NATIONAL AFFAIRS

Saving Federalism

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During the debates over the ratification of the Constitution, Patrick Henry railed against the proposed document, warning that it would result in a "great consolidation of Government" at the national level. For close to 150 years, his fears proved largely unfounded, as the Constitution's checks and balances mostly held fast. But in the early 20th century, those checks and balances were dramatically weakened and in some cases swept away altogether. Federal power slipped its constitutional moorings and began to expand dramatically. Henry's prediction rapidly became a reality.

The constitutional transformation began with the 16th Amendment, which allowed Congress to institute a real income tax for the first time, and the 17th Amendment, which provided for direct election of senators. These two changes gave the federal government a more national character and fueled its vast expansion. The legislative innovations of Woodrow Wilson marked the birth of the modern administrative state, with its shift of legislative power from Congress to the executive branch. Then came the New Deal, with its insistence on protecting key constituencies in labor and agriculture through national programs that were plainly outside Congress's power to regulate commerce "among the several states."

The Supreme Court at first mounted some resistance, but then, starting in 1937, it dramatically backed down. By the mid-20th century, the Court had abdicated its responsibility of judicial review in the areas most crucial to checks and balances: the protection of property rights and economic liberty; the guarantee that federal revenue would be raised only to provide for the "general Welfare of the United States," rather than to reward special interests; and the maintenance of the boundary between state and federal authority, particularly with respect to the regulation of commerce. One cumulative effect of these abdications was the rise of "cooperative federalism": the integration of state and federal governments under an umbrella of federal control.

Among the many troubling questions raised by this constitutional transformation, one stands at its hub, connected in some way to virtually all the others: Can the states still serve their crucial but limited role as platforms for self-government within a properly functioning scheme of checks and balances? The Supreme Court has gotten the question mostly wrong since the passage of the 14th Amendment shortly after the Civil War. The Court has opened the door to federal control of state governments where exclusive state jurisdiction was most vital, while substantially curtailing federal protection against state abuses where federal protection was most vital. The result is a constitutional arrangement that diminishes liberty, empowers government at every level, and has left much of the original Constitution in disarray.

For decades, proponents of state sovereignty — and of the principle of limited and enumerated powers — have argued that modern theories of "cooperative federalism" are just a veil for a vast expansion of federal power over state governments. Progressives have traditionally fought back by arguing that state autonomy is protected in a variety of ways without judicial review, making fears of a federal takeover overblown. The Supreme Court has generally agreed with them.

But progressive legal thinkers are increasingly apt to champion the view conservatives have long warned of. A symposium published in the *Yale Law Journal* this past spring lifted the curtain on "cooperative federalism." Led by Yale law professor Heather Gerken, these scholars of "National Federalism" now insist that the conservatives were right — the federal government has, in fact, already taken substantial control of many state activities and possesses ample powers to extend its dominion further. As champions of centralized government, they believe that this transformation is all to the good. In the course of several hundred pages, they argue that federalism has become an indispensable tool of nationalism, improving national politics and national policymaking, integrating the national polity, and entrenching national power. Their theories

offer no clear limit to the further aggrandizement of federal power.

Proponents of expanded federal control often justify their program by claiming to protect minority rights. Unfortunately, federal control often has the opposite effect, robbing minorities of local majority rule, displacing strong property rights, and leaving them instead with ineffective rights of political participation. The protection of minority rights should mean the protection of all minorities, not just a select few "suspect categories," and depends vitally on preserving local self-rule within what the Supreme Court has called the "structural framework of dual sovereignty."

By undermining the constitutional premises of its own cooperative federalism, the National Federalism school ironically offers a way to reclaim something of the original arrangement of powers envisioned by our constitutional system. Doing so doesn't mean going backward to a time before the modern state. It means moving forward toward a constitutional order better suited to the needs of a 21st-century nation and to principles of government and constitutional text that cannot be interpreted away by the whims of a transient majority. It means a recovery of the principles of federalism and their application once again to American life.

