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The Politics of Sovereignty:

Federalism in American Political Development

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The Politics of Sovereignty:

Federalism in American Political Development

by

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Dissertation

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For Cindy.

Acknowledgements

This project started with a chance encounter with a book. Wending my way through the book lined maze that was the old Seminary Co-op Bookstore at the University of Chicago, *The Limits of Constitutional Democracy*, at that time a new release, caught my eye from the shelf. The essays it contained, written in honor of Walter Murphy's magnum opus *Constitutional Democracy*, set me on a journey that continues to this day. This dissertation is, in many ways, my first attempt to make sense of the road I've traveled.

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The development of American federalism is a story of contested sovereignty, and those contests are fundamentally shaped by the evolving structures, relationships, and understandings of the constitutional order. This dissertation seeks to show how the American federal system is both cause and effect of political development. Even as it structures legal and political contestation, American federalism is shaped—even redefined—by such contestation. Central to the account of American federalism that I advance are two related arguments about the nature of the federal system. The first is that the Constitution's definition of the state-federal relationship is structurally underdeterminate: while the Constitution constrains the set of permissible state-federal relationships, it fixes no single definition. Rather than establish a determinate division of state and national powers, the Constitution establishes a range of parameters for their relationship and sets forth the legal and political processes through which that relationship is contested, defined, and revised. As a result, the American federal system

both shapes and is shaped by constitutionally structured politics. Developing an implication of this argument, the second argument holds that notions and definitions of sovereignty are structured relationally. Articulations of national power reciprocally define a category of state powers, just as invocation of local concerns over which states have authority reciprocally define national concerns over which the national government has authority. On this account federalism is both an independent and a dependent variable, an approach that shifts our focus from federalism *and* American political development to federalism *in* American political development. By foregrounding the underdeterminacy of the federal system and interrogating the constitutional construction it anticipates, we can glimpse the intertwined contingency and continuity of American constitutional development.

This dissertation is broadly divided into two parts—the first theoretical, the second developmental—each of which consists of two components. The resulting four chapters constitute the core of the project. The theoretical chapters (Chapters One and Two) provide a framework for understanding the federal system both in the general context of the American Constitution and, more specifically, in contrast with the separation of powers. This framework is fundamentally structured by the underdeterminate constitutional division of state and national powers and the consequent need for constitutional construction of the state-federal relationship. The developmental chapters (Chapters Three and Four) operationalize the theoretical framework developed in the first two chapters in two different domains: constitutional jurisprudence and a discrete episode of the political construction of the state-federal relationship. Taken together, these chapters are intended to illustrate the central argument of the preceding chapters: that the

constitutional design of the federal system anticipates development and that this development is inflected by the institutional logics of the principal institutions of American government. The dissertation concludes with a brief reflection on the two conceptual cornerstones of the analysis presented in the preceding chapters: constitutional construction and constitutional logics.

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Introduction: Federalism *in* American Political Development

A central problematic of the American constitutional order, common to all federally organized political systems, is the question of boundaries: What is the line dividing national from subnational powers, and what is the logic underlying that demarcation? Absent a division of power or logic justifying such a division, the authoritative realms of action appropriate to each government would be difficult, if not impossible, to establish. More to the point, such a division or justifying logic is widely understood to be the *sine qua non* of a federal system.[1] Thus, without it, it isn't clear what claim the system would have to the designation "federal."[2]

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[1] According to the conventional definition, federalism is "a political organization in which the activities of government are divided between regional governments and a central government in such a way that each kind of government has some activities on which it makes final decisions." See William Riker, "Federalism," in *Handbook of Political Science* (Fred Greenstein and Nelson Polsby eds.) (Addison-Wesley, 1975), 101. In a more pithy expression of the same notion, Jenna Bednar has identified three principal characteristics of federations: geopolitical division, independence, and direct effect. See Bednar, *The Robust Federation: Principles of Design* (Cambridge University Press, 2009), 18-19.

[2] This is, to be sure, a contested proposition. See, for example, Richard Primus, "The Limits of Enumeration," 124 *Yale Law Journal* 576 (2014), 596 note 78 (dissenting from Rubin and Feeley's distinction between decentralization and federalism).

The boundary question is particularly apparent and felt especially acutely in polities, such as the United States, that have over the course of their existence endured significant changes in the distribution of powers among constituent governments.[3] The American federal system, for example, is frequently described as entailing a "balance" between state and federal power,[4] even a "delicate balance."[5] What, then, if the balance is upset with the shift of a power or set of powers from one government to the other? Is the federal system "imbalanced," out of sync with its intended structure or design? It would seem, at the very least, that each successive alteration of the "state-federal balance" would call into question the validity of the previous "balance" or its underlying rationale. Or is there a mechanism that allows for such changes and thus makes them reconcilable with the legal edifice that structures the political system? In back of all of these questions is a more basic inquiry: From where does this notion of "balance" come? At bottom, each of these interrogatives concerns the question of boundaries. Hence, any account of the nature, development, or legitimacy of the American federal system must provide a response to the boundary question that makes sense of both the political institutions and processes established by the Constitution, as well as the epochal changes that system has undergone.

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[3] See Bruce Ackerman, *We the People: Transformations* (Harvard University Press, 1998); and Robert McCloskey, *The American Supreme Court* (5th ed.) (University of Chicago Press, 2010), especially 35-52 and 91-204.

[4] See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 459 (1991) (O'Connor, J., majority) ("If this 'double security' is to be effective, there must be a proper balance between the States and the Federal Government.")

[5] *Gregory v. Ashcroft*, 501 U.S. 452, 460 (O'Connor, J., majority) ("The Federal Government holds a decided advantage in this delicate balance[.]"), which is then cited in *New York v. United States*, 505 U.S. 144, 159 (O'Connor, J., majority); see also *Wyeth v. Levine*, 129 S.Ct. 1187, 1205 (2009) (Thomas, J., concurring) ("[I]n order to protect the delicate balance of power mandated by the Constitution, the Supremacy Clause must operate only in accordance with its terms.").

Intimately connected to—indeed, entailed by—the boundary question is the question of sovereignty: Which governmental level possesses ultimate decisional authority on those matters within governmental purview? According to one quite prominent interpretation, the "Framers split the atom of sovereignty," creating a political order in which "citizens would have two political capacities, one state and one federal, each protected from incursion by the other."[6] The result of this political fission was a system of dual sovereignty in which each level of government was sovereign with respect to certain objects. Based on this theory of sovereignty, the proper boundary line between state and national powers can be identified and, as was the case in the context of this account, enforced. Recent efforts to judicially enforce this conception of the federal boundary have revealed both the pervasiveness of sovereigntist rhetoric and the difficulty of formulating a stable account of the sovereign attributes or prerogatives of governmental levels.[7] These difficulties, in turn, have produced an understandable impatience with the utility of sovereignty as an organizing or foundational principle of the American federal system.

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[6] *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995), 838 (Kennedy, J., concurring).

[7] For the pervasiveness of sovereignty rhetoric, see, e.g., *Federal Maritime Commission v. SOU*, 535 U.S. 743 (2002) ("By guarding against encroachments by the Federal Government on fundamental aspects of state sovereignty, such as sovereign immunity, we strive to maintain the balance of power embodied in our Constitution and thus to 'reduce the risk of tyranny and abuse from either front.'") This phenomenon is especially apparent in pro-state sovereign immunity decisions. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Alden v. Maine*, 527 U.S. 706 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999); and *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000). As is explored below, sovereignty exhibits many of the characteristics of what Jack Balkin has termed "nested" or "conceptual oppositions." See Balkin, "Deconstruction's Legal Career," 27 *Cardozo Law Review* 101 (2005); and "Nested Oppositions," Faculty Scholarship Series, Paper 281 (1990) (available at http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1280&context=fss_papers).

As for the difficulty of generating a stable account of essential or traditional sovereign attributes, compare *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Garcia v. San Antonia Metropolitan Transit Authority*, 469 U.S. 528 (1985), marking the interval in which the Court attempted to apply a framework predicated on the states' "traditional governmental functions" to determine the scope of permissible congressional regulation.

After all, if talk of sovereignty serves only to obscure rather than illuminate, why not dispense with it altogether? To wit, recent accounts of "Our Federalism" have sought to cabin questions of sovereignty, with some going as far as to call for a reconceptualization of the American federal system "[s]horn of the traditional trappings of sovereignty and separate spheres, detached from the notion that state autonomy matters above all else, [and] attentive to the rise of national power and the importance of national politics."[8]

We must be careful to acknowledge that the result of the sovereignty centered approach, whether of the atom splitting or states' rights variety, was not (or not *merely*) the creation of two opposing sovereigns. It was, rather, the creation of two sovereign *capacities* of the People. This rendering reveals the doubly complicated nature of sovereignty in the American constitutional order. On one hand, the competing sovereign claims of governments state and national must be resolved; and on the other, both of those claims must be reconciled with the foundational sovereignty of the people. Even as sovereignty signifies the ultimate rule of the people—Lincoln's "political community without a political superior"[9]—it also signifies governmental actors with "no hight enforcement agency—no political superior."[10] This can be considered either the problem or the promise of sovereignty in the American federal system. Assertions of governmental sovereignty, at either level, are always susceptible to objection by the sovereign people. Similarly, sovereign "prerogatives" of one governmental level are threatened by infringements from the opposing level. Accordingly, a satisfactory account of the nature

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[8] Heather Gerken, "Federalism as the New Nationalism: An Overview," 123 *Yale Law Journal* 1889 (2014), 1890.

[9] Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in *The Collected Works of Abraham Lincoln*, Roy P. Basler (ed.) (Rutgers University Press, 1953), 433.

[10] Sotirios A. Barber, *The Fallacies of States' Rights* (Harvard University Press, 2012), 152.

and development of the American federal system must address the tensions that result from a political order that seeks to meaningfully realize popular sovereignty while also according sovereign status to the claims made on the people's behalf by both the national and state governments.

This dissertation is motivated by the conviction that extant accounts of the nature and development of the American federal system fail to satisfy one or both of the requirements identified above. To be more precise, by and large they offer a theoretically, analytically, or historically unsatisfactory response to the boundary question, the question of sovereignty, or both. These failures, moreover, are quite often linked. As noted above, certain accounts of sovereignty strongly imply (if not entail) certain responses to the boundary question. And conversely, certain notions of jurisdictional boundaries in the federal system lead to particular notions of sovereignty. As I explain below, it is no coincidence that for the most part federalism scholarship has eschewed a developmental orientation, for the prevailing static notions of jurisdictional boundaries and governmental sovereignty render questions of development and change matters of incorrect, even unfaithful, interpretation.

To be understood properly the American federal system must be studied as a dynamic and not a static system of self-government. In turn, such a perspective forces us to take stock of the ways in which the federal system itself has changed over the course of American political history, even as it has fundamentally shaped the course of that history. For too long federalism has been the independent variable in examinations of American politics, conditioning political phenomena but not itself being a product of those and other forces. Federalism is both an independent and a dependent variable, both a cause

and an effect of American political development. In short, we must be at least as concerned with federalism *in* American political development as we have been with federalism *and* American political development. It is for this reason that the questions to which this dissertation is addressed—that of *nature* and *development*—are best thought of not as distinct questions but as inextricably connected dimensions of one question.

Central to the account of American federalism that I advance are two related arguments about the nature of the federal system. The first is that the Constitution's definition of the state-federal relationship is structurally underdeterminate. By this I mean that, while the Constitution constrains the set of permissible state-federal relationships, it fixes no single definition.[11] Nowhere is the state-federal relationship comprehensively or exhaustively explicated. Rather than establish a determinate state-federal relationship, the Constitution (1) establishes a range of parameters for the relationship, and (2) sets forth the legal and political processes through which that relationship is contested, defined, and revised. As a result, the American federal system both shapes and is shaped by constitutionally structured politics. This is the principal reason why, as noted above, the state-federal relationship is simultaneously a product and a cause of political development. The second central argument picks up on an implication of the first. If the state-federal relationship is contested within constitutional parameters and that contestation is an inherent feature of constitutional politics, then sovereignty in the

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[11] I employ this notion of underdeterminacy—as well as the term itself, instead of "indeterminacy" or "ambiguity"—in conformity with others who have addressed the question of the nature of constitutional powers and the degree of textual constraint. See, *e.g.*, Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2015), 5 note 23. For a discussion of underdeterminacy and its relation to related terms like "vagueness" and "ambiguity," see Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation," *Oxford Handbook on Language and Law* (Oxford University Press, 2011) (Lawrence Solum and Peter Tiersma eds.).

American order has two fundamental characteristics. First, sovereignty is *constructed* and, second, it is constructed *relationally*. This is the case because the contestation and elaboration of the state-federal relationship is a function of dialogue between and among institutionally embedded political actors. Constructions of sovereignty—of the scope and location of ultimate decisional authority—identify which institutions are empowered to act in certain ways and, by implication, which institutions are not. More fundamentally, these constructions identify how, with respect to legitimate exercises of constitutional authority, political institutions relate to one another. In this way, my account emphasizes the *relational* component of the state-federal relationship. The second fundamental characteristic follows from the first: Sovereignty and the related notion of limited government are *endogenous* to the constitutional order. This means that the state-federal relationship is the product of constitutionally structured politics, a direct consequence of the underdeterminacy of the federal system. The title of this dissertation, "The Politics of Sovereignty," seeks to encapsulate the dynamism and conflict inherent in the American federal system while also foregrounding the enduring salience of its structural and relational components. In the remainder of this Introduction I provide an overview of the dissertation. In the part that immediately follows, I identify and respond to the dominant methodological approaches to the study of American federalism, with the goal of clarifying and justifying the approach taken here. The subsequent section then limn the contours of the arguments I advance in the four chapters that constitute the substantive core of the dissertation.

American Federalism and the Boundary Question

While there are many ways to organize the robust body of literature on the American federal system, it is advantageous for present purposes to use as a lens the answer, whether explicit or implicit, to the boundary question. In a recent review essay, Jenna Bednar employs such a schema, identifying four forms of federalism research: (1) Optimal Design, (2) Positive Political Theory, (3) New Institutional Economics, and (4) Complex Adaptive Systems.[12] To situate this dissertation in the extant scholarship on *American* federalism, it is necessary to include literatures and methodologies beyond those Bednar discusses. Thus, I've adapted that framework not only to include a wider body of relevant literature but also to include a fifth and sixth methodological approach: (5) American Political Development, and (6) normative theorizing about the nature of sovereignty and governmental boundaries in the federal system, which I term Historical-Philosophical Analysis.

In the first section that follows I review the methodological approaches, identifying the central premises, presuppositions, and exemplars of each. I then critically evaluate these approaches in the second section, assessing their strengths and weaknesses. A review of relevant scholarship reveals that, from the standpoint of the theoretical framework outlined above, most accounts of American federalism fall short on at least one of three discrete but related counts: (1) they deny or ignore the underdeterminacy of the federal structure, (2) they are ahistorical, or (3) they are insufficiently solicitous of the role of politics in the nature and development of the federal system. But two methodological approaches—American Development and Complex Adaptive Systems—

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[12] Jenna Bednar, "The Political Science of Federalism," *Annual Review of Law and Social Science* 7:269-288 (2011).

are consistent with the principles of underdeterminacy and developmental analysis entailed by a sound understanding of the federal system. As such, they are best suited for answering the question posed at the outset of the Introduction: How has the federal system shaped and been shaped by American political and constitutional development?

Methodological Approaches to American Federalism

This section reviews six different approaches to the study of federal systems. Although there is considerable overlap among the approaches and their associated literatures, they are nonetheless distinguishable on the basis of their fundamental understanding of (a) what a federal system is, and (b) how a federal system should be studied. As a result, these approaches are fairly conceived of as the six dominant methodological orientations in federalism scholarship, all of which take as their animating inquiry the boundary question or the nature of sovereignty in federal systems.

1. Optimal Design: Federalism as a Means to an End

According to the optimal design approach, federalism is a means to achieving a desired end. A properly designed federal system is one that sufficiently achieves the stipulated end. The precise nature of that end (or those ends) varies from observer to observer. For William Riker[13] and John Jay, writing as Publius,[14] it is security both

[13] Riker, *Federalim: Origin, Operation, Significance* (Little, Brown, 1964).

[14] See especially *The Federalist*, No. 9.

foreign and domestic. For Jenna Bednar,[15] John Kincaid,[16] and Daniel Ziblatt,[17] it is economic stability or performance. For James Madison, writing as Publius, it is the protection of individual rights.[18] In this he is joined by Michael Zuckert, Randy Barnett, and, more broadly, the line of thinkers associated with the negative (or natural) rights approach to American constitutionalism.[19] In other of his writings Madison argued that a well-designed federal system could yield representative outcomes congruent with the governmental levels to be represented: local interests could be generated at the state level and general interests at the national.[20] Examples could be multiplied further, but the aforementioned suffice to establish the point that there are numerous political ends for which it has been argued that federalism can be a means.

Though the putative political, social, and economic ends differ, these accounts are united in their approach to federalism as an *independent variable*. The federal system is the condition that influences the outcome of a dependent variable—the end or ends under consideration. In some studies the question of federalism's influence is slightly different.

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[15] Bednar, *The Robust Federation*.

[16] Kincaid, "Values and Value Tradeoffs in Federalism," *Publius* 25(2):29-44 (1995).

[17] Ziblatt, *Structuring the State: The Formation of Italy and Germany and the Puzzle of Federalism* (Princeton University Press, 2006).

[18] *The Federalist*, No. 51. But see also No. 10 (arguing that rights are best secured in an extended republic in which the formation of factions is more difficult than in a smaller republic). For a contemporary exposition of this argument, see Ilya Somin, *Democracy and Political Ignorance: Why Smaller Government is Smarter* (Stanford University Press, 2013). For an in-depth treatment of the question whether (and when) federalism protects individual rights, see Owen Lipsett, "The Failure of Federalism: Does Competitive Federalism Actually Protect Individual Rights?" 10 *Journal of Constitutional Law* 643 (2008).

[19] See Michael P. Zuckert, *The Natural Rights Republic: Studies in the Foundation of the American Political Tradition* (University of Notre Dame Press, 1997); and Randy Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2007).

[20] Madison, *The Federalist*, Nos. 37 and 39.

Instead of approaching federalism as an optimization mechanism, it is deployed as a structural or environmental condition that influences outcomes in specific policy arenas or for particular demographic groups. This is readily apparent from the titles in this genre —Mettler's *Dividing Citizens: Gender and Federalism in New Deal Public Policy*[21] and Miller's *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control*[22] are two illustrative examples. Additionally, the focus on optimal design has led some to invert the inquiry, looking instead for the suboptimal consequences of federalism. Thus, to cite just one such work, Craig Volden has shown how in situations with high heterogeneity of government services and low subnational efficiency in service provision, both levels of government engage in service provision, frequently leading to greater levels of spending and taxation than would be necessary under single-government provision.[23] For the Optimal Design approach, then, federalism is conceived of principally as a means to achieving certain ends. Accordingly, the federal system is the (or *one of the*) independent variable(s) and is of interest mainly for the ways in which it influences governmental performance with respect to stipulated dependent variables.

2. Positive Political Theory: Federalism and Competitive Interests

Positive Political Theory (PPT) approaches the distribution of authority in federal systems not as the independent variable but as the dependent variable, itself the result of

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[21] Suzanne Mettler, *Dividing Citizens: Gender and Federalism in New Deal Public Policy* (Cornell University Press, 1998).

[22] Lisa Miller, *The Perils of Federalism: Race, Poverty, and the Politics of Crime Control* (Oxford University Press, 2008).

[23] Craig C. Volden, "Intergovernmental Political Competition in American Federalism," *American Journal of Political Science* 49(2):327-342 (2005).

political and economic phenomena. As Bednar writes, reflecting on Parikh and Weingast's 1997 study, PPT begins from the premise that "the distribution of authority is not a sterile line but instead represents the distribution of power, and power is the stuff of politics."[24] The result is an understanding of federal systems as the rules that structure coordination problems, problems whose solutions define a distribution of state and federal authority. As intimated by the centrality of coordination problems, this approach is heavily informed by economic approaches to political analysis, principally rational choice and noncooperative game theory.[25]

It is important to acknowledge that for PPT a federal system is treated as a collection of authority distributions. Granting the basic premise of PPT, it would be improper—even unintelligible—to claim that "federalism is *x*," where *x* is a distribution of state and federal power. This is so because there are numerous policy spaces and political-economic interactions encompassed by the federal system, from which it follows that the distributions of authority in a particular federal system are functions of the dynamics appropriate to particular political and economic issues. Hence, it would be more proper to say that for issue *x*, the authority distribution is governed by *f(x)*, where *f(x)* defines the factors that bear on the behavior of governmental and relevant private actors that, in turn, yields an authority distribution relevant to *x*. The focus for PPT are the products of politics—*i.e.*, differentiated authority distributions—not its causes—*i.e.*, the overarching rules that structure the federal system under examination.

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[24] Bednar, "The Political Science of Federalism," 275. Sunita Parikh and Barry R. Weingast, "A Comparative Theory of Federalism: India," 83 *Virginia Law Review* 1593 (1997).

[25] Bednar, *id*., 275. See, *e.g*., Ellinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Actions*. (Cambridge, 1990).

