governance than separation, for many of the same reasons.<sup>160</sup> Interjurisdictional governance achieved through consultation and negotiation is more likely to produce outcomes that appropriately balance the values and interests in conflict, and in which participants who feel respected are more likely to invest meaning. Both normative accounts hinge on the good governance benefits of inclusion, engagement, and negotiation, and both herald the value of procedurally derived consensus when substantive agreement is unavailable.<sup>161</sup>

AQ2

AQ3

Markedly in the legal pluralism and dynamic federalism discourses, these positive and normative accounts can be—and frequently are—disaggregated. That is, the interpreters or architects of governance might subscribe to both accounts, or they might accept the positive account while rejecting the normative account. Many governance scholars reluctant to embrace the normative proposals associated with legal pluralism have nevertheless acceded to its description of the multiple legal identities juggled by individual actors and the overlapping normative forces of both state-based and nonstate sources.<sup>162</sup> Similarly, many federalism scholars have accepted the positive account of

<sup>156</sup> See *supra* notes 1-2, 14-15.

<sup>157</sup> See *supra* note 18.

<sup>158</sup> See, e.g., *supra*, notes 11-13 (listing scholarship skeptical of legal pluralism model); Greve, *The Upside-Down Constitution*, *supra* note 18; Young, *supra* note 18 (examples of scholarship skeptical of dynamic federalism). See also Jessica Bulman-Pozen, "Partisan Federalism," *Harvard Law Review* 127, no. 4 (Feb. 2014): 1077-146 (arguing that the dynamics of American federalism are further complicated by ideologically polarized party politics, enabling states to check federal action by channeling partisan conflict through the institutional frameworks of the federal structure); Bulman-Pozen and Gerken, "Uncooperative Federalism," *supra* note 18, at 1258-60 (arguing that dynamic federalism is marked by stonewalling as well as collaboration).

<sup>159</sup> See sources cited *supra* notes 1-2.

<sup>160</sup> See sources cited *supra* note 18, 82-83.

<sup>161</sup> See sources cited *supra* notes 1-2 (legal pluralism), 18 (dynamic federalism), and 83-85 (advocating negotiated governance).

<sup>162</sup> See, e.g., Berman, "How Legal Pluralism Is and Is Not Distinct," *supra* note 9 (in responding to Galán and Patterson's critique of his pluralism normative proposals, first noting the significance of the fact that they accepted his pluralism descriptive account). For the quoted text, see *supra* note 15.



dynamic exchange and intergovernmental bargaining in federalism without endorsing the normative claim that it is an effective means of governing.<sup>163</sup>

## 18.4.2 The Rejection of Zero-Sum Governance

The next shared feature likely accounts for the controversy that each normative account has generated in comparison to its paired positive account. In contending for their normative visions of good governance, both legal pluralism and dynamic federalism reject critical assumptions underlying the preceding theoretical model about the allocation of authority within governance.

The pluralist model departs from the prior monist model, in which legitimate legal authority derives only from a territorial sovereign.<sup>164</sup> Dynamic federalism departs from the separationist dual federalism model, which polices an idealized boundary between mutually exclusive spheres of national and local regulatory authority.<sup>165</sup> Yet the most important similarity here is how the rejected assumptions are themselves related. In rejecting the prior models of monism and separationist federalism, legal pluralism and dynamic federalism each reject the “zero-sum” approach to governance embraced by their intellectual predecessors.

### 18.4.2.1 *Rejecting Zero-Sum Federalism*

The entrenched role of negotiation in American federalism reveals a dynamic relationship between state and federal power that departs from the stylized, strict separationist model that predates it, one which I previously coined “zero-sum” federalism.<sup>166</sup> The zero-sum model of federalism, which predominated the American federalism discourse until relatively recently, assumes that jurisdiction is a finite and fixed-sum competitive resource, in which more for one competitor necessarily means less for the other.<sup>167</sup> Focusing on sovereign antagonism within the federal system, it envisions the federal and state governments as locked in a bitter, winner-takes-all struggle for power, in which every jurisdictional gain by one side represents a loss for the other.<sup>168</sup> By contrast, the dynamic federalism model acknowledges sovereign competition while also recognizing the ways in which engagement enhances the ability of both sovereigns to

<sup>163</sup> See, e.g., Greve, *Upside-Down Constitution*, *supra* note 18. <sup>164</sup> See *supra* notes 3, 11–14.