FEDERAL POWER UNLEASHED

Having only just escaped the tyranny of George III, the foremost project for the framers was to forge a national government that was strong enough to survive external threats and internal disintegration but constrained enough to avoid sliding into a new tyranny of its own. Deeply influenced by the Glorious Revolution a hundred years before and by such Enlightenment philosophers as John Locke and Baron de Montesquieu, the framers were keenly aware of the dangers of a government captured by "factions" — which today we call "special interests." To guard against the danger, they put their trust in the checks and balances of a divided government.

The Constitution they crafted divided power both horizontally (among the legislative, executive, and judicial branches) and vertic-ally (among the federal and state governments). The horizontal division of power was straightforward, corresponding to the three necessary functions of government in a democracy, each limited by its dependence on the others. But the vertical division was trickier. Under the supremacy clause, the national government could trump the states, but to keep that from turning into a tyranny of the national majority, federal supremacy was carefully confined to the limited powers enumerated in Article I. As the Supreme Court insisted for 150 years, "that immense mass of legislation which embraces everything within the territory of a state not surrendered to the general government" was left to the exclusive sovereign jurisdiction of the states, which citizens were free to enter and exit.

The powers enumerated in Article I faithfully implemented the principle of subsidiarity: namely, that policies should be decided by the smallest political unit that can effectively deal with the issue, including its actual and potential externalities. National defense, the regulation of interstate commerce, the post office, the patent system, and the power to tax and spend for the general welfare of the United States were ceded to the federal government because smaller units couldn't effectively deal with the creation or protection of those extensive public goods.

In order to prevent local tyrannies, the federal government had to be in a position to guarantee the free movement of goods and people across state lines within a framework of regulatory competition — and it had to guarantee minority rights. That is why Congress was given the power to regulate commerce between states. With respect to other democratic guarantees, the ticking time-bomb of slavery finally exploded in the Civil War and animated the passage of the 14th Amendment, which conferred — against state governments — an extensive list of privileges and immunities for state and national citizens, as well as fundamental protections of due process and equal protection for all persons.

Alas, the Supreme Court did not fare well in its early 14th-Amendment decisions. In the amendment's first decade, the Court whittled the privileges or immunities clause to nearly nothing in the *Slaughterhouse* cases and in *U.S. v. Cruikshank*. The Court essentially decided that all protection of personal and economic liberties from state power had to be awkwardly routed through the due process and equal protection clauses of the 14th Amendment. In 1905's *Lochner v. New York*, the Supreme Court struck down a state regulation limiting the number of hours a baker could work, affirming that freedom of contract was guaranteed by the due process clause of the 14th Amendment. Throughout the *Lochner* era, the Court would rely on "substantive due process" and equal protection not only to defend the economic liberties of citizens against state power, but also to extend protections for religious and social liberties. Sadly, *Lochner* proved fleeting. Meanwhile, the decision in *Cruikshank*, which abandoned the federal protections against state criminal law, proved enduring because the

rise of substantive due process did nothing to protect against abuse of the states' electoral and criminal processes, and particularly against black citizens.

This unprincipled withdrawal of federal protections against state governments was not accompanied by any undue expansion of federal power until the early decades of the 20th century. Congress's power to tax and spend was severely constrained by the Constitution's requirement that direct taxes be apportioned among the states according to population, which made the passage of a national income tax all but politically impossible and forced Congress to rely on a tiny revenue base, namely tariffs. Meanwhile, the Court continued to insist as late as 1918's *Hammer v. Dagenhart* and the *Child Labor Tax* case in 1922 that Congress had no power to regulate or tax the purely internal commerce of the states.

But then three major developments allowed federal power to break free of its original constitutional moorings.

First came the 16th Amendment in 1913, which removed the requirement that direct taxes be apportioned among the states according to population. The first substantial federal income taxes followed shortly after, and judicial decisions soon made it clear that Congress could impose whatever income taxes it liked and then spend the money for whatever purposes it liked. *U.S. v. Butler* in 1936 warned against federal manipulation of the spending power to impose unconstitutional conditions, but that warning was ignored just months later in *Steward Machine Co. v. Davis*, which allowed the federal government to impose virtually any conditions it wanted on the money it provided to state governments and individuals. Beyond that, *Butler* confirmed the Hamiltonian view that the power to tax in order to provide for the "general Welfare of the United States" operated independently of any other enumerated power. The general welfare clause was meant to ensure that public goods could be supplied to one person or group only if similarly extended to others. But *Butler* and *Steward Machine* removed those limitations, such that the expanded spending power became a massive fount of benefits for special-interest groups.