Among the principal insights identified by this approach is the recognition that governmental actors in federal systems will frequently face incentives to free ride, act non-cooperatively, or otherwise violate authority boundaries dividing levels of government. In the American context this insight appeared as early as 1787 when, in his "Vices of the Political System of the United States," James Madison argued that the signal weakness of the Articles of Confederation was the possibility—and, therefore, the likelihood—that absent effective institutional mechanisms it would often be in the interest of subnational governments to violate their commitments or obligations (*e.g.*, financial requisitions and troop commitments) to the national government.[26] Overcoming this obstacle would require the establishment of a national government strong enough to enforce the commitments of subnational governments and empowered to act directly on citizens rather than having to work through the states.[27] This approach has also led to insights about the prospects of and conditions favorable for cooperation between governmental levels following the establishment of a competent central authority.[28] In contrast to the Optimal Design approach, for Positive Political Theory federalism is the (or *a*) dependent variable, and the central object of analysis is the authority distribution produced by the behavior of rationally motivated political and economic actors.

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[26] On this, and particularly the examples cited, see Calvin H. Johnson, *Righteous Anger at the Wicked States: The Meaning of the Founders' Constitution* (Cambridge University Press, 2005).

[27] *The Federalist*, Nos. 23-29.

[28] For a sampling of the considerable literature on cooperative federalism, see Heather K. Gerken, "Foreword: Federalism All the Way Down," 124 *Harvard Law Review* 4 (2009), sources cited in note 15.

3. New Institutional Economics: Federalism as Safeguards

Whereas the Positive Political Economy approach focuses on the authority distributions produced by interactions of rationally motivated governmental actors, the New Institutional Economics approach is concerned with the institutions that regulate those interactions and the incentives faced by political actors. Put differently, and in the terms of the literature produced by this approach, New Institutional Economics is most concerned with the institutions and processes that safeguard the federal system. It is these safeguards that ostensibly preserve the boundaries of the system. Such safeguards can take the form of either "carrots" (*i.e.*, incentives for compliance) or "sticks" (*i.e.*, penalties for noncompliance), and both forms require mechanisms that "trigger" the safeguard's operation.[29] As Filippov, Ordeshook, and Shvetsova argue, three central "levels" of safeguards (or constraints) can be identified.[30] The first level entails "constraints that correspond in part to explicit bargains among federal subjects over the allocation of authority between them and the federal center, and other limits on their and the center's actions."[31] These protections consist of clear textual commitments identifying the extent of and limitations on the powers granted and prohibited, as well as promises guaranteeing autonomy in certain spheres. Level-two constraints encompass institutional structures and arrangements, both of which "define[] the national state, its relation to federal subjects, and its relation to the ultimate sovereign, the people."[32] Finally, level-

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[29] Bednar, "The Political Science of Federalism," 278.

[30] Mikhail Filippov, Peter C. Ordeshook, and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustaining Federal Institutions* (Cambridge University Press, 2004), 33-41.

[31] *Id.*, 36.

[32] *Ibid.*

three constraints are the values—political, cultural, and ideological—that serve to buttress the federal system.

A prominent safeguard, as common as it is significant, is a constitutional court empowered to preserve the federal bargain by reviewing acts of both governmental levels.[33] Indeed, it was the perceived aggrandizement of the Supreme Court, owing in no small part to its exercise of this review power, that led Alexander Bickel to raise the specter of the "countermajoritarian difficulty," the shadow of which has loomed over modern constitutional theory.[34] Nevertheless, the literature on the American federal system has, since Herbert Wechsler's seminal 1954 article on the "political safeguards of federalism," focused disproportionately on structural safeguards—the institutional features of the political order through which subnational interests are incorporated into the national decision-making process.[35] This argument runs directly counter to the court-as-safeguard argument, because it identifies structural reasons why judicial review of the federal system isn't needed and, indeed, shouldn't be desired.[36] Following Wechsler, and

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[33] See Jenna Bednar and William Eskridge, "Steadying the Court's Unsteady Path: A Theory of Judicial Reinforcement of Federalism," 68 *Southern California Law Review* 1447 (1995); Richard E. Johnston, *The Effect of Judicial Review on Federal-State Relations in Australia, Canada, and the United States* (Louisiana State University Press, 1969); and Alec Stone Sweet, "Constitutional Courts," in *Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012), 816-830. See also *The Federalist*, No. 78.

[34] Bickel, *The Least Dangerous Branch* (Bobbs-Merrill, 1962). On this last point, see Mark A. Graber, "The Countermajoritarian Difficulty: From Courts to Congress to Constitutional Order," *Annual Review of Law and Social Science* 4:361-384 (2008).

[35] Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954)

[36] See especially Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (University of Chicago Press, 1980).

responding to the objections his argument provoked,[37] a number of scholars have sought to identify other safeguards of the federal system, including political parties[38] and the separation of powers.[39] Still others, echoing the level-three constraint of Filippov et al., have argued for popular safeguards of the federal system, consisting in the attachments, commitments, and values of the electorate. Despite their many differences, the works that comprise this body of literature are united in their treatment of federalism as a system that, for divergent reasons, must in some way be supervised and maintained, either by political actors or, more often, political institutions.

4. Complex Adaptive Systems: Federalism as a Constructed System

The three methodological approaches discussed above all presuppose a relatively limited timeframe in which the relevant political phenomena occur. For studies motivated by the Positive Political Theory approach, for instance, the interval is usually only as long as the interactions that produce the relevant authority distributions. And for much of the Optimal Design literature, the interval is more or less irrelevant, as it is the performance relative to the stipulated political end or social good that is of greatest interest. Moreover, insofar as federalism is treated as an independent variable—as it largely is for the Optimal Design and New Institutional Economics approaches—the distribution of state-

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[37] See, *e.g.*, John C. Yoo, "The Judicial Safeguards of Federalism," 70 *Southern California Law Review* 1311 (1997) and Saikrishna B. Prakash and John C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories," 79 *Texas Law Review* 1459 (2001).

[38] Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism," 100 *Columbia Law Review* 215 (2000) (opposing judicial review to protect the states from Congress on the grounds that political parties and national party politics preserve federalism).

[39] Bradford R. Clark, "Separation of Powers as a Safeguard of Federalism," 79 *Texas Law Review* 1321 (2001).

federal authority or the rules structuring the federal system enter into the analyses only as causes, not consequences, of the examined political processes.

It is towards these last characteristics and tendencies that the fourth approach, Complex Adaptive Systems, is directed.[40] As Bryan Jones describes it, "Complex adaptive systems consist of a large number of diverse components, or agents, that interact and that produce an aggregate output behavior."[41] This approach is founded on a twofold recognition. First, that "system properties emerge that are not predictable when the analysis is confined to the linear aggregation of individual components."[42] And second, that federal systems do not rest in equilibrium. Violations of jurisdictional boundaries—in consequence or intention—are not the exception to the rule; they are the norm. Federal systems, therefore, must be approached as *systems*, not as a collection of independently operating parts. Moreover, changes to the federal boundaries must be endogenized. That

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[40] For general background, see John Miller and Scott E. Page, *Complex Adaptive Systems* (Princeton University Press, 2007); and Jason Brownlee, "Complex Adaptive Systems," Complex Intelligent Systems Laboratory, Technical Report 0703021 (available at http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.70.7345&rep=rep1&type=pdf). In the legal literature, see J.B. Ruhl, "The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy," 49 *Vanderbilt Law Review* 1407 (1996); and Greg Todd Jones, "Dynamical Jurisprudence: Law as a Complex System," 24 *Georgia State Law Review* 873 (2008).

Though left unacknowledged by Bednar, the Complex Adaptive Systems approach has already been used to great effect in political science research. For example, see Elinor Ostrom, *Understanding Institutional Diversity* (Princeton University Press, 2005). There Ostrom writes, in a passage particularly relevant to the study of federal systems, "Polycentric systems are themselves complex, adaptive systems without one central authority dominating all of the others" (284). See also Bryan D. Jones and Frank R. Baumgartner, *The Politics of Information: Problem, Definition, and the Course of Public Policy in America* (University of Chicago Press, 2015), especially chapter 1; and "From There to Here: Punctuated Equilibrium to the General Punctuation Thesis to a Theory of Government Information Processing," *The Policy Studies Journal* 40(1):1-19 (2012).

[41] Bryan D. Jones, *Politics and the Architecture of Choice: Bounded Rationality and Governance* (University of Chicago Press, 2001), 6. It is important to note that Jones's usage is directed towards "human behavior in formal complex institutions" (ix; i.e., *human* organizations), though not necessarily federal systems (i.e., *governmental* organizations).

[42] Bednar, "The Political Science of Federalism," 280.

is, accounts of the federal system must treat the line dividing governmental levels as both a cause and an effect of political phenomena. Federalism is both an independent and a dependent variable, a product as much as a source of American political development.

Though the implications of this approach haven't been fully brought to bear on the study of the American federal system, its influence is nonetheless readily apprehensible. Indeed, it is more prevalent than is suggested by Bednar's review. There is a long, though not necessarily well travelled, avenue of inquiry in the American political thought and development literatures that acknowledges the contested nature of the federal system and, as a result, its openness to redefinition and change. Thus, in his study of *The Federalist*, David Epstein could write, "While the Constitution does enumerate the objects of the central government, the partition between states and nation will not be as much a legal issue as a political one."[43] For Keith Whittington, "[f]ederalism is best thought of not as a specified intermediate position between confederation and nation, but rather as a continuing tension contained within, and created by, the founding document."[44] The consequence, drawing on Whittington's work elsewhere, is that the contours of the federal system are defined through constitutional construction, "the method of elaborating

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[43] Epstein, *The Political Theory of* The Federalist (University of Chicago Press, 1984), 53. This argument draws on *The Federalist*, Nos. 17, 29, 35, 37, 45, and 46.

[44] Whittington, "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius* 26(2), 1. The passage continues: "Partly because of that ambiguity, *the resolution of that tension is a political, and not merely a legal task* that has fallen on subsequent generations since the founding...Although the foundations for the ultimate structure are taken as given, *political actors must bring external values and interests to bear in order to add specificity to an inherently indeterminate text and change received understandings of its implications*. Such political efforts do not merely reshuffle the administration of intergovernmental relations, but construct the principled configuration of federalism within which such political debates can then take place" (1-2; emphases added).

constitutional meaning in the political realm."[45] In the most developed work in this tradition, Edward Purcell offers an impressive dissection of the "doubly blurred, fractionated, instrumental, and contingent nature of the constitutional structure,"[46] a structure that resists the imposition of a determinate relationship between the national and state governments. The common thread uniting these analyses is the observation that the state-federal relationship is a feature of the political order that both shapes and is shaped by the politics the Constitution structures.

5. American Political Development

According to its most prominent exponents, American Political Development (APD) is guided by the theoretical insight that "because a polity in all its different parts is constructed historically, over time, the nature and prospects of any single part will be best understood within the long course of political formation."[47] Central to this approach is the commitment that development is a defining characteristic of politics. Moreover, for this approach there is a very specific notion of political development: "Political development is a durable shift in governing authority."[48] Politics, then, for the American Political Development approach is irreducibly temporal and inherently developmental. As such,

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[45] Whittington, *Constitutional Construction* (Harvard University Press, 1999), 1.

[46] Purcell, *Federalism, Originalism, and the American Constitutional Enterprise* (Yale University Press, 2007), 6. David Brian Robertson presents a similar interpretation of the federal system, noting the "unsettled dividing line between state and national power" that "left the ensuing boundary disputes for future politicians to work through." See *Federalism and the Making of America* (Routledge, 2012), 34.

[47] Orren and Skowronek, *The Search for American Political Development* (Cambridge University Press, 2004), 1. As they write elsewhere, American Political Development "grapples with what we describe as the historical construction of politics, and with political arrangements of different origins in time operating together" (x).

[48] *Ibid*., 123.

those seeking to explain political phenomena must attend assiduously to the ways in which political institutions persist through time, change over time, and are constructed by political time.

The emphasis of APD on "shift[s] in governing authority" as a fundamental unit of political analysis would, at first blush, seem particularly well suited to the examination of the boundary question in the context of the American federal system, particularly in light of the argument about underdeterminacy and development presented at the outset of this Introduction. More to the point, we should expect this kind of work from a methodological approach that accords such importance to the temporal dimensions of political analysis. It is, therefore, more than a little surprising that federalism has remained largely under-theorized and exempt from developmental analysis. In their 2004 survey of the emergent disciplinary focus, Karen Orren and Stephen Skowronek have surprisingly little to say about the treatment of federalism in the extant literature, largely because there is little work to discuss. Where it is discussed, it is presented in a strikingly static way, as if the federal system were exempt from the fundamental theoretical insight of APD.[49] Broadening the focus to include works that treat more general aspects of temporality and politics, we find a similar state of affairs. Paul Pierson's *Politics in Time*, for example, identifies federalism as a promising subject of *future* inquiry, reflecting the

[49] See, *e.g.*, *id.*, 10, 86, 115, 131, and 190.

general dearth of work that takes seriously the relevance of the dynamics he highlights—path dependence, positive feedback, sequencing, and layering—to federal systems.[50]

6. Historical-Philosophical Analysis: Federalism as a Theory of Sovereignty

The body of work most conspicuous in its absence from Bednar's review is that which approaches the federal system as embodying a theory of sovereignty on the basis of which the boundary question can be addressed. These theories of sovereignty are derived and explicated through either historical or philosophical methods, or some combination of the two. Accordingly, for present purposes the literature characterized by this approach can be categorized as employing a methodology of Historical-Philosophical Analysis. The distinguishing feature of this approach is the conception of the federal system as expressing a definitive theory of political power and its organization, which theory is articulated by the constitutional text and made manifest by the institutions established by the Constitution. It is against this theory that interpretations or applications of the federal system can be evaluated and conclusions of their accuracy reached.

Despite their common methodological approach, works in this vein posit interpretations of the American federal system that exist in some tension with one another. Sotirios Barber, for example, has argued that the "true constitutional federalism" is "Marshallian federalism," which "insists that national power is plenary and denies that

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[50] Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004), 162. See also Pierson, "Not Just What, but When: Timing and Sequence in Political Processes," *Studies in American Political Development* 14(1):72-91 (2000). Pierson's article appears as the lead piece in a forum that includes quite relevant pieces from Robert Jervis, Kathleen Thelen, and Amy Bridges. While there are important differences between and among the contributing authors, they are united in the belief that temporal processes are fundamentally important to political and social analysis.

the states can use their powers to check the pursuit of national ends."[51] "Clashes with the states are irrelevant," Barber argues, so long as Congress is pursuing legitimate constitutional goods.[52] This is a federalism that both affirms limited national aims and denies states' rights against the national government.[53] The nature of Barber's account—the explication of a coherent philosophical and legal description of the constitutional regime—is revealed also by the counterarguments he addresses, states' rights federalism and process federalism, both of which posit a contrary overarching theory of sovereignty in the federal system. Barber's strategy reveals a central commitment of Historical-Philosophical Analysis literature, namely that "it takes a theory to beat a theory."[54] The salient assumption of this approach is that there exists a single, definitive theory of sovereignty in the American federal system, a *true* interpretation of the constitutional regime.

As identified by Barber's argument in behalf of Marshallian federalism, states' rights and process federalism are two alternative theories of sovereignty. For the states' rights theorist, the boundary question is resolved by the states' possession of certain inviolable

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[51] Barber, *The Fallacies of States' Rights*, 47.

[52] Sotirios Barber, *The Fallacies of States' Rights*, 6. Barber's understanding of the federal system both follows from and extends his welfarist interpretation of the Constitution, according to which the government established by the Constitution must be understood primarily from the perspective of the ends it was created to achieve. See Barber, *Welfare and the Constitution* (Princeton University Press, 2005), chapters 2 and 5; *On What the Constitution Means* (Johns Hopkins University Press, 1986); and "The Fallacies of Negative Constitutionalism," 75 *Fordham Law Review* 651 (2006).

[53] Barber, *The Fallacies of States' Rights*, 8 (Figure 1).

[54] The first instance of this assertion in the legal literature appears in Richard Epstein, "Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler," 92 *Yale Law Journal* 1435 (1983), at 1435.

political capacities and jurisdictional prerogatives.[55] In contradistinction, process federalism maintains that national power is plenary so long as the states have been able to participate in the decision-making processes as defined by the Constitution.[56] For others the federal system established by the Constitution is characterized by an *absence* of constitutional principles guaranteeing any particular distribution of political powers.[57] Thus, in his reflection on the history of the federal system, Charles Black concludes that there is no *legal* substance to American federalism.[58] While seemingly eschewing any overarching theory of federalism, this too is a theory of political sovereignty, simply one that grounds ultimate political authority in popular endorsement and not determinative legal axioms.[59]

The debate over the "true" understanding of constitutional federalism has of late been reinvigorated by the publication of a symposium in the *Yale Law Journal*, each contribution of which was written to probe and advance the proposition that "federalism

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[55] For a sampling of the primary sources related to this position, see Alpheus T. Mason, *The States Rights Debate: Antifederalist and the Constitution (2nd ed.)* (Oxford University Press, 1972). For the historical salience of the states' rights position, see Richard E. Ellis, *The Union at Risk: Jacksonian Democracy, States' Rights, and the Nullification Crisis* (Oxford University Press, 1989); and Forrest McDonald, *States' Rights and the Union: Imperium in Imperio, 1776-1876* (rev. ed.) (University Press of Kansas, 2000).

[56] See sources cited *supra* notes 37, 38, 40, and 41. The categorization of this literature as both New Institutional Economics and Historical-Philosophical Analysis illustrates the fundamental truth that these approaches are more about methodological *emphases* than mutually exclusive presuppositions.

[57] Black, "On Worrying About the Constitution," 55 *University of Colorado Law Review* 469 (1984). See also Black, *Perspectives in Constitutional Law* (Prentice Hall, 1970), 25-29.

[58] Charles Black, "On Worrying About the Constitution," *id*. Edward Purcell would endorse this conclusion but, crucially, for different reasons than Black. See, Purcell, *Federalism, Originalism, and the American Constitutional Enterprise* (Yale University Press, 2007), 201.

[59] Black, *ibid*. See also H. Jefferson Powell, "The Oldest Question of Constitutional Law," 79 *Virginia Law Review* 633 (1993).

is the new nationalism."[60] To wit, Heather Gerken, in the culmination of a years long effort,[61] announced the arrival of a "descriptive and normative account [of federalism] that is deeply nationalist in character."[62] While written explicitly in the context of a particular era of state-federal relations, these pieces are nonetheless aimed towards advancing a new theory of constitutional federalism. Though at times divided in the most fundamental and consequential respects, the Historical-Philosophical Analysis literature is characterized by a commitment to understanding the federal system as embodying a coherent theory of sovereignty and state-federal relations.

Response: Towards a Developmental Account of American Federalism

It would be an exaggeration to claim that the methodological orientations discussed above are all wrong. What's more, it would be wrong to do so, because each picks up on some indispensable feature of the federal system. The problem is not that they are flawed but that they are incomplete. Though these approaches recognize and pursue important dimensions of the American federal system, they either disregard other important features or fail to make good on their methodological commitments. The problems with these approaches fall under two heads, both of which follow from rejecting or disregarding the

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[60] Gerken, "Federalism as the New Nationalism: An Overview," 123 *Yale Law Journal* 1889 (2014), at 1889. The Symposium includes the following pieces: Jessica Bulman-Pozen, "From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism"; Heather Gerken, "The Loyal Opposition"; Abbe Gluck, "Our [National] Federalism"; Alison L. LaCroix, "The Shadow Powers of Article I"; and Cristina M. Rodríguez, "Negotiating Conflict Through Federalism: Institutional and Popular Perspectives."

[61] Heather K. Gerken, "The Loyal Opposition," 123 *Yale Law Journal* 1958 (2014); "Uncooperative Federalism," 118 *Yale Law Journal* 1256 (2009); "Foreword: Federalism All the Way Down," 124 *Harvard Law Review* 4 (2010); "Federalism(s)," 53 *William & Marry Law Review* 1549 (2012); and "Exit, Voice, and Disloyalty," 62 *Duke Law Journal* 1349 (2013).

[62] Gerken, *supra* note 62, 1890.

underdeterminacy of the federal system. Two approaches, American Political Development and Complex Adaptive Systems, avoid these problems in theory, though, as well shall see, the practical applications of these approaches have yet to produce a satisfactory account of the development of American federalism. Correcting these practical shortcomings and realizing the benefits of the methodological approaches best suited to the American federal system would require pursuing a research agenda along the lines of that proposed and pursued in this dissertation.

The first problem is that for four of the approaches surveyed federalism is treated as the independent variable. Of these, three explicitly endorse such treatment, while the remaining approach does so in violation of its methodological commitments. To start, the Optimal Design and New Institutional Economics literatures both conceive of federalism as a feature of politics (or the political environment) that conditions governmental performance on stipulated metrics. This is most apparent in the Optimal Design literature. Consider, for example, Baumgartner and Jones's treatment of the post-New Deal federal system, in which they conclude that the portion of subnational budgets devoted to certain purposes are significantly impacted by federal grant-in-aid programs.[63] This study is deeply important, but no mention is made of the epochal changes in the legal, political, and social foundations of the federal system over the nearly five decades they examine. As a result, it can help us understand only part of the federal system, namely its role in conditioning political outputs.