<sup>165</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 109–44.

<sup>166</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 4–5 (“Reconceptualizing the relationship between state and federal power as one heavily mediated by negotiation demonstrates how federalism practice departs from the rhetoric, and offers hope for moving beyond the paralyzing features of the zero-sum discourse.”); Ryan, *Federalism and the Tug of War*, *supra* note 18, at xiii; Erin Ryan, “Negotiating Federalism Past the Zero-Sum Game,” *Administrative and Regulatory Law News* 38 (Fall 2012): 4–7.

<sup>167</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 4; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 267.

<sup>168</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 4; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 267.



achieve their regulatory goals and obligations.<sup>169</sup> Countless real-world examples of interjurisdictional governance reveals that the boundary between state and federal authority is less a bright line and more an ongoing project of negotiation, taking place on levels both large and small.<sup>170</sup>

For example, in advocating for both the positive and normative features of dynamic federalism in environmental law, Professors David Adelman and Kristen Engel specifically target a zero-sum model of environmental governance for rejection in their proposal. They frame this version of zero-sum federalism as the “matching principle,” directing that regulatory authority be assigned to the level of government that roughly “matches” the geographic scope of the subject problem, and exclusively to that level.<sup>171</sup> As they explain:

A hallmark of environmental federalism is that neither federal nor state governments limit themselves to what many legal scholars have deemed to be their appropriate domains. The federal government continues to regulate local issues, such as remediation of contaminated industrial sites, which have few direct interstate connections and few benefits from federal uniformity. At the same time, state and local governments are not content to confine their attention to issues of local concern, but are developing policies on environmental issues of national or even international scale, such as global climate change. Nor do environmental issues “stay” in the control of any particular level of government, but rather tend to pass back and forth between them like the proverbial football. The current system of environmental federalism is thus a dynamic one of overlapping federal and state jurisdiction . . .

This dynamic system is [] antithetical to the prevailing economic orthodoxy of federalism scholars. Legal academics have long maintained that an optimal level of government exists for regulating a given environmental problem. The orthodox view, which we refer to as the “matching principle,” is premised on the elementary economic theory that efficient regulation is possible only when the regulating entity fully internalizes the costs and benefits of its policies. A corollary of this principle is that the regulatory authority should reside at the level of government that roughly “matches” the geographic scope of the subject environmental problem. Hence regulation of intrastate groundwater ought to be regulated by state and local governments, whereas climate change should be addressed at the international level. This static model is incompatible with the existing dynamic system, as it precludes overlapping and shifting regulatory authority between the states and federal government.<sup>172</sup>

Instead, they advocate a dynamic model of federalism that more accurately reflects the reality of U.S. environmental governance, and through its ability to respond adaptively to changing circumstances, produces what they see as better normative results:

<sup>169</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 4; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 267.

<sup>170</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 6.

<sup>171</sup> See Adelman and Engel, *supra* note 18, at 1798. <sup>172</sup> *Ibid.*, 1796–98.



We reject the traditional static optimization model for an adaptive one. Our approach draws on an emerging trend in legal scholarship that calls for a dynamic model of federalism. We start with the unremarkable observation that environmental problems are multifaceted. Sources of environmental harm may be the manifestation of numerous failures, market as well as regulatory, that arise along numerous dimensions and at widely variant temporal and spatial scales. Further, the initiative to address environmental problems will originate from more than one level of government based upon a variety of political, socioeconomic, and environmental factors, each differing from the other in the mix of these variables. This diversity of contexts proves to be an essential asset in a complex and dynamic world.