Second came the direct election of senators, mandated by the 17th Amendment, also in 1913. Previously, state legislatures appointed senators who they could be confident would be responsive to the interests of the state governments that they served. The new mode of election instead produced senators who had direct ties to the public at large, which often led them to support national policies that pressed on state prerogatives. Thus a crucial state lever over the federal government was traded for a system that was significantly more national in character.

The third development was the unprecedented expansion of the commerce power. In *Hammer*, the Court had insisted that the federal power to regulate commerce "among the several States" could reach inside states only to those transactions that had a "direct" effect on interstate commerce. The *Child Labor Tax* case did the same with taxation. However, with a superficially subtle shift in diction, 1937's *NLRB v. Jones and Laughlin Steel Co.* unleashed a tsunami: The commerce power could reach any activity with a "close and substantial effect" on interstate commerce, even if the effect was indirect. After that, it was only a matter of time before *Hammer* was overruled. In 1941, *U.S. v. Darby* accomplished that task by upholding national labor standards for the first time, thus bringing an end to constitutional limits on the federal power to tax interstate commerce for collateral purposes.

Cumulatively, these restrictions meant that the set of activities reserved exclusively to the states became vanishingly small — only those activities with an indirect *and* insubstantial effect on commerce at most. The final blow was now inevitable, and a year later, in *Wickard v. Filburn*, the Court ruled that any activity was within the reach of the federal commerce power if, when aggregated across the nation, it would have a substantial effect on interstate commerce. The taxing power, as usual, tagged along.

The New Deal's insistence on creating cartels for its key constituencies required the extension of federal power over all labor standards and all agricultural activities, including whatever a farmer produced for his own consumption. In bowing to it, the Court ceded control of all economic activity across the country to the federal government. Before the New Deal, the oversight of most economic activity was reserved exclusively for state jurisdiction. By the final act of the New Deal, none of it was. Even such typically local practices as zoning would now remain within local control only at the pleasure of Congress.

Unfortunately, the Court could never quite bring itself to admit that it had killed one of the most important and valuable protections in the Constitution. Even as it expanded the commerce power, the Court in *Jones and Laughlin* had warned:

> [T]he scope of this power must be considered in the light of our dual system of government, and may

> not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.

This observation soon became the Court's routine lip service to federalism.

THE PASSING OF DUAL FEDERALISM

In 1950, Princeton University professor Edward Corwin published an influential law-review article entitled "The Passing of Dual Federalism," asking whether, under the new federal power, the states could be "saved for any useful purpose." Like many in his generation, Corwin thought the New Deal necessary: The Depression, the consensus concluded, had revealed the need to change the old constitutional arrangement of laissez faire in favor of one based on "economic security for 'the common man.'" But, he admitted, American federalism had been "overwhelmed and submerged" in the process, and he was skeptical of the Supreme Court's continuing empty praise for the concept of dual sovereignty.

Even if the states could still be saved, which Corwin doubted, it was clearly not the federal judiciary that was going to save them. The only alternative to constitutional constraints was self-restraint. So the extent of congressional power was left to Congress to decide. This arrangement was confirmed in 1938, when *U.S. v. Carolene Products* embraced "rational basis" scrutiny, under which a law is upheld if it has any rational relation to a legitimate government purpose, a standard that virtually any irrational law could survive.

In 1954, Herbert Wechsler published his seminal paper, "The Political Safeguards of Federalism." In it, he conceded the loss of a judicially enforced boundary between state and federal authority, but he argued that the dual sovereignty of the states was duly protected by the political process itself. Thanks to the states' participation in congressional and presidential elections, Wechsler argued, the states' interests were adequately represented when the federal government determined the scope of its own powers.