Unlike the Optimal Design approach, New Institutional Economics does not start from the premise that federalism is an independent variable. Rather, it begins with the

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[63] Frank R. Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (2nd ed.) (University of Chicago Press, 2009), 216-234.

institutions and processes that safeguard the federal system. Nevertheless, the consequences of the latter are the same as those of the former. This is the case because, to the extent New Institutional Economics is concerned with safeguarding a federal system, it presupposes a certain kind or substance of federalism that is to be preserved. Thus, though it may do so only implicitly, New Institutional Economics treats federalism as an independent variable and is, as a result, unable to account for changes in the configuration of state and federal powers as well as the significance of those changes for the safeguards examined. This is precisely the objection that has been made to the Wechslerian approach to political safeguards, and the recognition that has motivated attempts to resurrect that approach.[64] For studies in the vein of the Historical-Philosophical Analyses approach there is less of a concern with government performance or political outputs; thus, the dependent-independent variable framework may not be apt. Nonetheless, to the extent that an overarching theory of jurisdictions or boundaries is posited—which is precisely what this approach sets out to do—the effect is the same. The "true" or appropriate state-federal relationship is stipulated and various phenomena are evaluated on that basis, thus leaving little room for the incorporation of changes to the federal system. Most often, variations in state and federal powers are interpreted as failures to approximate the correct understanding of the federal system.[65]

For all three of these approaches, treating the federal system as an independent variable—as something that structures but is not itself structured by political processes—

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[64] The most prominent instance of this is Larry Kramer, "Putting the Politics Back into the Political Safeguards of Federalism." But also see Bradford Clark, "Separation of Powers as a Safeguard of Federalism."

[65] See, *e.g.*, Barber, *The Fallacies of States' Rights*, chapters 4-6.

precludes the recognition or incorporation of changes in the nature of the federal system. It is precisely this shortcoming that American Political Development is ostensibly intended to remedy. For studies in this tradition, political development is the cornerstone of the methodology. But as intimated in the earlier discussion of APD, this commitment has not been faithfully applied. The leading APD treatments of federalism fall into the independent variable problem outlined above. For instance, Robertson's suggestively titled *Federalism and the Making of America* forcefully recognizes the underdeterminacy of the federal system but then proceeds in a manner similar to the Optimal Design literature, showing how federalism structured political, social, and economic outcomes and accepts only out of necessity the drastic changes in the state-federal relationship. Where this error is avoided, as in some of Whittington's work,[66] the interval examined is too brief to truly make good on the recognition that constitutional underdeterminacy anticipates iterated political constructions of the federal system in which later episodes are, to a great extent, constrained and shaped by earlier episodes. While he has done yeoman's work illustrating how underdeterminacy shaped the Nullification Crisis, his study covers just three years (1830-1833), thus posing as many questions as it answers. Hence, the analytical and explanatory merits identified by the methodological commitments of American Political Development have yet to be realized.

The second problem concerns the imposition of an exogenous definition of the state-federal relationship, a flaw closely related to treating the federal system as the independent variable. As when federalism is an independent variable, federalism as an exogenous definition makes the empirical reality of changes to the state-federal

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[66] See Whittington, "The Political Constitution of Federalism" and *Constitutional Construction*, 72-112.

relationship difficult to incorporate and assess on terms consistent with the approach. As just noted this is most apparent in the Historical-Philosophical Analysis literature, for which such a definition is the principal focus. Faced with understandings that conflict with the proffered definition, this approach tends to treat such variations as just that: deviations from the proper legal, political, or historical meaning. Seeking to avoid such judgments, some of this literature has opted for framework understandings of the federal system that identify broad parameters of permissibility and legality.[67] This is an improvement over rigid exogenous definitions, but in practice these studies still haven't faced up to the reality of the federal system's inherent underdeterminacy and the consequent need for political elaborations of the state-federal relationship.

A principal consequence of constitutional underdeterminacy, identified most clearly by the commitments of the Complex Adaptive Systems approach, is that the definition of both the state-federal relationship and the theory of sovereignty that supports it are endogenous to the constitutional order. In this connection it would seem that the Positive Political Theory approach rests on solid methodological foundations, as it is characterized by a focus on the authority distributions that are *produced by* political and economic behavior. While this is undoubtedly true, it is true in only a limited sense because for PPT studies the interval under consideration is often quite short and episodic, thus obscuring the dynamics of contestation and political-economic definition that the approach is based on. This is where the methodological aspirations of American Political Development supply a necessary corrective. Granting that the federal system is underdeterminate and

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[67] See, *e.g.*, Alison LaCroix, *The Ideological Origins of American Federalism* (Harvard University Press, 2008) (treating federalism as a political inheritance from the seventeenth and eighteenth century); and Charles Black, *supra* note 59 (eschewing determinative principals in the development of the federal system while yet maintaining structural constants).

that, as a result, the state-federal relationship is produced through political processes, APD's focus on the irreducibly developmental nature of political institutions and phenomena forces us to expand the horizons of our inquiry to take account not just of episodic contestations of the distribution of authority in the federal system but also of how those episodes are connected to each other and how earlier episodes influence later episodes.

Reflecting on the broad literature engaging American federalism and the dominant methodological approaches used therein, it is thus clear that only the Complex Adaptive Systems and American Political Development approaches incorporate into their methodological commitments the underdeterminacy of the federal system and the consequent endogeneity of sovereignty and specifications of the state-federal relationship. Nonetheless, these virtues haven't yet resulted in a developmental account of the American federal system directed towards elucidating the consequences of constitutional underdeterminacy. As I've tried to show, this is a failure of extant American Political Development scholarship; and, as Bednar admits, Complex Adaptive Systems is still more of an impulse in the literature than a refined and coherently employed methodology.[68] Hence, the necessary work still remains to be done. The following section outlines how such an endeavor is undertaken in this dissertation.

Overview

The balance of this dissertation consists of two components. The first is theoretical, the second developmental. Each of these components, in turn, is subdivided into two distinct

[68] Bednar, "The Political Science of Federalism," 280-282.

parts. The theoretical component seeks to provide a description of the nature of the American federal system, a prerequisite for any account of the ways in which federalism has shaped political development. The first theoretical part attempts to explicate the underdeterminate and, as a result, inherently relational nature of American federalism. The second part then seeks to situate federalism in the broader context of American constitutionalism by engaging in a dialogical comparison with the separation of powers at the national level. The developmental component of the dissertation pursues the implications of the theoretical arguments by examining how the underdeterminacy of the federal system has influenced constitutional and political development. Like the theoretical component, the developmental component consists of two separate parts. While the first charts the jurisprudential development of the state-federal relationship over the first century of American constitutional history, the second examines a discrete episode of the political construction of the state-federal relationship. Taken together, these components comprise the four substantive chapters of this work. In the paragraphs that follow I briefly describe the arguments advanced in each chapter, with the goal of identifying the set of concerns that unifies them.

A satisfactory account of the *development* of the American federal system must begin with a defensible account of the *nature* of that system, even acknowledging, as I've suggested, that its nature is in part a result of political development. Thus, in Chapter One I offer an account of the constitutional logic of American federalism. In brief, that account focuses on the structural underdeterminacy of the federal system established by the Constitution and the consequent centrality of relationships between both (a) governmental levels and (b) governments and their citizens. Because there is no

constitutionally established line of jurisdiction that comprehensively defines state and national powers, rights, and roles, the appropriate distinctions must be made through constitutional politics. In turn, these distinctions hinge on the answers to two questions, both of which concern the relational dimensions just identified. First, what is the nature of the relationship between the states and the national government? And second, how do citizens relate to each level of government that represents them? The answers to these questions—the first arrived at through political contestation and the second both expressed through and shaped by that contestation—determine the precise contours of the state-federal relationship. In this way, my argument emphasizes the *relational* dimensions of the state-federal relationship, a point this chapter is intended to explain and defend.

To adequately describe the constitutional logic of federalism, this chapter proceeds in three steps. I begin by evaluating the constitutional text in order to defend the central claim that the federal system is underdeterminate and thus anticipates contestation over the proper scope and location of political power. This requires evaluating the state-federal relationship as set forth by the Constitution and, on that basis, identifying the parameters of the federal system. It must, in other words, identify which questions of state and national power are legally settled and which remain open to legitimate contestation. Second, sources contemporaneous to the founding are adduced to demonstrate that the underdeterminacy of the federal system was apprehended at the time of the Constitution's framing and ratification, serving as a virtue for some and a vice for others. By bringing Federalist and Anti-Federalist sources into conversation with each other, I argue that critics and supporters of the Constitution alike acknowledged that the distribution of power in the federal system was far from determinate and, moreover, depended crucially

on popular sentiments. This discussion identifies a common point of emphasis between Publius and leading Anti-Federalists, namely the people's attachment to (or confidence in) their governments. However, while attachment figured prominently in their debates, Federalists and Anti-Federalists ascribed to fundamentally different views of popular attachment that had similarly fundamental significance for their assessments of the federal system. Chapter One concludes with the identification of the contingent foundations of the federal system—concrete factors grounded in governmental capacity and political culture that shape the state-federal relationship. It is these variables that serve as the basis for the analytical model that is employed in Chapter Four to evaluate an episode of constitutional and political development.

A defense of the underdeterminate nature of American federalism immediately raises questions about how the federal system fits into the broader constitutional order. Moreover, the underdeterminacy of the federal system would seem to parallel the underdeterminacy of the separation of powers at the national level. The obvious question, then, is, in what ways are the federal system and the separation of powers similar and in what respects do they differ? And further, what are the consequences of these similarities and differences? Chapter Two aims to engage and ultimately answer those questions by means of a dialogical comparison of federalism and the separation of powers. Doing so not only clarifies the distinctive nature and challenges of the federal system. It also presents an opportunity to assess the prospects of securing—or, more accurately, producing—constitutional authority where the constitutional text is not fully determinate. A comparison of the federal system and the system of separated powers at the national level reveals two notions of political power and, as a result, two conceptions of the

separation thereof. There is, on the one hand, a negative notion of political power, according to which all political power is liable to abuse and must therefore be properly divided. On the other hand, there is a positive notion that is oriented towards incorporating the fundamental values of liberal constitutionalism (national and domestic security, individual rights, and democratic governance) into the exercise of political power. Whereas the positive notion is directed towards the *use* of political power, the negative notion is directed towards preventing its *abuse*. In turn, these notions of political power undergird divergent notions of why political power should be separated. While the negative notion supports a view of the wholesale separation of powers among political institutions to prevent tyrannical abuses (which I refer to as the *division of power*), the positive notion supports a view that subdivides power across governing institutions in order to give expression to the polity's fundamental value commitments. While federalism can serve the purposes of the negative notion of political power and the view of separated power that it supports, I argue in this chapter that it cannot serve those of the positive notion or its attendant view of separated powers. This is the case because, unlike the governing institutions at the national level, state and national institutions do not stand as equals in relation to one another. Rather, their interactions are shaped by the constitutional commitment to national supremacy and the deeply-rooted (though non-constitutional) commitment to state sovereignty, both of which preclude the deliberative interactions and responsive relationships required by the positive notion of political power. Fully mounting this argument requires recourse to recent scholarship on constitutional authority, which is animated by a recognition of the same constitutional underdeterminacy that underlies this inquiry.

The foundational claim of this dissertation is that the structure and nature of the federal system have decisively shaped and been shaped by American political and constitutional development. The difficulty, however, is not in making this claim but in justifying it. Moreover, because I argue in the theoretical chapters that the federal system anticipates constitutional development, our focus should correspondingly shift to developments subsequent to the ratification of the Constitution. Hence, the third and fourth chapters engage different aspects of political and constitutional development related to the federal system. The focus of Chapter Three is constitutional interpretation over roughly the first century of the American Republic (1787-1873). There I offer an account of federalism jurisprudence that demonstrates how the underdeterminacy of the federal system has shaped both the course and the substance of judicial interpretations of the state-federal relationship. The goal of this chapter is to demonstrate the consequences of judicial engagement with constitutional underdeterminacy. Moreover, I hope to illustrate how, in the hands of the judiciary, the structural underdeterminacy of the federal system induces a distinctively *relational* mode of reasoning, according to which state and national powers are understood in relation to each other, implicitly or explicitly delimiting each other, with each level of government shaping the powers of and limitations on the other. While the American federal system has been characterized as relational[69] and a relational account of federalism jurisprudence has been called for,[70] there has yet to be an extended defense of this claim or presentation of such an account.

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[69] See, for example, Charlton C. Copeland, "Federal Law in State Court: Judicial Federalism Through a Relational Lens," 19 *William & Mary Bill of Rights Journal* 511 (2011); and David Fontana, "Relational Federalism: An Essay in Honor of Heather Gerken," 48 *Tulsa Law Review* 503 (2012).

[70] Heather Gerken, "Comment—Slipping the *Bonds* of Federalism," 128 *Harvard Law Review* 85 (2014), 113-119.

By showing how the constitutional logic of federalism shaped judicial interpretations of the federal system, this chapter is also intended to demonstrate that the jurisprudence of federalism and, by implication, constitutional law more broadly are *species of political development*, phenomena inscribed in the compass of constitutional politics that are structured by the institutional and operational logics of the judiciary.

The dual claims that the underdeterminacy of the federal system induces a relational mode of reasoning and that judicial engagement with the federal system produces a logic of federalism distinct from the constitutional logic are both supported by an examination of federalism jurisprudence over the first century under the Constitution (1787-1873). Examining Supreme Court decisions (and broader judicial developments) from the Marshall Court into Reconstruction we encounter two clear modes of reasoning, both of which are relational in form. The first reasons about the federal system from the standpoint of national sovereignty, defining the powers attendant to national supremacy and only then identifying the state powers that remain. Conversely, the second mode reasons from the standpoint of state sovereignty, articulating a sphere or jurisdiction of state power and, on that basis, defining national power. For both, identifying the bounds of permissibility in a federal system requires fleshing out the relationship between state and nation; that, in turn, requires reasoning inferentially from the constitutional text and the relationships it establishes. A different developmental dynamic emerges in the jurisprudence preceding and immediately after the Civil War. Here the focus was not only on the relationship between state and national governments but also on the relationships between both levels of governments and American citizens. The cases analyzed in this chapter necessarily take place in political time and, in virtue of being legal decisions, they

must take account of previous decisions and at least attempt to produce a coherent jurisprudence. This means that the resulting logic of federalism bears the marks of both modes of reasoning, the result of which is a single, ostensibly coherent expression of federalism's meaning.[71]

The crucial difference between the constitutional logic of federalism and the judicialized logic that emerged in this period is that whereas politicians could treat the state-federal relationship as underdeterminate, many judges did not. More importantly, though, and irrespective of any one judge's intentions, iterated legal disputes and the attendant rise of constitutional doctrine served to exacerbate the development of determinate understandings of the federal system. The Constitution established a federal system in which the line between the national and state governments was incomplete and underdeterminate; it did not answer every question about the precise scope or extent of state and national power. But when a federal question came before the apex constitutional court, the answer could not be incomplete or underdeterminate. It had to be definitive, and it had to be deduced from consistent constitutional principles. In the eyes of the Marshall and Taney Courts, questions of state and federal power called for answers that identified categories of governmental power appropriate to each level; they called for an adumbration of what each part of the compound republic could and could not lawfully do. The codification of national citizenship in the Fourteenth Amendment added another

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[71] It is only very rarely that the Court declares that a previous decision was not only wrong but wrong the day it was decided. See, *e.g.*, *Lawrence v. Texas*, 539 U.S. at 578 (2003) (declaring that the Court's decision in *Bowers* "was not correct when it was decided, and it is not correct today"). Even in these instances, though, there is a clear imperative to articulate a single, definitive constitutional meaning. The decisions that were always wrong were wrong because they did not comport with the proper interpretation of the provision in question. This, as I argue at greater length in Chapter Two, is characteristic of an approach to the Constitution that seeks determinacy from the constitutional text, an approach induced in part by the institutional logic of the judiciary.

relational dimension to the state-federal relationship. The affirmation of a citizen-state relationship separate and apart from the several states had wide ranging consequences for both the structural relations between governmental institutions and the salience of citizens' attachment in the federal system. The new logic of federalism produced by these developments, I ultimately argue in Chapter Three, was the direct result of the interaction of the institutional logic of the judiciary with the constitutional logic of federalism.

While judicial engagement with the federal system illustrates one aspect of federalism's development, it nevertheless tells only part of the story. The implications of constitutional underdeterminacy extend beyond the precipitation of legal cases that present questions about the permissible scope of state and national power. Indeed, the implications pervade legislative and executive politics organized around the extent and application of political power. If there is merit to the argument that the underdeterminacy of the federal system anticipates contestation and requires specification of the state-federal relationship, then our attention must turn also to the political episodes in which the state-federal relationship is contested and defined. By examining an episode of political contestation over the scope and location of governmental power, we can gain a more subtle understanding of the ways in which the federal system has been understood and reinterpreted over the course of American political history. What is the extent of national power under the Constitution? By what are national and state powers limited? What value(s) or end(s) is the federal system supposed to serve? Answers to these questions can be found in debates over the nature, requirements, and purposes of the American federal system. These are the questions Chapter Four aims to address.

The episode under consideration here is the Commission on Intergovernmental Relations (CIR), which was convened by President Eisenhower in 1953 to study the proper roles of and divisions between levels of government. While the Commission's work took place over just two years (1953-1955), it must be considered as a late act within a much longer drama of state building and constitutional change. To this end, I situate the CIR and the questions it engaged within the context of the period running from the beginning of the New Deal through the Second World War and into post-war American politics. During this roughly two decade period, both the role of the national government and the broader constitutional order in which it was embedded underwent epochal changes. Within the context of the approach to American federalism outlined in Chapters One and Two, these changes touched each of the contingent foundations of the federal system. What's more, given the temporal proximity of the New Deal and the War, political contestation over the "New Deal settlement" was largely deferred until after war's end. As a consequence, many New Deal programs and wartime expansions of federal power—along with the new state-federal relations they inaugurated—were able to consolidate and become entrenched before their desirability and legality were seriously tested in the political arena. Building on the analysis of the contingent foundations of the federal system presented in Chapter One, I construct a model of federalism that can be used to evaluate political and constitutional development. This model identifies two broad categories of variables—those rooted in governmental capacity and political culture—the modulation of which structures the social, political, and legal context in which the state federal relationship takes shape.

The CIR was proposed by President Eisenhower as a way to both placate resurgent conservative critics of national power and to take stock of the profound changes to the constitutional order wrought by the New Deal and Second World War. Drawing on sources from the Commission's archive at the Eisenhower Presidential Library, I argue that through its work and in the report it ultimately produced, the CIR reconstructed the federal system, elaborating a vision of the proper roles of governmental levels in an era of expanded, administrative national governance. It was, at bottom, a vision that prioritized the ends of good governance over legally specified distributions of authority. This shift from legal divisions of power to the desiderata of governance in the post-New Deal, post-War American state demonstrates how legislative and executive institutions interact with the underdeterminacy of the federal system. As such, it stands as a particularly illustrative example of the political—as opposed to exclusively judicial—construction of the state-federal relationship.

Chapter One: The Politics of Sovereignty

In his Edward Douglass White Lectures, delivered in 1968 at the Louisiana State University, Charles Black presented a critique of American constitutional interpretation that, though nearly half a century old, still warrants serious consideration.[1] His point of departure was the observation that in attempting to answer constitutional questions we have opted for an interpretive method that seeks to derive meaning and direction from the constitutional *text*. This is, in his words, "the method of purported explication or exegesis of the particular textual passage[.]"[2] The "particular-text style"[3] forces those in search of constitutional guidance to focus on texts that are "in form directive of official conduct, rather than…those that declare or create a relationship out of the existence of which inference could be drawn."[4] In its place, he outlined and advanced an inference-based

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[1] The arguments presented in this chapter are a version, at times modified, of the arguments advanced in Connor M. Ewing, "Structure and Relationship in American Federalism: Foundations, Consequences, and 'Basic Principles' Revisited," 51 *Tulsa Law Review* 689 (2016).

[2] *Id*., 7.

[3] *Id*., 8.

[4] *Ibid*.

interpretive methodology, one "sounding in the structure of federal union, and in the relation of federal to state governments."[5] Black's emphasis on structure and inference has had a profound impact on constitutional reasoning, serving, for example, as a model for one of the six modalities of constitutional interpretation identified by Philip Bobbitt in his seminal work, *Constitutional Fate: Theory of the Constitution*.[6]

It is no coincidence that Black's discussion of structural inference and relational interpretation took the federal system as a primary object of consideration. Not only is the text-based method he critiques prevalent in federalism jurisprudence, but the state-federal relationship is also, perhaps, the constitutional example *par excellence* of the need to draw inferences from structure and relationship. To fully appreciate the force and potential of the analytical posture Black advocated, we must do more than provide correctives to instances in constitutional law of the absence of such reasoning. Indeed, we must reorient our focus and shift from the interpretive domain of constitutional law to the larger realm of constitutional politics, in which law is inscribed. Though Black reasoned from legal disputes centered on specific textual provisions to the relevant structures and relationships that clarify the questions presented, the nature of the American polity can also be glimpsed if we reverse that order and begin with the structures and relationships fundamental to the constitutional order. Thus reversed, the goal becomes to arrive at a clear understanding of our constitutional *regime*, so that interpretations of our constitutional *text* can proceed on a reliable foundation.

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[5] *Id*., 11.

[6] Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1984). See especially 74-92 for his discussion of the structural modality and 77-80 for his direct engagement with Black's arguments in *Structure and Relationship*.