The simplicity of the matching principle, in this light, comes at a significant price because it assumes away much of the inherent complexity of environmental problems. Further, the static nature of the matching principle's economic model ignores the constantly shifting landscape in which environmental policy is set, with its disruptions from both natural processes and human interventions. Rigid adherence to the matching principle . . . is counterproductive in such an environment because it increases the risks of freezing policies in local maxima (dead ends) and decreases responsiveness to changing environmental conditions.<sup>173</sup>

Indeed, it should not be surprising that so much federalism-sensitive governance is accomplished through dynamic collaboration, competition, and negotiation, given how these features are built into the very structure of American government.<sup>174</sup> The bicameral nature of the legislature, the presidential veto, and even the subtle invitation to iterative policymaking afforded by judicial review—prompting Congress to try again to meet constitutional muster, or signaling the concerns that future legislators must heed<sup>175</sup>—all speak to the way American governance is, by design, an iterative process of joint decision-making. The interest-group representation model of democratic governance itself anticipates how lawmaking will reflect the results of bargaining between competing interest groups.<sup>176</sup> Federalism affords federal supremacy and Tenth Amendment protection for those instances in which decision-making truly is a zero-sum game—but dynamic federalism suggests they may be far fewer than the zero-sum model of dual federalism assumed.

<sup>173</sup> *Ibid.*, 1798–1800.

<sup>174</sup> Ryan, “Negotiating Federalism,” *supra* note 19, at 8; Ryan, *Federalism and the Tug of War*, *supra* note 18, at 281.

<sup>175</sup> For example, Congress designed the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) in response to the U.S. Supreme Court's 1997 invalidation of the Religious Freedom and Restoration Act (RFRA) as exceeding legislative authority under the Fourteenth Amendment. RLUIPA, Pub. L. No. 106-274, 114 Stat. 803 (2000) (codified as amended at 42 U.S.C. §§ 2000cc-1 to -5 (2006)); RFRA, Pub. L. No. 103-41, 107 Stat. 1488 (1993), *invalidated by* *City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

<sup>176</sup> Jody Freeman, “Collaborative Governance in the Administrative State,” *UCLA Law Review* 45 (Oct. 1997): 1–98, 4–8 (proposing a model of collaborative governance that involves multiple levels of cooperation).



### 18.4.2.2 *Rejecting Statist Monism*

Similarly, the legal pluralists have rejected statist monism, which assumes that allowing normative competition from non-sovereignty-based sources will undermine the state. In doing so, legal pluralists are calling for a non-zero-sum normative world—a legal order in which law is composed, or at least influenced, by the full variety of norms and principles that influence the people within it.<sup>177</sup> The insight of legal pluralism is that more can be merrier, and even if all norms do not end up equally persuasive in the marketplace of ideas, we are all better off when these normative sources are acknowledged and contended with, rather than swept under a rug. That swept-under norm could be critical to understanding those outside the majority community. It might just be a really good idea.

For example, Professor Monica Hakima argues that the World Trade Organization (WTO), the international institution governing cross-border trade, was routinely the site of pluralist conflict that strengthened, rather than corroded, the effectiveness of the institution.<sup>178</sup> As this history of pluralism conflict within the WTO demonstrates, Hakimi explains that “ineradicable governance conflicts are not necessarily dissociative for a political community. . . . Rather, allowing these people to keep having their conflicts in relatively constructive ways can itself be productive for the group. Conflict is a way for those with diverse priorities to engage together on and invest in their joint enterprise and thus to preserve it as a going concern that binds them.”<sup>179</sup> By her account, enabling discursive pluralist competition to play out at the WTO strengthened the entire community, rather than simply creating zero-sum winners and losers in a given instance.

Legal pluralism thus heralds the promise of greater normative inclusivity. Its advocates contend that opening the process to more voices will improve governance by facilitating exchange, encouraging normative competition, and enabling nonstate norm generators to contribute in contexts where state-based law may never be as effective.<sup>180</sup> Pluralism opens the door to innovation by inviting the creative capacity of nongovernment actors into realms where they might even outperform the state (or where the state

<sup>177</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 12.

<sup>178</sup> Monica Hakimi, “The Integrative Effects of Global Legal Pluralism,” in this volume, chapter 20.