Wechsler's "process federalism" theory rapidly became a refuge for a Supreme Court faced with the impossible task of reconciling state sovereignty with the new plenary federal powers. The application of federal labor standards to state governments presented this structural dilemma in stark form, and the Court embarked on an embarrassing series of reversals. *Maryland v. Wirtz* ruled in 1968 that Congress could regulate the employment practices of state agencies, but *Wirtz* was overruled by *National League of Cities v. Usery* in 1976, which held that Congress cannot regulate internal state-government functions. Nine years later, *National League of Cities* was overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, which wholeheartedly embraced Wechsler's theory. *Garcia* was somewhat trimmed in 1992 by *New York v. United States*, which held that Congress could not commandeer states by forcing them to "take title" to nuclear wastes within their jurisdiction. But the damage had been done, and virtually all other regulations stuck.

Wechsler's theory had never been thought entirely convincing, even among progressive scholars, and today's National Federalists reject it out of hand. "By the end of the twentieth century," writes Jessica Bulman-Pozen, "notwithstanding its star turn before the Supreme Court, Wechsler's formal process federalism had lost some of its luster." State governments were no longer instrumental in elections for Congress or the presidency, and while process federalism might protect geographically concentrated interests, it did not actually protect the states *as states*. "In other words," writes Bulman-Pozen, "Wechsler's process federalism failed to protect federalism. The hunt was on for new safeguards."

Several of those "new safeguards" still rested on the idea that states were protected by the political process itself. Some scholars have argued the national political parties are the backbone of dual sovereignty; federal politicians depended on their state co-partisans to get elected and would look out for their interests. Yet another idea was that, with the rise of the administrative state, federal administrative agencies are best positioned to protect the states, because state officials could collaborate closely with federal-agency officials and make their views known in the notice and comment periods required by the Administrative Procedure Act. As National Federalists recognize, these different variants of process federalism shared one major conceptual flaw: namely, their mistaken insistence that plenary federal power and dual state sovereignty could and did comfortably coexist.

Heather Gerken has no trouble dismissing that proposition. She contends that states are more important now as subordinate actors within the national government than as autonomous actors with independent spheres of authority. They

matter more when they exercise the "power of the servant" than when they seek to stand as independent sovereigns. Bulman-Pozen agrees that "it is a mistake to believe that national political parties and the administrative state preserve autonomous state governance." Process federalism yields "ever-more thoroughgoing state-federal integration as states become sites of national policymaking and partisan conflict." States are "component parts of the national administrative apparatus."

Citing the many lawsuits states have brought against the Obama administration over health-care and environmental regulation, Bulman-Pozen notes that states often do not challenge federal power per se, but rather "try to tar the federal executive's choices as inconsistent with" laws of Congress. In so doing, she writes, the states "cast themselves as Congress's faithful agents, in contrast to a wayward executive branch."

In fact, states have widely varying motives for such challenges, but virtually never do they "cast themselves as Congress's faithful agents." Some states seek to enhance administrative power at the expense of Congress (and other states), as in 2007's *Massachusetts v. EPA*, which set in motion the EPA's regulation of greenhouse gases as pollutants under the Clean Air Act, a move that could not pass in Congress even with Democratic supermajorities in 2009 and 2010. Other states, by contrast, seek to resist federal-agency takeovers, as evidenced by the now-commonplace state challenges to those same EPA regulations. These states tend to see Congress as composed of *their* agents, not the other way around. When such states sue to force executive agencies to stick to the letter of the law, they are actually championing the prerogatives of their state residents as the true principals under the Constitution.

From the dual-sovereignty point of view, plenary federal power is bad, but keeping it cabined in Congress is much better than letting it escape to the executive branch, where even Congress has trouble reining it in. In Congress, it takes only a minority of states to block legislation, but once rulemaking power is delegated to an executive-branch agency, only a supermajority in Congress can block the unwanted rule.