Implicit in the idea of a written constitution is a notion of defined government, of explicit declarations that establish guidelines for the legitimate use of political power and enumerate the proper objects, purposes, and means of legislation and regulation.[7] In republican governments, those enumerations and limitations are intended to manifest the sovereignty of the people by identifying them, rather than those who govern, as the ultimate source of political authority. While the people are sovereign, they select representatives to exercise sovereign political power over the polity. But this presents a complication. Even as sovereignty in a constitutional democracy signifies the ultimate rule of the people—Lincoln's "political community without a political superior"[8]—it also signifies governmental actors with "no higher enforcement agency—no political superior."[9] Making sense of sovereignty in a constitutional democracy requires coming to terms with the tension between the sovereignty of the people and the sovereignty of the people's government(s). As a result, constitutional politics are characterized by what could be called a *politics of sovereignty*—the patterns of political behavior and discourse, the relationships between and among governments and citizens, and the institutional

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[7] This formulation, specifically the choice of "defined government" instead of "limited government" or some other formulation, is intended to set to the side questions about the nature of constitutional limitations. While the argument presented here certainly bears on those questions, a full treatment is beyond the scope of this inquiry, though one dimension of the debate is considered below. For a recent and particularly cogent colloquy on the meaning of "limited government," as well as a survey of the broader debate of which it is a part, compare Richard Primus, "The Limits of Enumeration," 124 *Yale Law Journal* 576 (2014) (arguing that the internal limits canon, which holds that "the powers of Congress must always be construed as authorizing less legislation than a general police power would," is wrong) and Kurt T. Lash, "The Sum of All Delegated Power: A Response to Richard Primus, 'The Limits of Enumeration,'" *Yale Law Journal Forum*, Dec. 22, 2014 (rejecting Primus' central contention on the basis that "the constitutional text, reasonably interpreted, communicates that the sum of all actual delegated federal power amounts to something less than all possible delegated power").

[8] Abraham Lincoln, *Message to Congress in Special Session* (July 4, 1861), in *The Collected Works of Abraham Lincoln* (Roy P. Basler ed., 1953), 433.

[9] Sotirios A. Barber, *The Fallacies of States' Rights* (Harvard University Press, 2012), 152.

interactions that give structure and substance to debates over the scope and location of government power.

The nature of a constitutional regime's politics of sovereignty is largely the function of the structure of its political institutions and the relationships between the government and the people. In federal systems, the politics of sovereignty are fundamentally shaped by the presence of two levels of government—national and subnational—that each purport to act on behalf of the people they represent. For federal regimes the perennial question of politics—what should government do?—is complicated by a further question of specification: which government should do those things?[10] As David Epstein notes in his study of *The Federalist*, the only unqualifiedly national component of the "partly federal, and partly national"[11] Constitution that Madison identifies in *Federalist* 39 is the "government's 'operation' on individuals."[12] As a consequence, in the American constitutional order "men have two masters, although each is only a master with respect to its own 'objects.'"[13] Moreover, as we see in both Publius' case for the Constitution and the Anti-Federalists' response, there was neither a clear nor comprehensive division of powers between the states and the national government. Rather than establish a determinate state-federal relationship, the Constitution set forth the legal and political

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[10] In his study of federalism and American political development, *Federalism and the Making of America* (Routledge, 2012), David Brian Robertson presents a cogent analysis of this aspect of the American federal system. See, *e.g.*, 1 and 8-9.

[11] Jacob E. Cooke (ed.), *The Federalist* (Wesleyan, 1961), 39:257 (Madison). [Hereinafter citations to *The Federalist* will follow this template. The essay number will be cited, followed by a colon and the page number of the text referenced or quoted; in instances where the author is not mentioned in-text, the name will be included parenthetically in the citation.]

[12] David F. Epstein, *The Political Theory of* The Federalist (University of Chicago Press, 1984), 51.

[13] *Id*., 51-52.

processes through which that relationship would be contested, defined, and revised. The federal system is fundamentally *underdeterminate*: the Constitution fixes no single division of power between levels of government but instead permits a range of potential state-federal relationships within permissible constitutional bounds. The underdeterminacy of American federalism inheres principally in the structural configuration of governing institutions and the relationships between citizens and their respective governments.[14]

In this chapter, I offer an account of the American federal system organized around its structural and relational components and develop an initial delineation of the politics of sovereignty of the American constitutional order. That account and the politics it structures, I argue, are necessarily dynamic, resisting the static conceptions and synchronic analyses that dominate judicial and, to a lesser extent, academic treatments of the topic. Understanding this account of American federalism requires reasoning inferentially and relationally, a recognition with increasing, though still limited, prominence in the academic literature.[15] I begin by setting forth the structural components and institutional arrangements of the federal system. A review of the constitutional logic of federalism and the mechanisms designed to preserve the federal bargain illustrate the causes and consequences of the underdeterminacy that I argue

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[14] I employ this notion of underdeterminacy—as well as the term itself, instead of "indeterminacy" or "ambiguity"—in conformity with others who have addressed the question of the nature of constitutional powers and the degree of textual constraint. See especially Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013), 5 n. 23. For a discussion of underdeterminacy and its relation to related terms like "vagueness" and "ambiguity," see Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation," *Oxford Handbook on Language and Law*, (Lawrence Solan and Peter Tiersma eds.) (Oxford University Press, 2011).

[15] For the most direct and elaborate development of this argument, see Heather K. Gerken, "Slipping the *Bond*s of Federalism," 128 *Harvard Law Review* 85 (2014).

characterizes the federal system. I then examine the notion of "attachment" in both the *The Federalist* and the writings of several prominent Anti-Federalists. I argue that the attachment of the people—their connections and commitments to a government—is a crucial determinant of the configuration of state and national power, which configurations are made possible by federal underdeterminacy. Extending this argument about popular attachment, I conclude by sketching a model of constitutional development based on the preceding argument. In particular, I identify two broad categories of variables, rooted in political culture and administrative capacity, that act as determinants of the federal system, structuring the distribution of powers between state and nation.

The Structure of Sovereignty

American federalism is often described as consisting in a "balance" between state and national power, a "balance" that reflects the intentions of the founders and, as such, should provide a normative guide for constitutional interpretation.[16] This, then, provides a useful starting point and theoretical alternative for my argument. The goal of this section is to advance a contrary understanding of the federal system. Indeed, I argue that the balance model is the theoretical antipode to what the Constitution establishes—a two-level federal system with an underdeterminate division of political power, the result of which is a contested jurisdictional line between the national and state governments. I start

[16] See, *e.g.*, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566, 2661 (2012) (Scalia, Kennedy, Thomas, Alito, J.J., dissenting) ("the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene"); and *Davis v. Monroe County Board of Elections*, 526 U.S. at 654-655 (1999) (Kennedy, J., dissenting) ("the Spending Clause power, if wielded without concern for the federal balance, has the potential to obliterate distinctions between national and local spheres of interest and power"). For an academic development of this understanding, see Myron T. Steele and Peter I. Tsoflias, "Realigning the Constitutional Pendulum," 77 *Alabama Law Review* 1365 (2014).

by describing the underdeterminate division of political power in the federal system, which I term the *constitutional logic of federalism*. I then address a number of protections intended to preserve the federal bargain in light of federal underdeterminacy. Finally, I conclude with a brief discussion of the Tenth Amendment, which is often interpreted as precluding the underdeterminacy that is central to the account of the federal system I offer.

The Constitutional Logic of Federalism

To begin understanding the logic of American federalism, we can begin by asking a foundational question: What does the Constitution constitute? The Preamble declares, "We the People…do ordain and establish this Constitution for the United States of America," signaling that the charter will govern the collective endeavors of the several states. The unstated premise is that the states themselves are not formally constituted by the Constitution. Rather, they are recognized as extant political bodies and are treated as such throughout the Constitution. Unlike other federal systems in which the powers, responsibilities, and legal rights of the subnational governments are enumerated, the U.S. Constitution addresses the states and their future role largely by implication or in relation to the operation of the new national government. The states appear in the constitutional text as (*inter alia*) constituent members of the Union;[17] preexisting governmental entities and the structure of extant legal political communities;[18] regulators of federal elections;[19]

[17] U.S. Constitution, Preamble.

[18] *Id.,* Art. I, Sec. 2 and Sec. 3.; Art. III, Sec. 2.

[19] *Id.,* Art. I, Sec. 4; Art. II, Sec. 1., as originally ratified and as amended by Am. XII.

units whose mutual relations and, in some cases, specific decisions are subject to federal regulation and oversight;[20] and bodies whose autonomy is limited by virtue of their membership in the Union.[21] States are also recognized as jointly contributing to a militia subject to national control, future members of the Union whose admission is subject to federal permission,[22] and governments whose "Republican Form" and security against invasion would be guaranteed by the Union.[23] Finally, states are explicitly recognized as key components of the process of amendment and their territorial integrity and representation in the Senate are protected.[24] The national government, by contrast, was literally—and in a way that doesn't similarly apply to the states—*constituted* by the Constitution. Its fundamental institutions were structured, its powers enumerated, its purposes outlined, and its restraints specified. Setting aside the much controverted question of whether the act of ratification constituted a national people, we can nonetheless clearly see that it did constitute a national government in a political context where sovereign states already existed and would continue to exist, in some modified status.[25] The question, then as it is now, is how the national government would stand in relation to the states.

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[20] *Id*., Art. I, Sec. 8, cl. 3., and Sec. 9 (regarding the "Migration or Importation of such Persons as any of the States now existing shall think proper to admit"); Art. III, Sec. 2. and Am. XI; Art. IV, Secs. 1 and 2.

[21] *Id*., Art. I, Sec. 10.

[22] *Id*., Art. IV, Sec. 3.

[23] *Id*., Art. IV, Sec. 4.

[24] *Id*., Amendment V and Art. IV, Sec. 3.

[25] See Kurt Lash, "The Sum of All Delegated Power," 183-189 for a review of the dominant theories of federalism and the place and understanding of sovereignty therein.

This may seem like a self-evident point, but it is in fact deeply consequential. Because the states exist in the Constitution largely by implication, their political functions taken as granted, we can identify a crucially important feature of the federal system's design—its underdeterminate dispensation of political power between the states and the national government. Consider the two options available to the Convention. The first was to comprehensively divide state from national power, drawing a clear jurisdictional line between the two levels and, in so doing, to create a determinate state-federal relationship. But that is emphatically what the Convention did not do, for reasons of both possibility and efficacy. For one, such an endeavor would have been impossible. The delegates could not have identified every possible political contingency and specified the proper political authority and process appropriate to each. And even if they could have done so, the political divisions at the Convention would have frustrated attempts to agree on the specified authority and processes for each contingency. Second, it would have been counterproductive to seek a determinate state-federal relationship. The very "stability and energy" the convention sought to combine with "the inviolable attention due to liberty, and to the Republican form"[26] required the ability to address contingencies in the most effective and appropriate manner, instead of relying on the foresight of a convention that could not have comprehended the political demands of the future. The latter had been the failing of the Articles of Confederation, and it left the "Government of the United States…destitute of energy."[27]

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[26] *The Federalist*, 37:233 (Madison).

[27] *Id.*, 15:93 (Hamilton).

The *locus classicus* for the argument against legal determinacy is *Federalist* 37. There Madison discusses the "arduous…task of marking the proper line of partition, between the authority of the general, and that of the State Governments."[28] After comparing the difficulties faced by the Convention to those faced by "the most acute and metaphysical Philosophers"[29] and "the most sagacious and laborious naturalists,"[30] he concludes,

> All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment…Here then are three sources of vague and incorrect definitions; indistinctness of the object, imperfection of the organ of conception, inadequateness of the vehicle of ideas.[31]

The problem of "vague and incorrect definitions" is one that pervades law. Moreover, it is a problem that affects constitution makers especially acutely, because they must cope with these obscurities and imperfections in the context of crafting *fundamental* law—the law that will structure future lawmaking.

Perhaps, though, this could be thought Publian dissembling. It would, after all, benefit those who favor national over state power to claim that it was impossible to clearly distinguish national from state objects. If so, then the guise of impossibility could facilitate the establishment of expansive national power. But the truth is that *Federalist* No. 37 was (at least) the second time this argument had appeared. After completing the

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[28] *Id*., 37:234.

[29] *Id*., 235.

[30] *Ibid*.

[31] *Id*., 236-237.

draft constitution, the delegates transmitted a letter to Congress introducing their handiwork. There they admitted, "It is at all Times difficult to draw with Precision the Line between those Rights which must be surrendered and those which may be reserved[.] And on the present Occasion this Difficulty was encreased [*sic*] by a Difference among the several States as to their Situation[,] Extent[,] Habits[,] and particular Interests."[32] To add a final complication, as Edward Purcell observes, the imprecise division of state and federal power was reinforced by the fact that "the Constitution conceived of both levels of government as counterpoised forces protecting the same vague and contested values—liberty, property, and republicanism."[33] Hence, the contention that the constitutional division of state and national power is underdeterminate is supported by both the testimony of members of the Constitutional Convention and the purposes they conceived both levels of government as serving.

But even still, Madison's description of the inherent challenges of lawmaking could be far from the consensus view of the time. There could, after all, have been others who dissented from the view expressed by the Convention and accordingly believed that it was possible to define the "line of partition" between governments with greater precision than Madison thought feasible. This is doubtless true, which highlights a crucially important philosophical division at the time. As Saul Cornell has argued, the ratification debates revealed "a profound epistemological gulf separating elite Federalist from

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[32] See Max Farrand, *The Records of the Federal Convention of 1787* (1911), II:584.

[33] Edward A. Purcell, Jr., *Originalism, Federalism, and the American Constitutional Enterprise* (2007), at 191.

popular Anti-Federalist views of language."[34] This gulf cut to the core of the nature and requirements of political constitutions:

> Elite Federalists generally accepted an essentially Lockean understanding of the limits of language and the inevitability of semantic instability. Popular Anti-Federalist ideology viewed language more naively and attributed ambiguity, vagueness, and other textual failings in the Constitution to a deliberate effort by Federalists to craft a document that could be more easily twisted and manipulated by legal elites and their allies among the well born.[35]

The existence of this disagreement between the Constitution's advocates and its opponents supports the case being made here, which is that the belief expressed by those principally responsible for writing and defending the Constitution is congruent with the constitutional text. Constitutional underdeterminacy, a facet of which is included in Cornell's "semantic instability," is an inescapable feature of constitutions. Though he identifies the ways in which "politics contaminated language,"[36] what Cornell doesn't address is the fact that this phenomenon is doubly exacerbated by federalism—first by extending the realm of people among which disagreements about constitutional meaning could take root, and second by multiplying the number of governments empowered to act in their name(s).

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[34] Saul Cornell, "Constitutional Meaning and Semantic Instability: Federalists and Anti-Federalists on the Nature of Constitutional Language," *American Journal of Legal History* 56:21-28 (2016), 26.

[35] *Ibid*.

[36] *Id*., 23.

Rather than attempt to specify the exact set of points at which state power yields to national power (or, perhaps importantly, vice versa[37]), the delegates to the Constitutional Convention opted for grants of power and restrictions thereon. To wit, the Constitution enumerates the powers of the national government,[38] identifies explicit restrictions on both national[39] and state power,[40] and specifies the requirements of interstate conduct.[41] Additionally, the national government was endowed with the "executive Power" and "judicial Power," housed, respectively, in the office of the president and the federal courts. The result was a federal government possessed of the inherent powers of national sovereignty—preservation of national security, superintendence of interstate conflict, management of the national economy, and the conduct of foreign diplomacy. At the same time, states maintained "most of the policy tools for governing everyday American life,"[42] including the powers to regulate local commerce, to ensure local peace, and to preserve and further local welfare.

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[37] There is reason to believe that the directionality of this point is important. Consider, for example, an articulation of the state-federal relationship that begins from the perspective of national power. The jurisdictional line would be found at the outer edge established by the full scope of the powers that the Constitution grants to the national government. If, however, the analysis is reversed, and state power is the starting point, then the jurisdictional line would be found at the edge of the full extent of the states' powers, as expressed in their constitutions and the traditional body of police powers. Unless these two analyses can be said to establish the same jurisdictional line, then it seems reasonable to conclude that the directionality of the analysis is consequential for the contours of the state-federal relationship. Here we see the significance of the relational dimensions of the state-federal *relationship*, a point alluded to by Gerken, "Slipping the *Bond*s of Federalism," 113-119. The causes and consequences of this dynamic are taken up in Chapter Three.

[38] U.S. Constitution., Art. I, Sec. 8; Art. III, Sec. 3; and Art. IV, Secs. 3 and 4.

[39] *Id*., Art. I, Sec. 9.

[40] *Id*., Art. I, Sec. 10.

[41] *Id*., Art. IV, Secs. 1 and 2.

[42] Robertson, *Federalism and the Making of America*, at 32.

The result of the Convention's labors was a mélange of exclusively national, exclusively state, and concurrently exercised powers. Though defined in broad strokes, the compound republic was characterized by underdeterminacy, as there was not an exhaustive division between state and federal power nor a clear jurisdictional line drawn between the two. This meant that the "true meaning" of the state-federal relationship could not be arrived at through legal analysis or constitutional interpretation. Rather, it was an essentially political, and thus contested, question. As David Epstein argues, "While the Constitution does enumerate the objects of the central government, the partition between states and nation will not be as much a legal issue as a political one."[43] Coupled with the underdeterminacy of the federal system, the inherently political nature of the state-federal relationship meant that the division of powers between levels of government could reflect the will of the people. "If…the people should in future become more partial to the federal than to the State governments," Madison argued in *The Federalist* No. 46, then "they ought not surely to be precluded from giving most of their confidence where they may discover it to be most due."[44] In this passage, Madison stresses that only superior administration could bring about this transfer of partiality, a point that is examined more closely below. But unless this capacity of the people was to be illusory, there had to be a means by which the people's partiality, or attachment, could be meaningfully registered. By allowing for the jurisdictional line to be subject to

[43] Epstein, *The Political Theory of* The Federalist, 53.

[44] *The Federalist*, 46:317.

political negotiation and construction responsive to these changes in public support, the underdeterminacy of the federal system did exactly that.

Two specific constitutional provisions underscore the underdeterminacy of the state-federal relationship, and the consequent need for an inferential and relational conception of American federalism. The first is the Necessary and Proper Clause, which makes clear that the Constitution's identification of congressional powers mustn't be read as an exhaustive enumeration. Rather, there are powers undefined by the Constitution that are nonetheless legitimate exercises of national power. To be sure, this clause leaves many questions unanswered, including whether it is an independent grant of power and whether it should be read as conjunctive or not. But that is precisely the point. Not only does the clause point to lawful powers beyond those explicitly granted, its formulation raises further questions about the extent of national legislative power. The Necessary and Proper Clause makes clear that the national government possesses discretionary power that, of its nature, can permit only description and not enumeration.

The second provision is the Supremacy Clause, which declares that the Constitution, its laws, and treaties "shall be the supreme Law of the Land,"[45] and that state judges are bound by that supreme law. Consider what makes this clause consequential, that is, what prevents it from being "mere surplusage."[46] If the Constitution's division of power was exhaustive, then this clause would be superfluous; it would follow as a matter of logic that the national government was supreme in the instances it was granted power and not

[45] U.S. Constitution., Art. VI, Sec. 2.

[46] *Marbury v. Madison*, 5 U.S. 174 (1803).

supreme where the states were granted power. In other words, there would be no questions occasioned by state-federal relations that a determinate division of power could not resolve because all such relations would be comprehended by a determinate federal system. But if the Supremacy Clause is to serve anything more than a merely hortative function it is because the Constitution's definition of the federal system is *not* determinate, thus making the clause necessary in order to address those instances to which the text does not reach but federal supremacy is nonetheless intended to apply. Equally important, the Supremacy Clause explicitly identifies the actors and bodies of law relative to which national supremacy is to be understood. Rather than simply assert the superiority of the national government, the Supremacy Clause indicates that the supremacy of federal law—whatever exactly that meant—would necessarily develop and be properly understood in relation to state governments.

Preserving the Federal Bargain: Three "Levels" of Constraints

The underdeterminate federal system described above casts new light on a question central to the Convention and ratification debates: Which level of government stands to gain from an underdeterminate definition of the state-federal relationship? The Anti-Federalist critique of the Constitution (about which more below) focused on the threat of consolidation they saw in the institutions established and powers granted by the document. For their part, the Federalists had the exact opposite fear. As Publius argued in

(*inter alia*) *Federalist* Nos. 17, 31, and 45,[47] it was at least as likely that the states would encroach on the national government, and the national government would be comparably ill-equipped to rebuff state encroachments. Both camps were united by the concern that the federal bargain reached at the Convention would not hold. Thus, two closely related questions are presented. First, what *kind* of protections does the Constitution provide for the federal system? And second, what *specific protections* does it provide? Both of these questions bear heavily on the political processes that the underdeterminate federal system structures and the political contestation that, in turn, shapes that system.

To answer the first question, we can advert to the identification, made by Filippov, Ordeshook, and Shvetsova, of three "levels" of constraints employed to preserve federal systems.[48] The first level entails "constraints that correspond in part to explicit bargains among federal subjects over the allocation of authority between them and the federal center, and other limits on their and the center's actions."[49] These protections consist of clear textual commitments identifying the extent of and limitations on the powers granted and prohibited, as well as promises guaranteeing autonomy in certain spheres. Level-two constraints encompass institutional structures and arrangements, both of which "define[]

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[47] See *The Federalist*, 17:106 (Hamilton: "It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."); 31:198 (Hamilton: "It should not be forgotten that a disposition in the State governments to encroach upon the rights of the Union is quite as probable as a disposition in the Union to encroach upon the rights of the State governments."); and 45:310 (Madison: "We have seen, in all the examples of ancient and modern confederacies, the strongest tendency continually betraying itself in the members, to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments…[A]s the States will retain, under the proposed Constitution, a very extensive portion of active sovereignty, the inference ought not to be wholly disregarded.").

[48] See Mikhail Filippov, Peter C. Ordeshook, and Olga Shvetsova, *Designing Federalism: A Theory of Self-Sustainable Federal Institutions* (Cambridge University Press, 2004), 33-41.