<sup>179</sup> *Ibid.*

<sup>180</sup> See, e.g., Janet K. Levit, “A Bottom-Up Approach to International Lawmaking: The Tale of Three Trade Finance Instruments,” *Yale Journal of International Law* 30 (Winter 2005): 125–210 (contrasting the “top-down” approach, in which states enact rules that govern the behavior of those subject to the rules with the “bottom-up” approach, in which the practices of nonstate actors inform the making of the rules that then evolve to govern those same actors); Berman, *Global Legal Pluralism*, *supra* note 1, at 44 (noting that industry-generated corporate codes of conduct may “regulate” behavior more effectively than state sanctions because the threat of consumer mobilization may be more motivating than the possibility of state-based enforcement); Hendry and Tatum, *supra* note 7, at 95 (discussing benefits when indigenous communities translate culturally normative practices into legal norms but critiquing the fact that “a lack of reciprocity on the part of the dominant U.S. legal culture means that these benefits have been necessarily limited”); Resnik, “Law’s Migration,” *supra* note 17, at 1579.



is manifestly underperforming).<sup>181</sup> Ideally, pluralist structures, institutions, and procedures can strengthen the overall conversation simply by enabling new players to join it. Pluralists point to compelling examples of productive dialectic between private and state-based authorities, including federal deference to Native American courts, the influence of international professional associations like the International Chamber of Commerce, and even transnational corporations and NGOs.<sup>182</sup>

### 18.4.3 Contending with Zero-Sum Realities?

All that said, the idea of nonstate-based sources of “law” provokes deep anxiety for those who worry that the state is best positioned to protect the liberal values and fundamental rights that most democratic societies hold dear.<sup>183</sup> If we entertain sources of law from beyond the state, will that weaken the ability of the state to guarantee good governance? If religious law holds currency in a pluralist society, what will that mean for members of a minority faith, or no faith at all? Can we trust the purveyors of private norms to be as zealous in protecting the public interest as the public institutions of government?

These are serious concerns, although it is worth considering whether they assume that the liberal state is performing better in this capacity than it really is—in some contexts, perhaps more mistakenly than others. Of course, not every sovereign state is a liberal state with these values, making the concern inapposite in some nations from the start. But even among those nations that purport to be liberal states, we hear increasingly cogent critiques of the idea that the liberal state is the best vindicator of these liberal values of good governance. In the United States alone, consider the intractable problems we are currently experiencing regarding democratic accountability and

<sup>181</sup> Calliess and Jarass, *supra* note 6, at 12 (discussing the role of the International Chamber of Commerce in the regulatory void left after World War II); Amnon Lehavi, “Unbundling Harmonization; Public versus Private Law Strategies to Globalize Property,” *Chicago Journal of International Law* 15, no. 2 (Winter 2015): 452–517, 455 (discussing the ability of private actors to conform to global systems and how global private lawmaking demonstrate the ‘power that society, culture and history exert upon law’s empire.’”).

<sup>182</sup> Berman, *Global Legal Pluralism*, *supra* note 1, at 167 (noting that “[e]ven outside the context of Islamic law, the U.S. Supreme Court has at times deferred to the independent parallel courts maintained by American Indian populations located within U.S. territorial borders” [referring to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)]); Cécile Pelaudeix, “Governance of Arctic Offshore Oil: Gas Activities: Multilevel Governance and Legal Pluralism at Stake,” *Arctic Yearbook* (2015), 3 (arguing that many normative communities “articulate norms without formal state power behind them,” and that private sector actors, including transnational corporations and NGOs, “design norms and values in the offshore activities, potentially leading to a situation of legal pluralism where legal systems overlap.”); Calliess and Jarass, *supra* note 6, at 12 (discussing the ICC).