Thus the combination of process federalism and the modern administrative state has resulted in a massive dilution of the political minority's voting power at both the national and state levels. Vehement state lawsuits against federal-agency regulations, such as those already being prepared against the latest EPA greenhouse-gas rule, are almost certainly a permanent feature of modern federalism. Alas, the Supreme Court has left the states but little ground to stand on.

COOPERATIVE FEDERALISM AND NATIONAL CONTROL

Justice William Rehnquist lodged a short and remarkably angry dissent in *Garcia*. But when it was his turn at the helm as chief justice, the Supreme Court also failed to decisively impose meaningful limits on federal power. Though 1992's *New York v. United States* and 1997's *Printz v. United States* managed to stop the dangerous drift toward direct federal rule over state governments that was evident in *Garcia*, those seemingly strong federalism decisions did not revive a doctrine of dual federalism so much as reveal how elusive *any* coherent doctrine will remain so long as the Court's New Deal decisions remain undisturbed.

In *Printz*, the Court turned up the volume on the anti-commandeering principle of *New York* by ruling that the federal government cannot command a state official to do anything. *Printz* struck down a part of the Brady Act that required state police officers to perform background checks on gun purchasers. The decision was welcomed in traditional federalism circles, particularly for its categorical and potentially far-reaching phraseology. Writing for the Court, Justice Antonin Scalia insisted that federal and state governments occupy separate spheres in a "structural framework of dual sovereignty" and that states must remain "independent and autonomous within their proper sphere of authority." If a federal law offended "the structural framework of dual sovereignty," it was categorically unconstitutional, regardless of the weight of the interests involved.

There was only one problem: Like *New York*, *Printz* left the door wide open for the cooperative-federalism programs that are almost as effective in establishing federal control of the states as direct rule would be. Cooperative federalism uses either fiscal or regulatory inducements to rope states into implementing federal policy. Examples include state Medicaid programs and state implementation plans under the Clean Air Act (such as the EPA's new state-based carbon rule), both of which require states to seek federal approval to gain benefits and avoid penalties. The Rehnquist Court held fast to the fiction that such programs are voluntary for the states and constitute mere "encouragement" on the part of federal authorities, which is permissible unless and until it rises to the level of coercion. As the Court explained in *New York*, "Where Congress

encourages state regulation rather than compelling it, state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people."

But what is the conceptual difference between encouragement and coercion? Both involve free will but both involve the imposition of onerous penalties if states refuse to comply with federal policy. Federal funds, which now account for 32% of state budgets on average, often come with so many conditions attached that any state variations to a program can be only marginal. If states refuse to comply, they lose funds under programs that their citizens have already been taxed for.

Likewise, through what scholars call "conditional preemption," the federal government, exercising its commerce power, grants states permission to implement federal regulations in areas such as health care, the environment, education, and transportation — but only if the states comply with a host of conditions. The conditions are normally so extensive that if states comply they are reduced to mere field offices of the federal government. But if they don't comply, the federal government preempts them and imposes its own implementation program, often with little consideration for local constituents. Indeed, sometimes the federal agency comes to "crucify" local constituents, as former EPA regional administrator Al Armendariz boasted at a closed-door meeting in the first months of the Obama administration. One troubling example of such "crucifixion" arose when Texas refused to implement the EPA's first greenhouse-gas regulations: EPA preempted the field and then massively delayed the implementation of the regulation, leaving key industries with no access to necessary operating permits. Texas was forced to back down.

Unlike the Supreme Court, the National Federalists have no trouble praising cooperative-federalism programs that increase federal control of state governments. Federal conditions shape most state policies, chiefly because they are almost impossible for state officials to resist as a matter of political reality. The blandishment of hard tax dollars, which if rejected will go to other states even if raised from the citizens of the refusing state, plus the specter of unfriendly federal regulators stepping in if state regulators refuse to comply, are usually more than enough to force the hands of state officials.

Trying to distinguish pressure from compulsion, the Court in *New York v. United States* claimed that "[a]ccountability is...diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." But by definition any incentive-based "encouragement" diminishes a state government's responsiveness to local preferences in favor of national ones.