[49] *Id*., 36.

the national state, its relation to federal subjects, and its relation to the ultimate sovereign, the people."[50] Finally, level-three constraints are the values—political, cultural, and ideological—that serve to buttress the federal system. Though Filippov et al. focus on the operation of these values in elites, I follow Sanford Levinson and, as we shall see below, James Madison in interpreting these level-three protections as being constitutionally grounded in the people. Employing these distinctions we can address the second question, concerning what *specific protections* are provided by the Constitution. The balance of this section focuses on the first two levels, while level-three protections are treated in the following section.

(1) Level One: Explicit Bargains

Just as dividing state from federal powers cannot be an exact science, distinguishing level-one from level-two protections can at times be challenging because textual exhortations often accompany structural guidelines and institutional arrangements frequently incorporate a textual promise. Moreover, as Filippov et al. note, level-two protections serve in part to sustain level-one promises: "no Level I clause or provision can be of much consequence unless fortified by a second level of rules and procedures."[51] Nonetheless, several level-one protections can be identified in the Constitution. The first, which has already been discussed, is the Article VI Supremacy Clause. There we see the declaration that the Constitution and federal law are supreme, though no structural provisions accompany that claim. The clause stops short of "confer[ring] authority on any

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[50] *Ibid*.

[51] Filippov et al., *Designing Federalism*, 73; see also 36-37.

specific level or branch to say definitively what the Constitution meant when disputes arose."[52] Another such protection is offered by the Tenth Amendment, which states that all powers not delegated or prohibited are reserved to the states or to the people.[53] I discuss this amendment at greater length below, so it will suffice for present purposes simply to note that it serves principally a declaratory, as opposed to directly institutional or procedural, purpose.

The Preamble to the Constitution could plausibly serve as a level-one constraint as well. An argument to this effect would hold that the Preamble articulates the ends for which the national government was established and, as such, should guide the interpretation of national powers vis-à-vis state powers. Finally, a set of level-one protections can arguably be found in the grants of "legislative," "executive," and "judicial" powers in the opening sections of Articles I, II, and III, respectively. On this argument, those grants of power would be understood to identify the types of power of which national power partakes and would invite distinctions between these national powers and the parallel but distinct powers of the several states. But defending this argument, along with level-one justifications for the other examples cited, requires resources beyond those supplied by the Constitution's text alone. That is, it requires

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[52] Purcell, *Originalism, Federalism, and the American Constitutional Enterprise*, 141. Purcell goes on to argue that the Oath Clause (U.S. Constitution., art. VI, § 3) "rather plausibly suggested that all [state and federal officials] were equally responsible for interpreting and enforcing the new charter. Such a compromise promised little but future contestation" (*id*.).

[53] By similar logic, the 9th Amendment serves as a level-one constraint on the federal system. Making this argument, however, requires a fair amount of historical exposition and more space than is available here. For the most developed versions of this argument, see Kurt Lash, *The Lost History of the Ninth Amendment* (2009) and "The Inescapable Federalism of the Ninth Amendment," 93 *Iowa Law Review* 801 (2008). Lash's argument for the federalism-regarding purposes of the 9th Amendment poses a sharp challenge to its principal application in American constitutional law, privacy jurisprudence. For Lash's engagement with this issue, see "Inkblot: The Ninth Amendment as Textual Justification for Judicial Enforcement of the Right to Privacy," 80 *University of Chicago Law Review Dialogue* 219 (2013).

precisely the kind of structural and relational inference that Charles Black observed was largely forsaken in American constitutional law. And though there are strong arguments for the constitutional significance of the provisions cited here, the fact remains that they have been frequently neglected in favor of provisions that are either more clearly directive or minimize the degree of inferential reasoning required to reach an authoritative conclusion.[54]

(2) Level Two: Institutions

It was precisely this weakness of level-one protections that motivated Madison's argument against "parchment barriers" in *Federalist* 48. Rather than rely on mere textual declarations, "which appears to have been principally relied on by the compilers of most of the American constitutions," it was necessary to devise "some more adequate defense…for the more feeble, against the more powerful, members of the government."[55] As regards the federal system, such defenses come in the form of at least four level-two constraints: the rules of representation in the national legislature, the federal courts, state management of federal elections, and the state militia power. Starting with the first of these, the so-called Great Compromise reached at the Convention brought a mix of proportional and state-based representation to the national government. In the House of

[54] Of the provisions discussed here, the clearest example of this phenomenon is likely the Preamble, with the Tenth Amendment being a close second. The least clear example is ostensibly the Supremacy Clause, as ubiquitous as it is in the case law treating conflicts between state and federal laws. But even these instances illustrate the point being advanced here. For it is rarely enough to simply point to the Supremacy Clause as conclusive proof of a federal law's legitimacy. Instead, the clause is more often cited as a trump card, played after it has been shown that the federal law or action in question was a legitimate exercise of a national power, which in turn requires recourse to more clearly directive provisions.

[55] *The Federalist*, 48:333.

Representatives the rule of representation was People-as-Union, according to which the Union was defined as a popular constituency.[56] On this rule, the national People was the object of representation. The rule in the Senate was States-as-Union, by which the states were identified as the units of representation. Consequently, the representation of individual citizens in the upper chamber was tied to their status as citizens of the several states, and not primarily as members of a national constituency. The equal representation of the states is buttressed by the guarantee, in Article V, that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." The Senate's advice and consent powers on presidential appointments and treaties serves also to ostensibly inflect these exercise of national power with the input of the states.

The combination of rules of representation in Congress meant that the national legislative process would, in effect, model a virtual negotiation between the two objects of representation: the national People and the several states. Though the Senate is arguably the most significant component of state influence in the national government, it is important to recognize the ways in which undue state influence was *avoided*. Three such features that are commonly cited are the state legislatures' lack of the powers to recall senators and to control senatorial salaries (both of which would have enabled them

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[56] It is important, though, to note the significance of the states here too, as state boundaries still structure the apportionment of House seats and, as a result, House districts. See U.S. Constitution, Art. I, Sec. 2 and Amend. XIV, Sec. 2. This point is made by Michael W. McConnell in "The Redistricting Cases: Original Mistakes and Current Consequences," 24 *Harvard Journal of Law & Public Policy* 103 (2000-2001), 111 ("But even the House of Representatives, the members of which supposedly represent 'the People,' not states, flunks the 'one person, one vote' test."). Hence, it is understandable why this point would increase in salience in direct proportion to the emphasis on meeting the standard, set out in *Reynolds v. Sims*, 377 U.S. 533 (1964), of "one person, one vote." See also *Gray v. Sanders*, 372 U.S. 368 (1963), 379-381. Nonetheless, the distinction between the States-as-Union and the People-as-Union still stands because it rests on the presence or absence of mediation between citizens and their representatives, not the relative weight of citizens' votes for their representatives. My thanks to Mariah Zeisberg for pressing this point.

to punish disobedience or non-cooperation), as well as the Senate's six-year term of office (which meant that many senators would be in office longer than the state officials that appointed them).[57] Each of these proposals was debated and defeated at the Constitutional Convention, though they have enjoyed continued support as auxiliary safeguards for state influence over the course of American political history.

Second, the Constitution grants to the states the power to manage national elections. According to Section 2 of Article I, the qualifications for voting in elections for the House of Representatives are determined by the states' qualifications for their most numerous legislative branch. Until the passage of the 17th Amendment state legislatures were also empowered to choose the senators that would represent them.[58] Though the states were given the power to determine the "Times, Places, and Manner" of elections for the House and Senate, the Constitution also granted Congress the power to "make or alter such Regulations, except as to the Place of Chusing Senators."[59] As regards the election of the president, Article III empowers the state legislatures to determine how their electors will be appointed. Though these provisions have been altered significantly over the course of American history—most notably by the 15th, 17th, and 19th Amendments—the states nonetheless retain the power and a considerable amount of autonomy to influence the manner in which national representatives are elected.

The third level-two protection is the federal judiciary, which is endowed by Article III with the "judicial Power of the United States" and, by implication from the Supremacy

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[57] See Sanford Levinson, *Framed: America's 51 Constitutions and the Crisis of Governance* (2012), 311.

[58] U.S. Constitution., Art. I, Sec. 3.

[59] *Id*., Art. I, Sec. 4.

Clause, is empowered to enforce the state-federal relationship established by the Constitution. However, the efficacy of this protection for preserving state power depends on the degree to which the Constitution determinately defines the federal system. For if there is a non-negligible degree of underdeterminacy, as I've argued there is, then the federal judiciary's power to police the boundaries of that federal system merely begs the question of what those boundaries are. From the standpoint of state power this concern is enhanced by the fact that, despite its powers of enforcement, the judiciary is still a *national* judiciary. Unlike the system proposed by the New Jersey Plan, according to which state courts would have effectively served as the lower federal courts, the Constitution gives the national government full control—from appointment to confirmation to salary—over the federal judiciary. Moreover, depending on how it is interpreted, Article III either permits or requires Congress to establish lower federal courts, a debate that would quickly emerge in the First Congress and persist for decades to come. The very same reasons that underlay the Anti-Federalist opposition to the Senate could be applied to the federal court system. As Alison LaCroix convincingly argues in her study of the origins of American federalism, through its rejection of Madison's proposed national veto and subsequent adoption of the Supremacy Clause, the Convention opted for a markedly *judicial* resolution of conflicts over the federal system.[60] To the extent the federal judiciary expressed the views of the governmental level of which it was a part, the courts offered little comfort to those skeptical of the protections the Constitution offered to state autonomy and power. That the structure and

[60] Alison LaCroix, *The Ideological Origins of American Federalism* (Harvard University Press, 2008), 132-174.

jurisdiction of the federal judiciary emerged as a hotly contested issue between Federalists and Jeffersonian Republicans in the early national period illustrates the centrality of these matters to the distribution of powers between levels of government.

The fourth, and for our purposes final, level-two constraint on the federal bargain is the states' ability, implied by several provisions of the Constitution, to maintain a militia. Article I, Section 8 grants Congress the power to "call[] forth the Militia" and to "provide for organizing, arming, and disciplining" it when called into the "Service of the United States." Additionally, Article III identifies the president as the Commander-in-Chief not only of the "Army and Navy of the United States," but "of the Militia of the several States, when called into the actual Service of the United States." And, of course, there is the Second Amendment, which prefaces its recognition of the right of the people to keep and bear arms with the enigmatic declaration, "A well regulated Militia, being necessary to the security of a free State[.]" Though these provisions grant the national government a considerable measure of control over the state militias and clearly foresee some possible form of cooperative relationship, the more important point is that they recognize the very existence of state militias, implicitly condoning the continuation of these state-based military forces. Indeed, far from repudiating the role of violence in the federal system, the Second Amendment goes as far as to underscore the legitimacy of armed resistance in defense of liberty. Despite the shift of power over the militia from the states to the national government brought about by the Constitution, it's important to remember that the militia was widely seen as a prophylactic against the oppression made possible by a

standing army organized and maintained by the national government.[61] What's more, the congressional debate over what would become the Second Amendment seems to reveal a widespread agreement that, in the words of Roger Sherman, "the States, respectively, will have the government of the militia, unless when called into actual service[.]"[62] Taken together, the constitutional provisions recognizing the state militia power identify armed resistance as not only a possible but also a licit recourse in event of federal overreach. And, like so much else in the Constitution, the definitions of the terms on which the use of the militia power would depend are left unelaborated.

(3) Interlude: The States' Rights Amendment?

Given its importance, both legally and historically, for claims of state power, the Tenth Amendment merits separate consideration. The traditional constitutional prooftext for states' rights claims,[63] the Tenth Amendment can plausibly be read to preclude (or at least significantly weaken) the argument for federal underdeterminacy that I have advanced. With its reservation of powers to the states, the argument runs, the Tenth Amendment creates a zero-sum distribution of powers between the states and the national government, removing any uncertainty about the jurisdictional line separating the two.

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[61] See, for example, *The Federalist* No. 46, where Madison argues that any standing army raised by the national government would be offset by a militia orders of magnitude larger. In the debates over amendments to the Constitution in the First Congress, Elbridge Gerry gave voice to this understanding, saying, "What, sir, is the use of a militia? It is to prevent the establishment of a standing army, the bane of liberty." 1 *Annals of Congress: The Debates and Proceedings in the Congress of the United* States (Washington, D.C.: Gales & Seaton, 1834), 1:778 (August 17, 1789)

[62] Roger Sherman, *id*., 779 (August 17, 1789).

[63] See, *e.g.*, *National League of Cities v. Usery*, 426 U.S. 833 (1976) (holding unconstitutional the Fair Labor Standards Act as applied to state employees); and *New York v. United States*, 505 U.S. 144 (1992) (holding the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act unconstitutional for, in part, violating the Tenth Amendment).

On this head, two points are relevant. The first is that, for all the rhetorical fodder the amendment can provide advocates of state power, it actually does nothing to clarify the specific dimensions of the state-federal relationship. In fact, consistent with my analysis of the constitutional logic of federalism, by recognizing "powers not delegated…nor prohibited"[64] it acknowledges that there are aspects of the state-federal relationship that are not captured by the Constitution's text. Moreover, as Levinson argues, the amendment "provides no clue at all as to what precisely *is* assigned to the national government or prohibited to the states[.]"[65] This recognition in no way clarifies the extent—to say nothing of the scope of legitimate application—of federal powers granted by the Constitution, which would seem to be the true ground of contention in debates that center on the Tenth Amendment.

The second point concerns the significance of the amendment's final clause. After recognizing that there are powers beyond those delegated to the national government and prohibited to the states, the amendment concludes that those undefined powers "are reserved to the States respectively, or to the people." While most arguments in the states' rights vein place emphasis on the reservation to the states, it must be remembered that those undefined powers are also reserved to the people. The addition of "the people" to the analysis of the state-federal relationship not only underscores the popular basis of republican government; it also foregrounds, but does not resolve, the question of where the people stand in relation to both levels of government. For example, the meaning

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[64] U.S. Constitution, Amendment X.

[65] Levinson, *Framed*, 309.

would be quite different if the amendment concluded with "reserved to the States respectively, *that is to the people*," a formulation that would have equated the people in their political capacity with the states. Similarly, it could have read "reserved to the States respectively, *and not to the people*," which would have implied that the division of power is a zero-sum enterprise, with every addition to national power coming at the expense of an otherwise state-possessed power.

Both of those alternative formulations are markedly different from what the Tenth Amendment actually says, what it means, and the political realities it underscores. For Joseph Story, the amendment served as "a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution."[66] As he argues in his *Commentaries*,

> "Being an instrument of limited and enumerated powers, it follows irresistibly, that what is not conferred, is withheld, and belongs to the state authorities, if invested by their constitutions of government respectively in them; and if not so invested, it is retained BY THE PEOPLE, as a part of their residuary sovereignty."[67]

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[66] Joseph Story, *Commentaries on the Constitution of the United States; with A Preliminary Review of the Constitutional History of the Colonies and States, before the Adoption of the Constitution* (1991 [1833]), 3:752.

[67] *Ibid.* (emphasis in original). Significantly, this passage is followed by a discussion of the nature of powers delegated to government. After recounting the efforts in Congress to add the word "expressly" to the original draft of the Tenth Amendment, Story writes, "On that occasion it was remarked, that it is impossible to confine a government to the exercise of express powers. There must necessarily be admitted powers by implication, unless the constitution descended to the most minute details. It is a general principle, that all corporate bodies possess all powers incident to a corporate capacity, without being absolutely expressed" (752-753).

Here Story emphatically identifies the people as the foundation of political power, the ultimate sovereign who in a federal system delegates *all* political power.[68] On this reading, the Tenth Amendment pays homage to Madison's arguments in *The Federalist* Nos. 37 and 46 by gesturing towards the people's role in shaping the contours of the state-federal relationship. But the addition of the people to the state-federal equation raises a host of further questions. Where do the people fit into the process by which the state-federal line is contested? How does the presence of two fundamentally different governments affect the political meaning of a decision to support one over the other? What does it even mean in a federal system to choose one government over the other? It is to these questions that I now turn.

The Relationships of Sovereignty

We have seen thus far that the constitutional division between state and federal powers is underdeterminate and that, as a result, the precise contours of the state-federal relationship are subject to contestation, adjustment, and revision. We can now turn and inquire into the significance of these facts. Put more precisely, the question now before us is, why is this underdeterminacy and relational contestation relevant to an inquiry into the nature and development of the federal system? Answering this question takes us from the first component of our analysis—the structure and institutional arrangement of the federal

[68] This interpretation echoes James Wilson's argument, voiced at both the Constitutional Convention and the Pennsylvania Ratifying Convention, that denying the people the ability to delegate power to the general government is tantamount to allowing the subordinate States "to dictate to their superiors…to the majesty of the people[.]" See *The Founders' Constitution*, 1:8:18 [citation notes the volume, chapter, and document number that correspond to the on-line version, which can be found at http://press-pubs.uchicago.edu/founders/tocs/toc.html].

system—to the second component, the relationships between the two levels of government and their citizens. Those relationships are the subject of the following discussion. I begin with an examination of what Sanford Levinson has called the "political sociology of federalism,"[69] focusing specifically on the concept of "attachment" in Publius' arguments in behalf of the Constitution. In the second section, I broaden the focus to inquire into the substance of the Anti-Federalists' treatment of "attachment." Taken together, these two sections reveal that, despite important differences concerning their understanding of the nature of attachment, Federalists and Anti-Federalists alike saw it as a crucial component of the underdeterminate federal system. Whereas Federalists acknowledged citizens' prevailing attachment to state governments and argued that it was a central though not inalterable, limit on federal power, Anti-Federalists feared that the creation of a national government would provide a new object of attachment whose very presence would undermine state power, over time leading to an increasingly centralized, if not wholly consolidated, government.

Level Three: The Political Sociology of Federalism

Even before Publius published the first essay in the series that would become *The Federalist*, the Constitutional Convention's proposal was attacked for presenting to the people a "consolidated government," that is, one "whose natural, perhaps inevitable tendency would be to annihilate the state governments or reduce them to

[69] See Levinson, *Framed*, 318; see also "Union and States' Rights 150 Years after Sumter: Some Reflections on a Tangled Political and Constitutional Conundrum," in *Union & States' Rights: A History and Interpretation of Interposition, Nullification, and Secession 150 Years After Sumter*, Neil H. Cogan (ed.) (University of Akron Press, 2013).

insignificance."[70] Typical of this genre of critique is The Federal Farmer's contention in his first essay, where he argues,

> The plan of government now proposed is evidently calculated totally to change, in time, our condition as a people. Instead of being thirteen republics, under a federal head, it is clearly designed to make us one consolidated government… The plan proposed appears to be partly federal, but principally however, calculated ultimately to make the states one consolidated government.[71]

This fear was echoed in the essays of Brutus,[72] Agrippa,[73] and the Impartial Examiner,[74] as well as Robert Yates and John Lansing's letter to the governor of New York, "Objections to the Federal Constitution."[75] It was also a common critique in the state ratifying conventions. For example, in the Pennsylvania convention, John Smilie argued that "it is fair and reasonable to infer, that it was in contemplation of the framers of this system, to absorb and abolish the efficient sovereignty and independent power of the several States, in order to invigorate and aggrandize the general government."[76] In Virginia's convention, Patrick Henry made the same argument, illustrated by reference to the Constitution's opening claim to speak in the name of a single *national* People:

> I rose yesterday to ask a question, which arose in my own mind. When I was asked the question, I thought the meaning of my interrogation was obvious: The fate of this question and America may depend on this: Have they said, we the States? Have they made a proposal of a compact between States? If they had, it

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[70] *The Founders Constitution*, 1:8.

[71] Letter I, *id.*, 1:8:12.

[72] See, *e.g.*, Essays I and XI, in *The Anti-Federalist: An Abridgment of the Complete Anti-Federalist* (Herbert Storing ed., 1985), 108-117 and 162-167. [Hereinafter Storing, *The Anti-Federalist*.]

[73] See, *e.g.*, Essays IV and VI, *id*. 234-236 and 238-240.

[74] See letter of 5 March 1788, *id*., 286-291.

[75] *The Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2nd ed. (Jonathan Elliot ed., 1863), 1:480-482.

[76] *The Founders' Constitution*, 1:8:16.

> would be a confederation: It is otherwise most clearly a consolidated government.[77]

In short, the debate over the Constitution quickly coalesced around the fear that, in either the short or the long term, the power of the states would be eroded while that of the national government would increase *pari passu*.

How could Publius respond to this accusation? Early in *The Federalist*, Hamilton engaged the consolidation charge, arguing that the federal government's attempt to usurp the powers of the states "would be as troublesome as it would be nugatory."[78] But his argument in behalf of the Constitution ultimately rested on conjecture about the disposition of national representatives—"I confess I am at a loss to discover what temptation the persons intrusted [*sic*] with the administration of the general government could ever feel to divest the States of the authorities of that description."[79] Later in *The Federalist* Madison identified the national and federal components of the "compound republic" (No. 37), explained how the proposed Constitution conformed to republican principles (No. 39), and provided a general defense of the powers delegated to the national government (Nos. 41-43). Nonetheless, as the excerpt from The Federal Farmer attests, fears of consolidation persisted. And so in Essays 45 and 46, Madison presents his case for why states will have the advantage over the national government, in the hope of rendering the Anti-Federalists' charges of consolidation baseless. The lynchpin of Madison's argument is found in No. 46, where he writes,

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[77] *Id.*, 1:8:38.

[78] *The Federalist*, 17:106.

[79] *Ibid*.