<sup>183</sup> See, e.g., Isiksel, *supra* note 9, at 187 (“In liberal democracies, constitutional rule safeguards pluralism against its own excesses by ‘select[ing] a subset of worthy values, bring[ing] them to the foreground, and subordinat[ing] others to them.’ Constitutionalism combats this anarchical tendency by highlighting some values as more central to the public weal than others. However, in the absence of such an authoritative ordering of principles, ends, and prerogatives, pluralism in the global legal realm runs a more immediate risk.”).



campaign finance issues.<sup>184</sup> Similar issues have bedeviled the European Union, leading to withdrawal movements such as Brexit.<sup>185</sup>

Nevertheless, such anxiety begs the question whether there may be legal realms pertinent to the legal pluralism proposal that, as in the federalism context, really *are* zero-sum games—legal realms in which allowing nonstate actors to play meaningfully diminishes the ability of the state to govern effectively. Strengthening the authoritative force of private norms could harmfully displace state law in those realms in which state-based law really does perform better. For example, while environmentalists are pleased that private industry seeks to self-regulate under principles of Corporate Social Responsibility, many worry that allowing these private norms to displace formal environmental regulation by the government could dangerously undermine public health and the environment.<sup>186</sup>

AQ5

This brief consideration barely scratches the surface of these issues, many of which have been well-trod elsewhere.<sup>187</sup> However, the zero-sum analytical framework signals several important questions on which more research is needed. For example, if there are zero-sum realms in the statist-pluralist context, how can we identify them? And having identified them, how can we ascertain which sources of law will be more effective to resolve the identified problem? Important scholarly canons provide us a starting point for thinking about these issues, such as John Braithwaite's work on social capital<sup>188</sup> and Elinor Ostrom's work on private regulation,<sup>189</sup> yet much remains for the next generation of scholars in this important and ongoing conversation. For even if we identified areas where we might prefer one kind of regulation or another, how could we meaningfully protect zones of exclusive jurisdiction for each where it may be needed? After all, even when a lawmaking community attempts to exclude alternative normative communities,

<sup>184</sup> See, e.g., Russ Feingold, "The Money Crises: How Citizens United Undermines Our Elections and the Supreme Court," *Stanford Law Review Online* 64 (June 2012): 145–51 ("Super PACs, now ubiquitous across the political spectrum, can collect unlimited funds from corporations and individuals, and then spend that money to elect or defeat candidates for office, so long as that work is not 'coordinated' with the candidate campaigns themselves. In practical terms, super PACs can now legally use barely-disclosed money from corporate treasuries to produce blisteringly negative television ads attacking candidates and elected officials directly.").

<sup>185</sup> See, e.g., Timothy Garton Ash, "Liberal Europe Isn't Dead Yet. But Its Defenders Face a Long, Hard Struggle," *Guardian*, July 9, 2018, <https://www.theguardian.com/commentisfree/2018/jul/09/liberal-europe-isnt-dead-struggle>.

<sup>186</sup> See, e.g., Dan Pontefract, "Faking Corporate Social Responsibility Does Not Fool Employees," *Forbes*, Sept. 24, 2016, <https://www.forbes.com/sites/danpontefract/2016/09/24/faking-corporate-social-responsibility-does-not-fool-employees/#2b1a33f57994>; Bruce Watson, "The Troubling Evolution of Corporate Greenwashing," *Guardian*, Aug. 20, 2016, <https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies>.

<sup>187</sup> See *supra* notes 11–14.

<sup>188</sup> See, e.g., John Braithwaite, "The Regulatory State?," in *The Oxford Handbook of Political Institutions*, eds. Sarah Binder, R.A.W. Rhodes, and Bert A. Rockman (Oxford: Oxford University Press, 2009); John Braithwaite, "The Essence of Responsive Regulation," *U.B.C. Law Review* 44, no. 3 (2011): 475–520.

<sup>189</sup> Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990).



positive accounts of both legal pluralism and dynamic federalism suggest that such efforts may fail.