Nor can the Court's current federalism construct be saved by insisting that the difference between encouragement and coercion is a matter of degree. One might as well say that it is fine for a robber to give you a choice between 5% of your wealth and your life, but not between all your money and your life. It is the forfeiture of any federal revenue for non-cooperation that marks off coercion from encouragement. The fact that money is taxed directly from American citizens and given back to state governments (or withheld) in two separate "transactions" is irrelevant.

The Rehnquist Court failed to make any progress on the federalism front because it was unwilling to disturb the key New Deal decisions in any way. In fact, at the end of the day, it only strengthened them. On the commerce-power side, 1995's *U.S. v. Lopez* struck down the Gun-Free School Zones Act because it wasn't a regulation of economic activity, but in so doing it strongly reaffirmed the vitality of the 1942 *Wickard v. Filburn* decision and of the virtually limitless commerce clause. Meanwhile, on the spending side, 1987's *South Dakota v. Dole* affirmed that a state could be docked federal highway funds if it refused to raise the drinking age to 21. *Dole* relied almost entirely on 1937's *Steward Machine Co. v. Davis*, which refused to see inducement as coercion because to do so would "plunge the law in endless difficulties." Chief Justice Rehnquist wrote the majority opinions in both *Lopez* and *Dole*.

The Supreme Court's feeble defense of dual federalism has only played into the hands of the National Federalists, who are totally unconcerned with differentiating between encouragement and compulsion anyhow. They believe in federal oversight of the states so strongly that they have turned a new page on the progressive constitution. For four generations, their predecessors in law schools and courts had earnestly sought to explain why there was no coercion in cooperative federalism, and how states retained their portion of dual sovereignty no matter what the extent of federal power. In contrast, the National Federalists do not just concede federal coercion and control on every front of cooperative federalism; they celebrate it.

For Bulman-Pozen, the states are already dead as autonomous independent actors: "[W]e should think more seriously about federalism's afterlife as a form of nationalism." For Gerken, "the federal government can increase its power by

devolving it"; the task of federalism now is to expand the list of nationalist ends served by federalism and identify new institutional means for achieving those ends. For Abbe Gluck, federalism "mostly comes — and goes — at Congress's pleasure"; National Federalism goes beyond process federalism because it embraces "Congress as federalism's primary source."

The National Federalists have done the country a signal service by dispelling the myth that any of the variants of process or cooperative federalism can possibly coexist with the state's dual sovereignty when Congress decrees otherwise. They are surely correct, and the Supreme Court will hopefully soon take note that nobody on the right or left takes its affirmations of devotion to dual sovereignty seriously anymore.

Where the National Federalists present a most profound danger is in their confident argument that national control of states is a good thing. Luckily, their arguments on this front are demonstrably incomplete and misconceived. Gluck, for example, criticizes the Supreme Court's Obamacare decision (in the 2012 case *National Federation of Independent Businesses v. Sebelius*) on the Medicaid front because it "unrealistically assumed that erecting barriers to state implementation of federal law will stop Congress from enacting major federal legislation altogether. The New Deal, however, is here to stay. The question is not whether we will have major federal statutes, but what the continuing relevance of the states in this landscape will be." The "alternative to National Federalism is not state autonomy," she assures us; "it is more Washington-controlled federal legislation."

In fact, however, cooperative federalism allows the federal government to do many things it might not be able to do otherwise. Medicaid might never have passed if it had been unconstitutional for the federal government to rope states into match-funding a federal program, because the federal cost projections would have been staggering. Or consider marijuana decriminalization in Colorado and Washington: Without state and local police on hand to do its bidding, the federal government can't even enforce its own drug laws.

Unfortunately, the National Federalist account misses many of the troubling questions that its aggressive agenda raises for political economy and constitutional principle in the post-New Deal era. For example, the National Federalists laud the states' ability to vary from federal standards because it enfranchises local preferences while advancing national goals. What they ignore is that these benefits are a one-way ratchet: States can always pile taxation and regulation *on top* of the federal baseline, but they can never reduce the federal baseline. The National Federalists concede states the right to have *more* government than the national norm, but never *less*, except in the rare case that a special waiver program allows it. Wisconsin's mid-1990s welfare reform, for instance, is one of the few examples of a state reducing a cooperative-federalism program pursuant to a federal waiver.