> Many considerations, besides those suggested on a former occasion, seem to place it beyond doubt that the first and most natural attachment of the people will be to the governments of their respective States. Into the administration of these a greater number of individuals will expect to rise. From the gift of these a greater number of offices and emoluments will flow. By the superintending care of these, all the more domestic and personal interests of the people will be regulated and provided for. With the affairs of these, the people will be more familiarly and minutely conversant. And with the members of these, will a greater proportion of the people have the ties of personal acquaintance and friendship, and of family and party attachments; on the side of these, therefore, the popular bias may well be expected most strongly to incline.[80]

The conceptual anchor of this argument is Madison's emphasis on the "attachment of the people," a relationship of familiarity, connection, and trust that will prevent the national government from encroaching on the states.

Sanford Levinson has described Madison's argument in *The Federalist* No. 46 as "one of *political sociology* and not one based on the raw text of the Constitution, which scarcely supports in an unequivocal way a reading of significantly limited national powers."[81] He presents Madison's argument about attachment as maintaining that "ordinary citizens will naturally identify with their state governments and view the national government as a fairly remote and possibly mistrusted identity."[82] In other words, relative to the national government, the state governments will be larger, better known to the people, and more able to directly benefit more people than the national government. As such, they will be the objects of their trust and allegiance. The people will identify with their state governments and, for that reason, they will resist attempts to transfer power to the relatively unknown and remote federal government.

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[80] *The Federalist*, 46:316.

[81] Levinson, *Framed*, 246 (emphasis in original).

[82] *Id*., 247.

In evaluating Madison's argument in No. 46, it is critically important to recognize the basis for his contention that states needn't fear consolidation. Rather than rest his argument on Filoppovian level-one or level-two protections of the federal bargain, like those discussed in Part I, Madison invoked level-three protections: the cultural and ideological values of the people. Of the five state advantages over the federal government that he identified in *Federalist* 45, three were rooted in the sentiments or commitments of the people: "the weight of personal influence," "the predilection and probable support of the people," and "the disposition and faculty of resisting and frustrating the measures of each other."[83] Incidentally, the remaining two—"the immediate dependence of the one on the other" and "the powers respectively vested in them"—are directly connected to the degree of determinacy of the federal system, which in light of my argument at the outset of this chapter would call into question how strong these state advantages actually are.

At the end of the day, Madison argued, constitutional text and institutional design only go so far. Within the broad parameters established by the Constitution, many of the details of the state-federal relationship would depend on which government enjoys the attachment of the people. And precisely because there is underdeterminacy in the federal system, the people would be able to choose which government to trust, or, put slightly differently, which government to entrust with the power to act on its behalf. In this way, underdeterminacy supplies the conditions necessary for the people's attachment to be politically consequential. As Josh Chafetz has argued, "[T]he balance of powers between the federal government and the states must remain to some degree indeterminate. If there

[83] *The Federalist*, 45:311.

is no indeterminacy, then there is no possibility for conflict; and if there is no possibility for conflict, then there is no opportunity for the people to choose their champion."[84] Chafetz's use of "indeterminacy" here is synonymous with my use of underdeterminacy throughout this chapter. (And as I, among several others have argued, underdeterminacy is the more accurate term for the phenomenon under investigation.) We can, therefore, condense his argument as follows: because there is underdeterminacy, conflict is inevitable; and because conflict is inevitable, the people will be able to choose which government to attach itself to. Accordingly, subject to legal and popular limitations the national and state governments will act where the people deem proper, and the state-federal relationship will reflect these determinations. Federal underdeterminacy and the variable constitutional authority that results from the people's attachment are reciprocal features of the American federal system.[85]

Though Levinson identifies only *The Federalist* No. 46 in his discussion of the political sociology of American federalism, the concept and consequences of the "attachment of the people" pervade *The Federalist*. In his seminal study, *The Political Theory of* The Federalist, David Epstein connects the notion of attachment to Madison's discussion in *The Federalist* No. 37 of the "proper line of partition" between the state and federal governments, arguing that that line would be "determined by the degree to which

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[84] Josh Chafetz, "Multiplicity in Federalism and the Separation of Powers," 120 *Yale Law Journal* 1084 (2011), 1093.

[85] Variable constitutional authority along these lines is a central emphasis of Mariah Zeisberg's work. See, generally, *War Powers*. See also Zeisberg, "Constitutional Fidelity and Interbranch Conflict," 13 *The Good Society* (December 2004), 24-30. For a similar, though ultimately distinct, notion of variable authority, see Wayne Moore, "Variable Constitutional Authority: Madisonian Founding Perspectives," 2 *American Political Thought* 217 (2013).

the people are or become attached to one or the other."[86] Epstein grounds Madison's contention that the states will have the advantage over the national government to, at least in part, an argument made in *The Federalist* No. 17. There Hamilton identifies the states' "administration of criminal and civil justice" as the source of the "one transcendent advantage belonging to the province of the State governments."[87] Not only is the states' administration of justice carried out in close physical proximity to the people, but it is also responsible for the protection of their lives and property. Both of these considerations would serve to remind the people of the importance, even necessity, of their state governments.

But, as one might expect knowing Hamilton's confidence in an energetic national government, there is more to this argument than is perhaps apparent on the first reading. For in the course of his assurances that states will benefit more than the federal government from the peoples' attachment, he identifies the principal qualification to the states' advantage. After asserting that affections decrease "in proportion to the distance or diffusiveness of the object," he concludes that local governments will be the object of the people's stronger bias. But appended to that conclusion is a profoundly consequential condition: "unless the force of that principle should be destroyed by a much better administration of the latter [*i.e.*, the government of the Union]."[88] Here Hamilton not only opens the door to the possibility that the people's attachment may shift to the new national government; he also identifies the process by which that shift can happen. The

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[86] *The Political Theory of* The Federalist, 52.

[87] *The Federalist*, 17:107.

[88] *Ibid*.

national government can, in effect, win over the people by doing well what it is charged with doing. Ten essays later, Hamilton again picks up this line of reasoning, candidly admitting that many of the *Federalist* essays have presented "reasons…to induce a probability that the general government will be better administered than the particular governments."[89] And because there is, he argues, no justification for the opinion that the general government will be administered worse than the state governments, "there seems to be no room for the presumption of ill-will, disaffection, or opposition in the people."[90] In other words, there is no reason to believe that the national government could not out-perform the state governments and, as a consequence of and in combination with the prevailing sentiments of the people, attract their attachment. While it is true that the people's extant attachments to the states could persist, a beneficial and, in time, respected national government could change that. And with that change could come theretofore uncontemplated configurations of the state-federal relationship.[91]

Attachment and the Anti-Federalist Fear of Consolidation

Lest one get the impression that Publius' treatment of attachment is a function more of an idiosyncratic or biased (collective) mind than of broader conceptual or discursive importance, we can also look to the Anti-Federalist critique of the Constitution. Recourse

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[89] *Id*., 27:172.

[90] *Id*., 27:171.

[91] Given Publius' anonymity at the time of publication, it wasn't likely that the authors' arguments would be interpreted through the specific lens of their reputations or, as in the case of Madison and Hamilton, known ambivalence—and, at times, antipathy—towards state governments. But it is nonetheless remarkable that in an essay (which itself is part of a larger enterprise) devoted to convincing skeptics of the Constitution's merits, Publius forthrightly acknowledged the logical implications of the argument about attachment and the potentialities of the federal system.

to the Anti-Federalists is helpful also for emphasizing that the argument I am advancing is not an argument about original intent, nor one that unnecessarily privileges the writings of a single individual (Madison or Hamilton) or writer (Publius). Rather it seeks to understand the logic of the political system established and regime inaugurated by the Constitution, and cites as illustration and support those who "saw best and farthest."[92] Moreover, by looking to the arguments of *both* parties to the debate over ratification, we can identify the central points of agreement between the two as well as the rationale underlying their disagreements. Indeed, when we look to the Anti-Federalists we find a more nuanced and compelling understanding of attachment than is presented in *The Federalist*. And for good reason. While Publius' discussions were concerned only with stasis—the peoples' attachments were and would upon ratification remain with their state governments—writers like The Federal Farmer, Brutus, and Agrippa were forced to deal with the *possibility of choice* presented by the proposed Constitution. With the addition of another government that acted directly on individuals, state governments would have to compete for the peoples' allegiances and would always be under threat of losing their attachment. There would, in other words, be competition between governments for the support of the people and, as a consequence, the power to act in the people's name. Accordingly, they were forced to argue developmentally, painting a picture not only of what the Constitution would do in the short term but also of what kind of regime it would create over the long run. For this reason, while the variability of constitutional authority

[92] Gordon Wood, *The Idea of America: Reflections on the Birth of the United States* (Penguin Books, 2011), 128. I cite this characterization well aware that Wood believes it was the Anti-Federalists, and not the Federalists, who best understood the political world to come and the consequences of the constitutional regime they opposed. Indeed, as I argue below, seeing farthest was not only a substantive merit of much Anti-Federalist argumentation; it was also a practical necessity.

is implied in Publius' treatment of attachment, it is a central concern of the Anti-Federalist critique of the federal system established by the Convention.[93]

We can begin to understand the Anti-Federalist notion of attachment by identifying an important area of common ground they shared with Publius. Both groups saw the attachment of the people as a central concern of statecraft and, by extension, as a crucial determinant of the contours of the state-federal relationship. Thus, for example, John Smilie's argument that "the attachment of the citizens to their government and its laws is founded upon the benefits which they derive from them" parallels Hamilton's argument in *The Federalist* No. 17 about attachment following the quality of government administration. Additionally, Brutus' claim that every government must be supported either by force or "by the people having such an attachment to it"[94] is echoed by Madison's pairing in *The Federalist* No. 46 of attachment and the power to maintain a militia as guarantors of state autonomy.[95] Finally, there is Centinel's belief that "time and habit" give "stability and attachment…to forms of government,"[96] which mirrors Madison's belief, expressed at the Convention, that attachments of association and

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[93] Though beyond the scope of this essay, it should at least be noted that a comprehensive assessment of the relevance of attachment to the understanding of the Convention's proposal would have to connect both Publius' and the Anti-Federalists' arguments back to the records of the federal convention. A cursory review of the Convention proceedings only underscores the discussion presented here, and several relevant episodes from the Convention are thus adduced. It also reveals that, in contrast to (many of) the ratification debates, attachment frequently appears in connection with the question of what influences the allegiances of representatives and how political structures and requirements can exploit or avoid those influences as desired. See, *e.g.*, the debate on 9 Aug., Farrand, *Records*, 2:230-242.

[94] Brutus, No. IV (29 Nov. 1787); see also Federal Farmer, Essay XVIII (25 Jan. 1788). Both in Storing, *The Anti-Federalist*.

[95] Here, after postulating that a regular army wouldn't number more than "twenty-five or thirty thousand men," Madison writes: "To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence." *The Federalist*, 46:321.

[96] Centinel, No. 1 (5 Oct. 1787), in *The Complete Anti-Federalist* (Herbert Storing ed., 1981), 1:137.

knowledge constitute a government's "greatest strength and support."[97] Examples could be multiplied further, but those cited here suffice to establish the point that for Federalists and Anti-Federalists alike, the attachment of the people was a deeply consequential component of the design and operation of government.

Here as elsewhere, though, the two groups disagreed in the particulars. The Federalists saw attachment as principally a function of effective governance, which had been undermined by the state governments so beloved by the Anti-Federalists. As Herbert Storing has described this position, "A government that can actually accomplish its resolves, that can keep the peace, protect property, and promote the prosperity of the country, will be a government respected and obeyed by its citizens."[98] But for the Anti-Federalists, attachment was the product of support freely given, of a confidence borne of knowledge of and proximity to one's governors. The extended republic proposed by the Constitution threatened the ability of individuals to gain such knowledge by increasing the distance between them and their government. Accordingly, it threatened the possibility that attachment could be freely given. This was, to the Anti-Federalist mind, a critical defect of the Constitution, because there was only one alternative to voluntary attachment: force.[99]

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[97] Madison, 23 June, Farrand, *Records*, 1:392. Incidentally, this quotation comes not from Madison's own notes, but the records kept by Robert Yates, further emphasizing the conceptual and linguistic commonalities between the authors of *The Federalist* and their contemporaries.

[98] Herbert Storing, *What the Anti-Federalists Were* For*: The Political Thought of the Opponents of the Constitution* (1981), 43.

[99] In his study of Anti-Federalist thought, Storing identifies three "fundamental considerations" that underlie the defects of the large republic. Its inability to "enjoy a voluntary attachment of the people to the government and a voluntary obedience to the laws" is listed first (*What the Anti-Federalist Were* For, 16).

We therefore see in the Anti-Federalist critique of the Constitution an almost constant pairing of voluntary attachment and the coercive force of a central government, framed by the argument that the extended republic undermines the prerequisites of voluntary attachment. We've already seen the thrust of Brutus' argument on this point, but its centrality to his and other Anti-Federalists' opposition to the Constitution merits further attention. In his first essay he writes,

> Men who, upon the call of the magistrate, offer themselves to execute the laws, are influenced to do it either by affection to the government, or from fear; where a standing army is at hand to punish offenders, every man is actuated by the latter principle, and therefore, when the magistrate calls, will obey…The body of the people being attached, the government will always be sufficient to support and execute its laws, and to operate upon the fears of any faction which may be opposed to it, not only to prevent an opposition to the execution of the laws themselves, but also to compel the most of them to aid the magistrate; but the people will not be likely to have such confidence in their rulers, in a republic so extensive as the United States, as necessary for these purposes.[100]

Obedience by force or voluntary attachment—those are the two available sources for the support and assistance that all governments depend on to implement their laws. But, as Richard Henry Lee argued, a consolidated nation "cannot be governed in freedom." Whereas at the state level "opinion founded on the knowledge of those who govern, procures obedience without force," the extended republic obliterates that opinion by diminishing the requisite knowledge, "and force then becomes necessary to secure the purposes of Civil society[.]"[101]

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[100] Brutus, No. I, in Storing, *The Anti-Federalist*, 115.

[101] Richard Henry Lee, letter to Samuel Adams, 8 August 1789, *The Letters of Richard Henry Lee* (1914), 2:496. Though this letter is cited and discussed in Storing, *What the Anti-Federalists Were* For*,* 16-17, it is attributed to a letter of 28 April 1788, with the recipient unknown.

We've seen that the Anti-Federalists' treatment of attachment is a constitutive part of a broader critique of the extended republic. But the argument I'm advancing here requires more than that, namely it must show that their treatment of attachment is bound up in the nature of the federal system. That is, that the Anti-Federalist critique is not just about the size of the nation to be governed by the Constitution, but also the structure of the federal system proposed to govern it. To the opponents of the Constitution, it was clear that the federal system as structured by the Constitution fundamentally changed the economy of attachment. Where there was once voluntary attachment to a known and physically proximate government, there would be a transactional attachment with a far-off government—an allegiance rooted in the things government does and provides, not freely given support flowing from knowledge of one's governors. Moreover, the federal system changed the calculus of attachment. In addition to trafficking in another currency of allegiance, the mere existence of an additional layer of government would destabilize the states by offering an exit option. If states didn't merit the support of their citizens, under the Constitution the latter could punish the former not only by electing national-level representatives to assume erstwhile state duties but also by electing state-level representatives more favorable to national power or policies. States would now have to compete for the people's support, and they would have to do so on the national government's terms.

I conclude this section with a brief comment on the relationship between the substance and practical imperatives of the Anti-Federalist critique of the Constitution. Reading the Anti-Federalist responses to the Convention's proposal, one is struck by their

predictive, almost prophetic tones. Theirs was not so much an appraisal of what the Constitution does in the immediate or short term as it was an attempt to understand and describe what the Constitution *would do*—to government, to society, and even to individual citizens. They were acutely aware that "the Constitution is much more than a constitution of government,"[102] that it would define both the ends towards which government was oriented and the means by which those ends would be pursued; as a result, it would constitute the *people* as much as their government. They saw not only the alterations to American governance posed by the Constitution, but the subsequent changes that those alterations would beget. Hence, they argued not that ratification of the Constitution would immediately institute a consolidated government but that it was "calculated ultimately to make the states one consolidated government,"[103] and that, "although the government reported by the convention does not go to a perfect and entire consolidation, yet it approaches so near to it, that it must, if executed, certainly and infallibly terminate in it."[104] The Federalists, on the other hand, faced a different imperative, to assure those skeptical of national power that the Constitution did not create an unnecessarily powerful federal government. Accordingly, they focused on the many things that the Constitution would not immediately change, foremost among which was the vast body of state powers that, for reasons of popular attachment and government capacity, would *for the time being* remain with the states. It was left to the Anti-

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[102] Barber, *Fallacies*, 174.

[103] Federal Farmer, Essay I, in Storing, *The Anti-Federalist*, 37.

[104] Brutus, No. I, *id*., 110.

Federalists to identify and explain how even those could in time be changed by the government proposed by the Constitution.

Attachment, Administration, and American Constitutional Development

The foregoing characterization of the federal system established by the Constitution captures the defining features of American federalism: the underdeterminacy of the state-federal relationship and its related dependence on the attachment of the people. While the contours of the state-federal relationship were not explicitly defined by the constitutional text, its parameters were nonetheless identified and demarcated. Those contours, furthermore, are shaped by the people's support for and confidence in each level of government, as well as their relative assessments of the two. As a result, the range of possible state-federal relationships is constrained but not fully specified by the constitutional text, and is embedded in the politics of a given moment. The elaboration or construction of the state-federal relationship is, therefore, a function of constitutionally structured politics and is both the responsibility of elected officials and a natural consequence of their efforts to pursue the ends of good governance.[105] It is, therefore, appropriate to think of the federal system as a constitutional disharmony, a component of the regime that "generates a dialogical process that may result in changes in identity that, however significant, only rarely culminate in a wholesale transformation of the constitution."[106] Federalism is *proleptic of* constitutional development—it structures,

[105] See, generally, Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999).

[106] Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010), 326.

anticipates, and precipitates conflict over constitutional meaning and, as a consequence, constitutional identity.[107]

While this understanding of the federal system directly conflicts with an interpretive approach that seeks legal determinacy from the Constitution on the question of the state-federal relationship, it is broadly consistent with the work of a number of scholars who see federalism "as a continuing tension contained within, and created by, the founding document."[108] What is less common, though, is the recognition that this feature of the American constitutional order induces particular kinds of debates and certain developmental dynamics. As to the former, the state-federal relationship becomes a *product* of constitutional politics, something that both structures and is produced by debates over the proper meaning or desirable manifestation of the system of governance established by the Constitution.[109] As to the latter, the underdeterminacy of the federal system privileges certain variables the development, augmentation, and modulation of which bear heavily on the nature of the federal system. While perhaps not as explicit as recurring patterns of politics, these variables (or determinants) nonetheless highlight

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[107] The argument presented here is an abridgment of Parts II and III of Connor M. Ewing, "Structure and Relationship in American Federalism: Foundations, Consequences, and 'Basic Principles' Revisited," 51 *Tulsa Law Review* 689 (2016).

[108] Keith E. Whittington, "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius* 26(2): 1. See also Edward Purcell, Jr., *Federalism, Originalism, and the American Constitutional Enterprise* (Yale University Press, 2007), 6; and David Brian Robertson, *Federalism and the Making of America* (Routledge, 2012), 34.

[109] Though it is not the focus of this inquiry and there is not sufficient space to adequately address the matter, it is nonetheless critical to note that this description is not intended to exclude judicial engagements with the federal system. Courts, as much as legislatures and executives, are affected by the underdeterminacy of the federal system, and their behaviors are influenced accordingly. In this way, judicial interpretations of federalism are not apart from but a species of the processes described here. This is the basic argument advanced in Chapter Three. For the development of a different component of this argument, one that critically evaluates commonly used tools of constitutional and statutory interpretation, see Ewing, "Structure and Relationship," 712-728.

aspects of governance and political institutions that have the potential to shape constitutional meaning.[110] Taken together, these induced characteristics give both shape and substance to constitutional development.

The constitutional logic of federalism outlined here is, I believe, the best understanding of the system of government inaugurated by the Constitution. Moreover, it is the conception of the federal system that Publius elaborates and defends in *The Federalist*, a fact that is somewhat remarkable. After all, critics of the Constitution alleged that the scheme of government set forth thereby would result in the "consolidation of the United States, into one government."[111] This was due in large part to the "vast extent of the United States" and what that extent would require, namely the use of coercion or force and the consequent diminution of liberty.[112] Their fear, in brief, was that the distribution of powers between the states and the national government would not hold, that the latter would in time "necessarily absorb the state legislatures and judicatories."[113] As Storing explains, "The Anti-Federalists stood…for federalism in opposition to what they called the consolidating tendency and intention of the

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[110] For an overview of the developmental mechanisms employed by scholars in the field of political development, see Paul Pierson, *Politics in Time: History, Institutions, and Social Analysis* (Princeton University Press, 2004); and "Not Just What, but When: Timing and Sequence in Political Processes," *Studies in American Political Development* 14(1):72-91 (2000). See also Karen Orren and Stephen Skowronek, *The Search for American Political Development* (Cambridge University Press, 2004).

[111] Cato, Letter III, 25 Oct. 1787, *The Essential Antifederalist*, ed. W.B. Allen and Gordon Lloyd (Rowman & Littlefield, 2002), 27. See also Agrippa, Letter IV, 3 Dec. 1787, *id*., 122.