On this last point, it is worth recalling that even dynamic federalism relies on the twin devices of preemption and deference to protect the regulatory prerogatives of each sovereign in realms that fall outside the zone of jurisdictional overlap. Dynamic federalism is more determinative than unbridled pluralism, because the federal government retains the constitutional trump card of federal supremacy (and in the United States, the Supreme Court has shown periodic—if inconsistent—willingness to enforce jurisdictional boundaries).<sup>190</sup> Yet even then, ongoing state resistance to federal marriage, marijuana, and immigration policies demonstrate that hierarchy cannot always eliminate the forces of legal pluralism.<sup>191</sup>

To be sure, the hierarchical supremacy of federalism is inconsistent with true constitutional pluralism, and it may be antithetical to pluralism more generally. On the other hand, it boasts advantage as a practical means of resolving conflict in circumstances where that has been adjudicated necessary. Correspondingly, the American Tenth Amendment provides constitutional fortification for a zone of local authority against national preemption. It will be interesting to see whether these devices of federalism, which initially seem so ill-fitting to pluralism, will nevertheless hold currency in the evolution of an operational model. Or, alternatively, whether the policing of jurisdictional boundaries will always prove vulnerable under conditions of serious social contestation.

## 18.5 CONCLUSION

This *Handbook* defines the field of legal pluralism and charts a conceptual path forward at a moment in history—rent by pluralist conflict—that highlights the need for intersystemic dialogue, now more than ever. Legal pluralism provides a critical perspective on contemporary legal relationships that challenges the hegemonic model of uniform, monist, and even sovereignty-based legal relationships, just as the new dynamic federalism model challenges the strict separationism of traditional dual federalism.

Just as dynamic federalism has forced our reconsideration of dualism, the critique of monism framed by legal pluralism is persuasive—especially in legal realms that intrinsically transgress the old-fashioned monist model, such as the internet, indigenous peoples, international trade, and global environmental challenges. It helps deconstruct the complicated issues of legal identity and orientation faced by individuals and entities operating in environments transected by competing normative authorities, be they

<sup>190</sup> Ryan, *Federalism and the Tug of War*, *supra* note 18, at 68–104 (tracing the vacillating history of judicially enforceable federalism constraints in the United States).

<sup>191</sup> See Ryan, “Environmental Federalism’s Tug of War Within,” *supra* note 19, at 355–56 (reviewing federalism controversies involving gay marriage, recreational marijuana policy, and immigration enforcement).



from state law, religion, professional norms, corporate governance, or other sources. Yet legal pluralism also raises troubling questions about the relationship between state-based and nonstate laws, the appropriateness of legal hierarchy and heterarchy, and whether there are zones of state or private authority that should be protected from one another, as constitutional federalism attempts.

While a fully normative theory of legal pluralism may remain inchoate, the institution of federalism provides an uncontroversial example of simple legal pluralism in practice. In recognizing the operation of multiple sources of sovereign authority within the same geographic territory, federalism creates a legal realm that is pluralist by definition—while sidestepping the vexing questions that pluralism raises about the commensurability of state-based and nonstate norms.

Federalism also provides a model of working pluralism in which many of the benefits of legal pluralism heralded by its champions are made manifest. The dynamic federalism model demonstrates the potential of the pluralist project in fostering the interactive, dialogic, and dynamic features of intergovernmental negotiation that federalism enables and to which pluralism aspires. Federalism creates a formal structure for governance in which those holding conflicting values and interests can compete and collaborate toward a fully informed, jointly constructed, and often hard-won consensus. Yet many federalisms rely on a preemptive hierarchy between sovereigns that, while not dispositive in all instances, aims to limit some of the uncertainty that worry pluralism's critics. The American model has hardly worked out the pickle of federal supremacy, and the European model takes an entirely different approach.

The relationship between federalism and pluralism is thus one of simultaneous opposition and overlap—not unlike the subjects of governance that they explore. As the ongoing federalism and pluralism discourses unfold, it will be interesting to see where they continue to converge and diverge, and what each can learn from the other.

AU1: In footnotes 156-157, please double-check note numbers in case they've changed.

AU2: In footnote 158, please double-check note numbers 11-13 in case they've changed

AU3: In footnotes 159-161, please double-check note numbers in case they've changed

AU4: In footnote 164, please double-check note numbers in case they've changed

AU5: In footnote 187, please double-check note numbers in case they've changed