Officials in regulation-heavy and tax-heavy states have an enormous incentive to collude with their fellows in other states to form coalitions in Congress aimed at imposing a high level of regulation and taxation on everyone. We saw why in the *Child Labor* case: With industrialization, labor and capital were becoming increasingly mobile and sensitive to seemingly small differences in state regulation. States with child-labor laws set at 14 years were furious that other states set theirs at 12. They cried out to Congress for a uniform national standard to counteract "the race to the bottom," a progressive pejorative for interstate regulatory competition.

One major objective of the New Deal was to safeguard states with high levels of taxation and regulation by neutralizing the effects of mobile labor and capital through federal programs meant to eliminate the competitive advantage of states with low levels of taxation and regulation. Modern federalism advances this vision with brutal effectiveness. The whole system is biased in favor of producing the highest level of overall government control and economic extraction that is politically sustainable — exactly the opposite of the competitive federalism of the original Constitution.

Another point the National Federalists overlook, again in keeping with their progressive forebears, is that their vision substantially neutralizes one of the great benefits of a modern economy. Keeping both capital and labor mobile encourages innovation, increases the velocity of exchange, and propels the market toward higher productivity and wealth creation. Consider, for example, one of the great legacies of the New Deal: the Rust Belt. Precisely when markets were needed to introduce a rapid re-allocation of human and material resources, the federal government stepped in to freeze everything in place with "protections from competition" and "economic security for the common man." The inevitable result of hitting efficient markets with these heavy interventions — which were driven by convictions that were as passionate as they were economically illiterate — was the desolation of an entire region of the country.

Bulman-Pozen unwittingly alludes to this problem when she sees states as "staging grounds for national networks seeking to further their agendas." There is one group of national networks that has increasingly little to gain from using the states as staging grounds, namely those with the agenda of reducing the overall level of taxation and regulation. The networks that have the most to gain from the system are, of course, special interests that masterfully pull government levers in order to extract special rents and benefits from the rest of society.

In championing massive delegations of rulemaking authority to the executive branch and the end of the states as independent actors within a structural framework of dual sovereignty, the National Federalists champion "integration" over "separation." They either fail to see, or blithely assume it doesn't matter, that their faith in integration runs totally counter to the checks and balances of divided government that the framers thought vital for protecting democracy from the power of faction.

PRINCIPLES OF A SOUND CONSTITUTION

Many of our modern constitutional debates take for granted that, as Gluck claims, "the New Deal is here to stay." But nothing lasts forever. The original Constitution didn't, and it was arguably more compelling. Constitutional law will continue to evolve with the decisions of federal courts as the common law has always evolved: through a patchwork of incremental change, discontinuous change, and even incoherent rulings that prove beneficial because they undo the serious mistakes of the past. There is no principled reason to show the Supreme Court's New Deal decisions more deference than the New Deal Court showed the precedents which time had handed down to it.

At the highest level of abstraction, the key task is for the Supreme Court to start undoing the major mistakes that started with the Progressive era a century ago. What that means concretely is that the Court must once again begin to protect the rights of all minority interests, including rights of property and economic liberty; to make sure that the power to tax and spend is really being used "for the general Welfare of the United States"; to preserve meaningful state sovereignty over some part of the purely internal commerce of the states; and to ensure the separation of state and federal government operations. Without judicial protection for the checks and balances at the heart of our Constitution, those checks and balances will continue to dissolve.

First on the agenda should be an effort to revitalize the earlier constitutional doctrines that, for at least 125 years and through tremendous economic and technological changes, imposed limits on the federal government's power to tax and spend and to regulate under the commerce clause. Nothing about the complexities of modern economic life precludes these results. Quite the opposite; this is merely another arena in which simple rules operate best in our complex world.