[112] Brutus, Essay I, 18 Oct. 1787, *id.*, 102. According to Brutus, this consolidation was "in the contemplation of the framers" of the Constitution. Citing the provision in Article I, Sec. 4 that empowered Congress to "make or alter [electoral] regulations," he argued that it was only a matter of time before "the state legislatures drop out of sight from the necessary operation of the government, then Congress are to provide for the election and appointment of representatives and senators" (*id*.).

[113] Brutus, Essay I, *id*., 102.

Constitution—the tendency to establish one complete national government, which would destroy or undermine the states."[114]

In the analysis of the political sociology of federalism we saw that Publius' response to the consolidation charge entailed adverting to considerations of political culture, specifically to the people's affective posture toward each level of government. We can now go one step further, following Publius' argument as it traced the attachment of the people to its foundation in government performance and administration. Recall that this was a theme that emerged early in *The Federalist*, where Hamilton suggested that, despite natural advantages possessed by the states, the attachment of the people would be influenced by how the governments of the union discharged the duties with which they were entrusted. More specifically, Hamilton argued that the states would possess "the greater degree of influence…if they administer their affairs with uprightness and prudence[.]"[115] This conditional advantage, buttressed by the principle of human nature that "affections are commonly weak in proportion to the distance or diffusiveness of the object," would persist "unless the force of that principle should be destroyed by a much better administration of" the national government.[116] But it wasn't until later in the ratification debate, when Madison engaged the consolidation charge directly, that this argument was spelled out in greater and more practical detail. As we've already begun to see, the attachment of the people is not free-standing; nor does it exist in a vacuum. It is, rather, grounded in political facts and circumstances connected most immediately to the

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[114] Herbert Storing, *What the Anti-Federalists Were* For, 10.

[115] *The Federalist*, 17:106.

[116] *Id.*, 17:107.

performance of government. Poor or unsuccessful administration will do little to preserve, much less cultivate or increase, popular support. The quality of governmental administration, in turn, depends on the ability of each government to capably acquit itself, which is principally a matter of government capacity. Without the requisite powers, resources, or institutions, there is little hope for successful administration. We see, therefore, a direct causal line connecting government capacity, running through administration, to the attachment of the people.

Madison mounts this argument in *The Federalist* Nos. 45 and 46 alongside the argument about attachment discussed in the previous section. There he undertakes to answer the question of whether the powers granted to the national government will "be dangerous to the portion of authority left in the several States."[117] Instead of legal restrictions or constitutional impediments—about whose efficacy he was less than optimistic—Madison adverted to a collection of practical facts and forces that underlie the ability of the national and state governments "to resist and frustrate the measures of each other."[118] In No. 45, he lists "the immediate dependence of the one [government] on the other," "the weight of personal influence which each side will possess," "the powers respectively vested in them, "the predilection and probable support of the people," and "the disposition and faculty of resisting and frustrating measures of each other."[119] Each of these considerations, Madison averred, had persuaded him that it was more likely that the states could encroach on the federal government than vice versa. In No. 46, he again

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[117] *Id*., 45:308.

[118] *Id*., 46:317.

[119] *Id*., 45:311.

cites the national government's dependence on the state governments, the "prepossessions of the people on whom both will depend," and the "disposition" or bias that members of both governments will have towards local matters.[120] He adds in this essay four more considerations, arguing that the states will employ more people than the national government, will control "a greater number of offices and emoluments," will regulate and provide "all the more domestic and personal interests of the people," and will possess more and better connections with the people.[121]

Madison's elucidation of the federal system established by the Constitution was made necessary by its underdeterminacy. He and other proponents of the Constitution, whether in the pages of New York newspapers or the ratifying conventions in the several states, could not easily point to a precise definition of the state-federal relationship; nor could they identify a clear statement of the jurisdictional line dividing the states from the national government. Nonetheless, Publius was remarkably candid about this fact and even its potential to lead to the aggrandizement of the new national government. Referencing Hamilton's argument in No. 27, Madison provides in No. 46 a passage that is indispensable for understanding the nature of the governmental system established by the Constitution:

> If therefore, as has been elsewhere remarked, the people should in future become more partial to the foederal [*sic*] than to the State governments, the change can only result, from such manifest and irresistible proofs of a better administration, as will overcome all their antecedent propensities. And in that case, the people ought not surely to be precluded from giving most of their confidence where they may discover it to be most due: But even in that case, the State governments could

[120] *Id*., 46:319.

[121] *Id*., 46:316.

> have little to apprehend, because it is only within a certain sphere, that the foederal [*sic*] power can, in the nature of things, be advantageously administered.[122]

Here Madison not only acknowledges the malleability of the federal system but suggests that the distribution of power between levels of government—a consequence of the variable partiality, or attachment, of the people—would reflect and respond to administrative competence. He doesn't, however, go as far as Hamilton did in No. 27, where Hamilton forthrightly states that there's little reason to believe that the states will have an advantage over the national government.[123] Rather, the reassurance that Madison has for those who feared consolidation is that there are natural limitations to the things that the federal government can administer well. Such limitations are reflected in his litany of state advantages. If one grants all of these things, it is not implausible to conclude that the reach of the national government would be substantially limited.[124]

But in matters of politics, "the nature of things" is bound to change. It may, indeed, not be too much to say that in politics the nature of things *is* change. This is precisely what the Anti-Federalist writers surveyed here feared—that the proposed Constitution would bring about radical changes or, in the case of those changes for which it was not directly responsible, would bring about undesirable results in the different circumstances

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[122] *Id*., 46:317.

[123] *Id*., 27:172-173.

[124] There is an argumentative thread running throughout Federalist and Anti-Federalist writings that connects the attachment or confidence of the people to the things they ask government to do. As goes the former, so goes the latter. So having previously suggested that the people may well become more or better attached to the national government than to their respective state governments, Publius was pushed to identify an intervening variable that would disrupt or confound the causal connection between attachment and governmental responsibility. We encounter in *The Federalist* Nos. 45 and 46 the development of this argument, with Madison citing administrative capacity as a limitation on national power.

that lay ahead of the country. For their part, Federalists acknowledged the necessity of change: a new frame of government was needed to make the states adequate to the challenges of the day, as well as for the future they could obtain under prudent, energetic, and well-structured governance. In this respect, the Constitution's invocation of "our Posterity" was much more than rhetorical embellishment; it was a concern embedded in the structures and processes it would establish. At the Constitutional Convention and throughout the ratification debates, change and the future circumstances it would bring about were at the very center of discussion. Hence the significance of the fact that each safeguard identified in Nos. 45 and 46 is a *contingent* fact of politics and political culture at the time of the founding. Accordingly, the bases for state advantage over against the national government—the foundation for limited national powers in the sense urged by Anti-Federalists—were similarly contingent, phenomena that were conditional upon the facts of a given political context and are not true by virtue of necessity or constitutional meaning. Madison's argument is one that sounds in both political culture and administration, which, as we've seen from the reasoning throughout *The Federalist*, are intertwined and mutually dependent. In this argument we can identify a number of concrete variables or determinants, corresponding to the categories of political culture and administration, that bear on the distribution of power in the federal system. In the domain of political culture there are four: personal influence, the attachment of the people, the posture of each government towards the other, and the number and quality of connections between the people and their governments. There are five more in the domain of administration and government capacity: intergovernmental dependence, the

powers vested in each government, the employment levels of both governments, the extent of governmental positions and salaries, and the regulation of "domestic and personal" matters.

The question critical observers of the American constitutional order are invited to ask —the question Anti-Federalists persistently pressed—is, what happens to the federal system if these determinants change? What will be the consequences for the structure and operation of the federal system if these variables shift in favor of the national government? For a long time, the possibility of such changes was so inconceivable that the questions just posed were little more than abstract hypotheticals. The national government simply lacked the capacity and the revenue to administer programs that would significantly alter these dimensions of political life. And, as Madison and Hamilton were at pains to convince their readers, despite their shortcomings and failures the states nonetheless enjoyed robust popular attachment. But in time, each of these dimensions would undergo significant changes, in some cases tipping the balance in favor of the national government and in others complicating the picture of the federal system presented in *The Federalist*. Of course, these changes wouldn't necessarily move in only one direction. Just as the national government could win the attachment of the people, so could state governments. The crucial point is that the determinants in which the state-federal relationship was rooted were bound to change. These changes would prompt questions about the correspondence between the Constitution's commitment to federal governance and the prevailing constellation of government powers and institutions, as well as the degree of popular support and confidence. What should federal

governance look like in an era of expanded national power and capacity? What should be the limits on the reach of the federal government when it can do much more than originally conceived? And what would be the consequence if Madison's suggested possibility became a reality and the people became more partial to the national government than to the state governments?

We would do well by way of conclusion to step back from the substantive dimensions of Publius' depiction and the Anti-Federalists' criticisms of the federal system and observe its formal qualities. The difference between the two goes beyond a conflict between "strict" and "loose" construction of constitutional powers and provisions, distinctions that wouldn't become relevant until after the Constitution entered into force.[125] Those terms, after all, concern that application of constitutional provisions, whereas the ratification debates concerned their desirability. In many ways, the debate between Federalists and Anti-Federalists was *pre-interpretive*. One searches in vain for a debate over the semantic particularities of specific terms that, following ratification, would become the subject of significant disagreement. This is not to say that textual meaning did not enter the ratification debates. But when it did, the focus was less on the precise legal meaning of operative terms as it was on what the general meaning of the

[125] See, for example, Saul Cornell, *The Other Founders: Anti-Federalism and the Dissenting Tradition in America, 1788-1828* (University of North Carolina Press, 1999), 188; David M. O'Brien, "Reflections on Courts and Civil Liberties in Times of Crisis," 3 *Journal of the Institute of Justice and International Studies* 11, 12 (2003); and Simeon D. Fess, *The History of Political Theory and Party Organization in the United States*, (Ginn and Company, 1910), 12-13.

proposed powers and processes augured for the organization of politics and society.[126] Indeed, there is not much of a difference between the two groups in *how* they evaluated the proposed Constitution. In order to reach the normative question, they had to first resolve the empirical question. That is, they confronted the necessity of determining what the Constitution proposed and what it was likely to cause before they could have a discussion of the desirability of that nature and those consequences.

A better term for the form of the arguments offered by Federalists and Anti-Federalists is *diagnostic*. Like a physician seeking to understand the systemic ramifications of a structural or operational change in the body, the Constitution's supporters and critics alike sought to elucidate the essential nature, central changes, and defining commitments of a new system of government. This approach, which Jeffrey Tulis and Nicole Mellow describe as oriented around constitutional logics, was principally concerned with the questions of "what the Constitution meant, what its words implied, and what its structure portended in broad nonnormative, empirical terms."[127] Their enterprise was not constitutional interpretation, as it has largely come to be understood in the American tradition, but the explication of constitutional logics. It is precisely this difference that Charles Black highlighted when he contrasted the "particular text style" that dominates American constitutional interpretation with an approach that seeks to identify institutions and relationships from which substantive commitments and

[126] A good example of this is the debate between Anti-Federalists (as exemplified by the arguments of Richard Henry Lee and "Timoleon") and leading Federalists (particularly Gouverneur Morris, James Wilson, and James Madison) over the general welfare clause. See Peter Zavodnyik, *The Age of Strict Construction, A History of the Growth of Federal Power: 1789-1861* (Catholic University Press, 2007), 18-22.

[127] Tulis and Mellow, "The Anti-Federal Appropriation," *American Political Thought: A Journal of Ideas, Institutions, and Cultures* 3(1):157-166 (Spring 2014), 161.

defining logics can be inferred. Where the two groups disagreed was on the question of whether the logics identified and the changes they would bring about were good or bad. But there was broad agreement on both what those logics were and what they would entail. In the case of the relationship between the states and the new national government, this logic was characterized by an underdeterminate division of powers and the consequent possibility of adjustments to that relationship that responded to changes in political culture and government capacity.

The analysis presented here, though, suggests something slightly different from what Tulis and Mellow observe about the debate between Federalists and leading Anti-Federalists. In the course of their examination of the debate over federalism, they conclude, "The structural properties of the regime are much more determinative of real power, and, correctly, the Anti-Federalists saw precious little structural support for states in the Constitution."[128] While the sources covered in this chapter supply ample support for the second part of this statement, the argument presented here points in an importantly different direction from the first part. I've argued that it is the contingent foundations of the federal system, in conjunction with the structural properties of the constitutional regime, that are constitutive of the state-federal relationship. The foundations of the state-federal relationship lie in political culture and administrative capacity, which differ from the composition of the Senate, the power of the national government over the state militias, and the lack of explicit reservations of robust state power—all of which are cited by Tulis and Mellow as structural properties of the regime. While the determinants

[128] *Id*., 163.

identified here have structural consequences and ramifications, it is essential to keep them distinct from strictly structural properties. Though this qualification doesn't diminish the force of Tulis and Mellow's central contention that Publius' victory came at the expense of consequential rhetorical concessions to critics of national power—concessions that were subsequently appropriated by those who lost the ratification debate—it nonetheless highlights the fact that *The Federalist* offers a remarkably candid assessment of the foundations of national and state power under the Constitution. It is, moreover, an assessment that is impervious to Anti-Federal appropriation, in that the determinants Publius identifies are actual facts about the world rather than rhetorical expositions of the form of government established by the Constitution. By shifting the focus from structural properties to contingent facts of politics, Publius put the future contours of the state-federal relationship squarely in the domain of political and constitutional development. If persuasive, then, the argument advanced in this chapter suggests that it is not *only* the structural properties of the constitutional regime that determine political power. Rather, an accurate and complete account of the constitutional logic of federalism must include the contingent determinants rooted in political culture and administrative capacity identified here. Consequently, investigations of political development—of durable changes in governing authority—must attend not only to structural transformations but also to modulations in political culture and government capacity and the consequences those shifts have for the structural properties of the constitutional order. And because such modulations were destined to occur—either by concerted effort or exogenous changes—the state-federal relationship would be both a

cause and an effect of American constitutional development, provoking political change even as it would be remade through politics.

Chapter Two: Federalism and the Separation of Powers

Students of American politics are often taught that there are three fundamental components of the political system established by the Constitution: the separation of powers, checks and balances, and federalism. But as they are examined the distinctions between these components quickly become clouded and difficult to maintain. For instance, the separation of powers is conventionally explained as a way political institutions check and balance one another. Similarly, federalism is frequently portrayed as one way in which power is separated in the constitutional system, with the states and the national government checking and balancing each other.[1] At the heart of this confusion is a misunderstanding of the basic nature and purpose of the divisions between the levels of government, on the one hand, and the coordinate political branches, on the other. In this chapter, I seek to clarify this misunderstanding by responding to the

[1] A perusal of various introductory textbooks to American politics is sufficient to establish this point. For a few notable examples, see Joseph M. Bessette et al., *American Government and Politics: Deliberation, Democracy, and Citizenship* (Wadsworth, 2012), 31-96; Theodore J. Lowi et al., *American Government: Power and Purpose* (13th ed.) (W.W. Norton, 2014), 48-103; and Samuel Kernell and Gary C. Jacobson, *The Logic of American Politics* (2nd ed.) (CQ Press, 2003), 30-99.

argument that federalism is a separation of powers, which attempts to make a virtue of unifying the three components mentioned above. But beyond addressing this argument there is a larger goal, which is to clarify the differences between the division of governmental levels and the separation of powers in the national government. This is particularly necessary because, as the last chapter anticipated and this chapter will make explicit, federalism and the separation of powers are both characterized by underdeterminacy.

I begin by introducing the "unifying theory"—the argument that federalism is a separation of power. I then present a distinction between the two notions of power entailed by this argument, notions that, in turn, serve as foundations for two different conceptions of why power is separated in a constitutional system. These I refer to as the *division of power* and the *separation of powers*. Returning to the fundamental premises of the unifying theory, I argue that while it accurately captures some aspects of how federalism functions in the American constitutional order, it ultimately fails because of the nature of the relationships between state and national institutions. The failure of the unifying theory is rooted in what I call the *puzzle of constitutional authority*, by which I mean that so long as state sovereignty is asserted over against national power, and national supremacy must therefore be invoked, state-federal relations cannot produce the deliberative and authority-enhancing benefits of the separation of powers among national governing institutions. But enabling these interactions to generate such benefits would require surrendering either state sovereignty as it has been understood for much of American history or national supremacy as it has developed over the same period. I

conclude by arguing that the puzzle of constitutional authority can be provisionally and contingently resolved through constructions of the state-federal relationship, constructions that are rooted in the defining features of the federal system discussed in the last chapter—the underdeterminate division of power between levels of government, and the consequent centrality of political culture and governmental capacity to the elaboration of the state-federal relationship.

The Unifying Theory: Federalism as a Separation of Power

A paradigm example of the argument that federalism is a separation of powers is Bruce Peabody and John Nugent's attempt to offer a "unifying theory" of the separation of powers.[2] In their article, Peabody and Nugent argue that "both the scholarship and jurisprudence on separated powers is marked by its inconsistency and lack of synthesis,"[3] which for them provides an occasion to advance an understanding of separated powers that is both "synthesized and inclusive."[4] Given the explicitness of their goal and comprehensiveness of their argument, Peabody and Nugent's article will serve as the main point of reference for my discussion of the analogy between federalism and the

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[2] Bruce G. Peabody and John D. Nugent, "Toward a Unifying Theory of the Separation of Powers," 53 *American University Law Review* 1 (2003) [hereinafter, Peabody and Nugent, "Unifying Theory"].

[3] *Id*., 4. See also Bruce G. Peabody and Scott E. Gant, "The Twice and Future President: Constitutional Interstices and the Twenty-Second Amendment," 83 *Minnesota Law Review* 565 (1999), 625.

[4] Peabody and Nugent, "Unifying Theory," 5.

separation of powers, though other arguments will be adduced where relevant to the elaboration of what, for ease of reference, I will refer to as the *unifying theory*.[5]

After surveying the scholarly landscape of separation of powers debates, Peabody and Nugent fault the dominant schools of thought—post-Nixon critiques, effects-based analyses, and architectonic approaches—for being insufficiently integrated, improperly structured by a judicial-legal framework, and ignorant of vital features of the separation of powers.[6] To remedy these defects they attempt to build on extant theories by advancing five underemphasized components of the American separated powers system, the first of which involves "expand[ing] the dominant understanding of the constitutional separation of powers to include the 'vertical' separation of powers between state government and the national government."[7] Thus, the principal component of Peabody and Nugent's unifying theory of the separation of powers is the designation of "federalism as a separation of power."[8]

On what considerations is this designation founded? Peabody and Nugent identify three main grounds for the equivalence they posit. The first is that state officials are able to influence policy through interactions with representatives and bureaucrats in the

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[5] There are, in addition to the accounts offered by Peabody and Nugent and Jessica Bulman-Pozen (introduced below), numerous other articulations and versions of the unifying theory. See, for examples, Maxwell A. Cameron and Tulia G. Falleti, "Federalism and the Subnational Separation of Powers," *Publius* 35(2):245-271 (2005); Thomas R. Dye, *Federalism: Competition Among Governments* (Lexington Books, 1990); and Victoria Nourse, "The Vertical Separation of Power," 49 *Duke Law Journal* 749 (1999).

[6] Peabody and Nugent, "Unifying Theory," 16-17.

[7] *Id*., 17. Peabody and Nugent are careful to distinguish this notion of a vertical separation from the notion given voice by Justice Kennedy in *Clinton v. New York*, according to which the "[s]eparation of powers operates on a vertical axis…between each branch and the citizens in whose interest powers must be exercised" [542 U.S. 452 (1998)].

[8] *Id*., 18.

national government. From congressional testimony and high-level meetings to implementation-stage cooperation between state and federal administrators, state representatives and bureaucrats can shape the creation and implementation of policy in ways similar to national officials. This influence can take the form of both positive and negative functions. Whereas the former is concerned with the productive use of political power, the latter is concerned with "checking institutional overreach."[9] Second, as is true for the separation of powers between the three branches of the national government, the separation of power between the national and state governments "leave[s] somewhat open the identity of the political entity ultimately authorized to decide how contested power is to be exercised."[10] The insight here is that the same kind of underdeterminacy that characterizes political power at the national level also characterizes political power in the domain of state-federal relations. As we shall see below, it is this point about underdeterminacy that connects arguments equating federalism and the separation of powers to considerations about constitutional authority. And third, the separations of power both at the national level and between levels of government "create different allocations of authority precisely so that they can be utilized differently, as distinctive kinds of power."[11] Here Peabody and Nugent affirm the functional division of powers that figures prominently in traditional accounts of the separation of powers, but add that

[9] *Id*., 22.

[10] *Id*., 21.

[11] *Ibid*.

they "simply think that the powers exercised by state politicians are qualitatively different from (but complementary to) their national analogues."[12]

To this account of federalism as a separation of power we can add an argument posed by Jessica Bulman-Pozen, who presents a case for why in a cooperative federal scheme—that is, one in which Congress empowers states to be partners in the implementation of a national statutory scheme—states can safeguard the separation of powers system.[13] What is most important for our purposes is the way in which Bulman-Pozen sees states fulfilling this function. When included by Congress in a national regulatory scheme, she argues, states can "reinvigorat[e] the separation of powers" by checking the power of the federal executive.[14] To be clear, Bulman-Pozen does not explicitly argue, as do Peabody and Nugent, that federalism *is* a separation of power, though she concedes that "the overarching similarities between federalism and the separation of powers are widely recognized."[15] Rather, she contends that federalism can further the purposes of the separation of powers. But in so doing, she indicates that a principal—perhaps the chief—purpose of the separation of powers is to enable one branch of the national government (here Congress) to check another (the Executive). Indeed, though Bulman-Pozen

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[12] *Id*., 22. On this point Peabody and Nugent cite the work of Jeffrey K. Tulis in *The Rhetorical Presidency* (Princeton University Press, 1988). See also Tulis, "Impeachment in the Constitutional Order," in *The Constitutional Presidency* (Johns Hopkins University Press, 2009) and a pair of articles by Robert Post and Reva Siegel: "Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act," 112 *Yale Law Journal* 1943 (2003) and "Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power," 78 *Indiana Law Journal* 1 (2003).