Start with the regulation of commerce and manufacturing. In earlier times transportation networks were weak, so it was more likely that producers in any given state could develop regional monopolies. But no one thought that this risk justified national control over local production, even if it did impose on the federal government the task of keeping the lines of transportation and communication open across state lines to facilitate interstate competition in goods and services. Instead, Congress left the creation and protection of a national common market to the courts, which from the early 19th century took on the task of protecting interstate commerce from state discrimination through the creative invocation of what came to be called the "dormant commerce clause."

In modern times, the enormous advances in technology for both transportation and communication reduce the likelihood that local production will achieve monopoly status in the presence of new entrants, so the case for a limited commerce power is actually *stronger* in modern times than it was at the time of the founding. To be sure, the dangers of local regulation remain, but rights of entry and exit are cheap and effective means to counter their application. The argument that an integrated national economy requires integrated national regulation should be stood on its head.

Parallel arguments apply with respect to the power to tax and to spend. The Constitution delimits three ends for these powers: to finance the debt, to provide for the common defense, and to provide for the general welfare of the United States. Originally all of these referred to public goods, goods which when supplied to one had to be supplied to all. Taxation was the antidote to free riding. The restrictions on the ends of spending, on the other hand, were the antidote to faction, and they should prevent the culture of forced transfer payments from riding roughshod over property rights. But that won't happen so long as individuals are said to lack standing to challenge Congress when it goes beyond its enumerated powers.

It is particularly vital to disentangle the operations of state and federal governments. It is one thing for the federal government to locate a research institute at a state university or manage multiple federal, state, and local agencies in response to a disaster. It is quite another to systematically integrate the finances of governments with separate taxing authorities. As Michael Greve convincingly argues in his 2012 book, *The Upside Down Constitution*, the intermingling of state and federal finances has led to a disastrous and unsustainable fiscal dysfunction across the whole government. The money Washington sends to the states is not "assistance"; it is rent for the use of state agencies as field offices of the federal government, in transactions that contain a strong element of coercion. Much the same is true for cooperative regulatory programs under "conditional preemption." The separation of state and federal government is every bit as vital as the separation of powers within government, and given the much greater disparities in bargaining power, judicial policing of that troubled boundary is as indispensable for long-term national prosperity as for federalism itself.

Another key goal must be to strengthen the protection of private property and economic liberties, which have been undermined by narrow judicial interpretation that shrinks both beyond recognition. These rights have been stifled by the expansive reading of the police-power justifications for massive interference with industry. For example, the aggressive enforcement of labor contracts has been deeply harmful, in that they both undermine economic freedom and contribute to the low rates of labor-market participation in America. A complete program of federalism requires national checks on abuses of power at the state level, the lesson that went unlearned in the *Slaughterhouse* cases.

Recovering real federalism will require marshaling political support for it among both liberals and conservatives. Liberals will resist programs that slow down federal and state regulation of the marketplace. Conservatives will use judicial-restraint arguments to justify misreading key structural and individual-rights provisions of the Constitution. Both sides must be brought on board.

One obstacle is *stare decisis* (the doctrine of generally following precedents) writ large. Some supporters of the changes we propose will rightly worry that using judicial action to rectify wrong decisions that were made between 70 and 100 years ago throws too much of a wrench into our legal system, given that so many institutions have been built on top of those flawed precedents. Thankfully, that argument did not stop the judicial attack on the evils of segregation. But these structural problems do not have the same invidious intent as segregation and thus do not provoke the same fierce response.

Even if a frontal judicial assault is not possible, it hardly follows that incremental adjustments cannot be made so that the courts resist, at the very least, new programs that go beyond older, established ones. Constitutional law is a form of common law, which allows for both discontinuous changes and incremental adjustments.

The goal of such an agenda is not a sharp and sudden break. It is to make concerted and determined moves in the right direction. What is needed is a combination of judicial oversight and greater political awareness of the dangers of cooperative federalism and excessive government. States continue to demonstrate that capital and labor move in the direction of less government and greater property rights. Accepting these lessons will not produce instant changes. But it could alter the downward spiral of unsound doctrines that continues to erode the privileges and immunities, and checks and balances, of our Constitution.

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