[13] Jessica Bulman-Pozen, "Federalism as a Safeguard of the Separation of Powers," 112 *Columbia Law Review* 459 (2012).

[14] See, *e.g.*, Bulman-Pozen, *id*., 459, 461, 462, and 463. See also Heather Gerken, "Uncooperative Federalism," 118 *Yale Law Journal* 1256 (2009).

[15] Bulman-Pozen, *id.*, 460.

disavows any attempt to address "first-order questions about the meaning of the separation of powers,"[16] her article makes clear that for her the separation of powers is defined by its capacity to furnish one branch with checks on another branch's attempts to exercise political power. In this, her argument emphasizes the negative functions of the separation of powers that Peabody and Nugent also identify as served by federalism.

Two Notions of Power & Two Conceptions of Separation

Having identified the essential components of the argument that federalism is a separation of power, we can now turn to consider which aspects of the American constitutional regime it accurately captures and which it overlooks or misconstrues. My basic contention here is straightforward: arguments that equate federalism with the separation of powers, like those set out above, entail a distinction between two notions of political power and, consequently, two conceptions of the separation thereof. This is significant because only one of these conceptions is unproblematic when applied to federalism. I start by identifying the two notions of power at play in the unifying theorists' argument and conclude by developing the conception of the separation of powers to which each gives rise.

We may begin by observing that the unifying theorists employ two different notions of political power. Peabody and Nugent are quite explicit about this when they distinguish between the "positive" functions of the separation of powers and the

[16] *Id.*, 463. This is a somewhat odd admission for an argument that, to be intelligible, requires some notion of what the separation of powers is, if not a reasonably clear sense of what it is not. Nonetheless, Bulman-Pozen is content to observe that the "separation of powers is an essentially contested concept, perhaps even an essentially contradictory concept" (*id.*), and to leave it at that.

"negative" functions. As they argue: "[O]ur approach to the separation of powers emphasizes taking stock of a number of 'positive' functions associated with this system, aside from its commonly acknowledged 'negative' role of checking institutional overreach."[17] Though this will be discussed at greater length below, it will suffice for present purposes simply to note that the positive functions Peabody and Nugent identify as relevant to federalism consist primary in the distinctive *kinds of power* that states can exercise in the separation of powers system—the "distinctive 'qualities and functions' associated with each branch or division of government."[18] As indicated earlier, the negative functions predominate Bulman-Pozen's account of the separation of powers. Indeed, for her the essence of the separation of powers system is Congress' ability to check Executive branch domination, in which enterprise the states can be a useful ally.

These two notions of power are founded on different premises and oriented toward different ends. The negative notion is premised on the belief that political power is liable to abuse and that it must accordingly be appropriately divided, limited, and checked to protect liberty and enable effective governance. The positive notion, on the other hand, holds that the fundamental values of liberal constitutionalism should be incorporated into the exercise of political power and that political institutions must therefore be designed and empowered to express those values through their interactions with one another. These values—democratic will, security from threats foreign and domestic, the protection of individual rights and the rule of law—correspond to the fundamental genres of political

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[17] Peabody and Nugent, "Unifying Theory," 22.

[18] *Ibid.*, citing Tulis, *The Rhetorical Presidency*, 45

power in modern constitutional governments: legislative, executive, and judicial. Whereas the positive notion is oriented towards the use of political power, the negative notion is oriented towards preventing its abuse. For this reason, the two notions of power undergird two conceptions of why political power should be separated, as well as how the exercise of separated powers should be evaluated. The distinction between the two conceptions rests on the difference, seemingly trivial but in fact deeply consequential, between dividing power among authoritative institutions in the service of preventing arbitrary or tyrannical exercise and separating the constitutive powers of a constitutional republic. The salient distinction, then, is between the *division of power* and the *separation of powers*.[19]

The *division of power* incorporates the negative notion's emphasis on the potential abuses of power, and political power is accordingly either divided wholesale between governmental institutions and levels or interdependencies are created such that one branch cannot act without the concurrence of at least one other branch. As a result, branches (and individuals located therein) are able to prevent a use of power initiated or continued by another branch or institution from proceeding. Hence, an important

[19] Because of the linguistic similarity of these conceptions, hereinafter occurrences of the terms are selectively italicized in order to draw attention to the precise notion being discussed or distinguished. Given the distinction I am making here, it should be noted that although Peabody and Nugent are careful to employ "separation of power" in reference to federalism, their usage does not rest on the difference I've identified. Indeed, it isn't clear if their choice has any principled basis other than consistency.

institutional mechanism for the division of power conception is the veto point.[20] On this understanding, political power is conceived of as a single quantum that is either checked or exercised, and institutional determinations are either blocked or endorsed. The most familiar example of this is the lawmaking process. In order for a bill to become a law, Congress must first pass it and the president must then sign it; after this process is concluded, the legislation is then subject to judicial review. This process is further subdivided on the front end, in that both chambers of Congress must pass the same bill, and bills that entail raising revenue must originate in the House. For the government's lawmaking power to be successfully exercised, each of these conditions must be satisfied in the proper order. If one is not fulfilled or the proper order not followed, power cannot be exercised.

The division of power conception is closely associated with the natural rights interpretation of the Constitution.[21] Michael Zuckert, for example, has likened "the theory of the separation of powers as we see it expressed in Montesquieu and reaffirmed by Madison in *The Federalist Papers*" to a relay race, in which "the three branches each run

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[20] There is a well developed literature in the field of American politics that has identified and evaluated the consequences of a range of veto points. For example, see Keith Krehbiel, *Pivotal Politics: A Theory of U.S. Lawmaking* (University of Chicago Press, 1998); George Tsebelis, *Veto Players: How Political Institutions Work* (Princeton University Press, 2002); and David Watkins and Scott Lemieux, "Compared to What? Judicial Review and Other Veto Points in Contemporary Democratic Theory," *Perspectives on Politics* 13(2):312-326 (2015). And for further evidence that the unifying theory, especially as it extends to the division of powers conception, is firmly established in undergraduate education, consider this passage from Susan Welch et al., *Understanding American Government* (Wadsworth, 2014): "Because of federalism, separation of powers, and checks and balances, the American governmental system has multiple veto points, which are points in the political process where one official or group of officials can block proposals moving through the process" (45).

[21] See, *e.g.,*, Randy Barnett, *Restoring the Lost Constitution* (Princeton University Press, 2003); and Michael P. Zuckert, *The Natural Rights Republic* (University of Notre Dame Press, 1997).

part of the race and they pass the baton of law onto the next branch."[22] This incrementalization of power underscores the capacity of each "runner" to control the fate of the previous "runner." In a more developed formulation, Zuckert locates the "conceptual foundations of the doctrine of separation of powers" in Lockean political philosophy, specifically in Locke's identification of the functional separation of legislative, executive, and judicial powers, the absence of which makes "the state of nature a condition where rights are thoroughly insecure."[23] On this basis, Zuckert contrasts the Lockean vision of the separation of powers with Woodrow Wilson's Progressive critique, according to which "how powers are divided and separated matters hardly or not at all; what matters is merely that they are separated and can check each other."[24] Philip Muñoz has given voice to this (alleged Progressive) conception of the separation of powers, with an argument that perhaps reveals the inaptness of the relay race metaphor for a theory oriented towards stymying the exercise of power: "Sometimes we forget the whole purpose of the separation of powers is to frustrate government action, to make it harder for government to act."[25] Elsewhere Muñoz connects the emphasis on the separation of powers in *The Federalist* to Publius' "accept[ance] of human nature as it

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[22] Michael P. Zuckert, "Constitutional Principles: Separation of Powers," The Bill of Rights Institute and Jack Miller Center (Aug. 24, 2012). I take Zuckert here to be expressing a conventional, rather than his own, view of separation of powers. In the subsequently cited sources, he offers a considerably more detailed treatment of the issues and a more formal statement of his position.

[23] Michael Zuckert, "On the Separation of Powers: Liberal and Progressive Constitutionalism," *Social Philosophy and Policy* 29(2):335-364, 358-359 (July 2012). See also Zuckert, "Natural Rights and Modern Constitutionalism," 2 *Northwestern Journal of International Human Rights* 1 (2004).

[24] Zuckert, "On the Separation of Powers," 359.

[25] Vincent Philip Muñoz, "Constitutional Principles: Separation of Powers," The Bill of Rights Institute and Jack Miller Center (Aug. 24, 2012).

is," that is, that men are not angels.[26] Given the threats of abuse or infringement of individual rights, checks must be built into the procedures by which power is exercised and public authority wielded. Thus, for example, congressional enactments are subject to presidential veto, presidential nominees are subject to senatorial confirmation, and judicial and executive actors alike are subject to impeachment by Congress.

The proof-text for the *division of power* conception is *The Federalist* No. 51, in which Madison characterizes the compound republic's partitioning of power both between levels of government and among "distinct and separate departments" as "a double security to the rights of the people. The different governments will controul [*sic*] each other; at the same time that each will be controuled [*sic*] by itself."[27] Thus will federalism complement the "interior structure of the government" to protect the people's rights. Moreover, the division of power conception gives a specific interpretation to Madison's claim that, "Ambition must be made to counteract ambition."[28] From the standpoint of preventing the arbitrary or tyrannical use of political power, this description is understood to refer to each branch's—and, indeed, each governmental level's—ability to check actions of the others. Thus, according to the *division of power* conception ambition is construed as directed in the first instance towards thwarting the encroachments of other political actors. Further emphasizing the negative rights pedigree of this understanding,

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[26] Vincent Phillip Muñoz, *God and the Founders: Madison, Washington, and Jefferson* (Cambridge University Press, 2009), 56.

[27] *The Federalist*, Jacob E. Cooke (ed.) (Wesleyan University Press, 1961), 51:351. [Hereinafter citations to *The Federalist* will follow this template. The essay number will be cited, followed by a colon and the page number of the text referenced or quoted.]

[28] *Id*., 51:349.

the ambitious politician is one who strives, in defense of individual rights, to prevent the use of political power.

In contradistinction to the *division of power*, the *separation of powers* conception incorporates the positive notion of political power identified above and is consequently concerned with structuring and separating institutions that are designed to give expression to the polity's fundamental value commitments. This concern has two components: (1) the creation of adequately independent legislative, executive, and judicial institutions; and (2) the establishment of processes by which these separate institutions jointly exercise constitutionally enumerated powers. This is a richer, if often overlooked, conception of why powers are separated in a constitutional system, one that focuses on the potential value added to exercises of governmental power by interactions between legislative, executive, and judicial institutions. Jeffrey Tulis expresses this conception particularly cogently in his discussion of the "basic desiderata" of constitutional self-government:

> Basic desiderata of all democratic regimes include provision for the expression of popular will in and about public policy, protection of individual rights, and (common to all regimes) provision for security or self-preservation. These desiderata exist in tension with each other. Separation of powers can be thought of as an attempt to productively resolve those tensions by representing them in and among competing institutions…The structure of each institution, as well as the arrangement of legal powers, can be thought of as an institutional design to make productive the tension between popular will, rights, and security both within and among major institutions of government.[29]

On this account, while all three coordinate branches of the national government are concerned with the three basic desiderata, each is structured with a bias towards one

[29] Jeffrey K. Tulis, "Impeachment in the Constitutional Order," in *The Constitutional Presidency*, 242.

particular desideratum. Thus, because of its electoral bases and size, the Legislature is primarily concerned with the expression of popular will; endowed with the powers to conduct war and diplomacy, the Executive is oriented towards national security and welfare; and the Judiciary, having as its purpose the enforcement of both the Constitution and duly passed laws, is directed towards the protection of individual rights and the maintenance of the rule of law. In more refined accounts, these institutional biases are complemented by structurally-induced characteristics specific to each branch: deliberation in the Legislature, energy in the Executive, and judgment in the Judiciary.[30]

This view adduces as support Madison's arguments in *The Federalist* Nos. 47-51, which begin from Montesquieu's insight about the importance of separated powers but quickly move to the justification of a constitutional system in which institutions are "so far connected and blended as to give to each a constitutional control over the others."[31] To the *division of power* advocates' citation of Montesquieu as the model of separated powers that Madison affirms in *The Federalist*, adherents of the *separation of powers* conception counter that Madison's embrace of Montesquieu was far from complete. Rather, while duly honoring one of the "enlightened patrons of liberty" Madison was keen to stress that all the theory of "the celebrated Montesquieu" required was that "*all*

[30] See, *e.g.*, Jeffrey K. Tulis, "Constitutional Decay and the Politics of Deference," 10th Annual Walter F. Murphy Lecture in American Ideals and Institutions, delivered April 4, 2011, under the aegis of Princeton University's James Madison Program in American Ideals and Institutions. See also Tulis, "Deliberation Between Institutions," in *Debating Deliberative Democracy,* James S. Fishkin and Peter Laslett (eds.) (Blackwell Publishing, 2003).

[31] *The Federalist*, 48:332.

powers legislative, executive, and judiciary" not be accumulated in the same hands.[32] "[H]e did not mean," Madison writes of Montesquieu in No. 47, "that these departments ought to have no *partial agency* in, or no *controul* over, the acts of the other."[33] This left considerable room for power-sharing between institutions. As Madison argues in *The Federalist* No. 37, such sharing may well be inevitable because of the impossibility of "the task of marking the proper line of partition"[34] between both levels of government and the branches of the national government. More importantly, though, there is good reason for power to be shared. By giving "each department…a will of its own" and "the necessary constitutional means and personal motives to resist encroachments,"[35] the "opposite and rival interests" instilled in these institutions would, with every properly structured exercise of government power, express the fundamental values of liberal constitutionalism.

Just as the *division of power* account is associated with the natural rights interpretation of American constitutionalism, the *separation of powers* account is aligned with an ends-oriented interpretation of the constitutional order. A prominent proponent of this view is Sotirios Barber, who has over the course of several works developed the most sophisticated and comprehensive critique of the negative constitutionalist position.[36] The

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[32] *Id*., 47:324 (emphasis added). Hence the need, as noted above as component (1) of the twofold concern of the *separation of powers*, to construct adequately independent legislative, executive, and judicial institutions.

[33] *Ibid*. (emphasis in original).

[34] *Id*., 37:235.

[35] *Id*., 51:348, 349.

[36] See Barber, *Welfare and the Constitution* (Princeton University Press, 2003), 1-22; *The Fallacies of States Rights* (Harvard University Press, 2013), 172-179; and *Constitutional Failure* (University Press of Kansas, 2014), 26-52.

basic point of Barber's argument is that it is incoherent to contend that a government was established chiefly for the purpose of limiting government. The primary purpose of any particular government must be the achievement (or the pursuit) of the ends for which governments are established—happiness, general welfare, justice.[37] Hence, the limitation of government power can be, at most, an ancillary commitment of a constitutional system. And the limitation of government power must, moreover, be in service of the positive ends of government. What must take precedence are the purposes for which government is established—the pursuit of positive goods like general welfare, economic prosperity, and (in some account) secular public reasonableness.[38] The *separation of powers* conception can even cite as support Locke's articulation of the doctrine, which, returning to Zuckert's account, "does not take its bearing from limiting government but from accomplishing the positive tasks government must accomplish to justify its existence."[39] From this understanding of constitutional powers we arrive at a quite different interpretation of the maxim from *The Federalist* No. 51 that, "Ambition must be made to counteract ambition." Rather than being oriented towards frustrating or halting the use of power, ambition in a properly structured political system can be made *to improve the use of political power* by offering to the ambitious politician the interest and opportunity to defend an institution that is uniquely structured to express a fundamental

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[37] Each of these is identified as *a* or even *the* end of government in *The Federalist.* See 36:230 ("the great ends of public happiness and national prosperity"); 45:309 ("the real welfare of the great body of the people is the supreme object to be pursued"); and 51:352 ("Justice is the end of government.")

[38] On the last of these see Sotirios Barber, *Constitutional Failure*, 26-52 and 479-109.

[39] Zuckert, "On the Separation of Powers," 359.

regime value. It is through both conflict and deliberation between such institutions that well-considered, legitimate, and authoritative exercises of political power can be attained.

Before proceeding to an evaluation of the application of these conceptions to the unifying theory, it is necessary to make an important caveat with respect to the distinction I've made between the *division of power* and the *separation of powers*. The distinction offered here is clearly not a simple dichotomy. More importantly, the two exist concurrently, in the sense that the *division of power* is a structural feature of the constitutional order and the *separation of powers* is given life and possibility by this feature. This is most apparent when we realize that what appears to be a mine-run check of one institution on another (*e.g.*, a veto or the rejection of a judicial nominee) can simultaneously be the expression of a particular branch's distinctive governing capacity. But distinguishing between these two possibilities requires first determining the relationships between the relevant institutions and, second, evaluating the congruence between the reasons that are offered as justification for that branch's actions and the facts of the situation in question. This, in turn, requires that we inquire into the content of the reasons offered by governmental institutions in defense of their actions as well as the institutional contexts through which those reasons are refracted. It is to these considerations that I now turn.

Sovereignty, Supremacy, and Constitutional Authority

The claim that federalism is a species of separation of power is, at its most basic and consequential, a claim about the ends that both federalism and the separation of powers

serve. As I argued above, the unifying theory entails not a single but a dual notion of political power. From these two notions follow two conceptions of how and why power is separated in a constitutional system. The end served by the *division of power* model is the prevention of the arbitrary or tyrannical use of political power, while the end served by the *separation of powers* model is the beneficial use of political power ordered towards the expression of the fundamental values of liberal constitutionalism. Having distinguished between the two notions of power and the two conceptions of separated powers at play in the unifying theory, we must now determine which conception (if any) can properly be said to apply to federalism.

The argument I should like to develop here is that while the *division of power* conception captures some aspects of how federalism functions in the American constitutional order, the *separation of powers* conception cannot accurately be applied to the federal system. I begin by briefly discussing the ways in which federalism can serve —for better and for worse—to frustrate the use of national power, thus serving the *division of power* conception of the nature of political power and the reasons why it must be divided among institutions. The majority of this section, though, is devoted to demonstrating why federalism ultimately cannot serve the ends stipulated by the *separation of powers* conception. Connecting the unifying theory's emphasis on the underdeterminacy of the federal system to Mariah Zeisberg's relational conception of constitutional authority, I argue that, unlike the separation of powers at the national level, federalism cannot generate robust constitutional authority. This inability is rooted in what I call the *puzzle of constitutional authority*, by which I mean that so long as states retain

political autonomy or sovereignty, and national supremacy must consequently be invoked, state-federal relations cannot produce robust constitutional authority. However, enabling these relations to generate constitutional authority would require surrendering either state sovereignty as it has come to be known in the American federal system or the supremacy of national law.

The Kernel of Truth: Federalism as a Division of Power

Let us begin by identifying the kernel of truth in the unifying theorists' argument. The federal system can, in fact, serve the ends of the *division of power* conception by both complicating and potentially frustrating the exercise of national power. In Peabody and Nugent's and Bulman-Pozen's terms, federalism can serve the negative functions of separated powers by checking the attempted exertion and perceived expansion of national power. This is due in part to the process by which state laws that putatively infringe on national concerns are contested. As Alison LaCroix has detailed in her study of the origins of American federalism and Matthew Brogdon has described in his work on the development of the federal judiciary, in rejecting Madison's proposed national veto and constructing the Article III judiciary the Constitutional Convention endorsed a highly judicialized procedure for resolving state-federal disputes.[40] By requiring that all state legislation be approved by the national government, the national veto supported by

[40] See Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harvard University Press, 2008), 132-174; and Matthew S. Brogdon, "Constitutional Text and Institutional Development: Contesting the Madisonian Compromise in the First Congress," *American Political Thought* 5(2):219-249 (2016) and "Political Jurisprudence and the Role of the Supreme Court: Framing the Judicial Power in the Federal Convention of 1787," *American Political Thought* (forthcoming, 2016). For the argument that judicial resolution is not the *only* constitutional means of resolving state-federal conflicts, see Josh Chafetz, "Multiplicity in Federalism and the Separation of Powers," 120 *Yale Law Journal* 1084 (2011).

Madison and proposed by the Virginia Plan (or something else along those lines) would have forced a political resolution of these conflicts; as a result, the scope of state authority would be a function of national political discretion. Instead, the architecture of Article III, coupled with the development of federal jurisdiction over the first three decades of the Republic,[41] ensured that "federal questions" would be adjudicated before the federal bar. And because of the Supremacy Clause, national law would trump contrary state laws and be binding on state judges. Though this has been widely interpreted as prejudicial to state interests—if not *ab initio* then certainly after the development of federal jurisdiction—it nevertheless created space for states to frustrate national power by passing laws that would have to be struck down in order for the alleged infringement of national authority to be corrected. By disconnecting the actions of state governments from direct federal oversight by Congress and the Executive, the rejection of the national veto increased both the opportunities for and the chances of state obstruction of national prerogatives and policies.

Furthermore, the large swaths of *de jure* and *de facto* concurrent regulatory power, in conjunction with the judicially protected domain of state police powers,[42] enable states to vindicate the interests of their citizens in the face of contrary national policies, consistent with negative constitutionalism's emphasis on the individual rights basis of separated powers. This aspect of the federal system has been increasingly emphasized in recent years, as the Court has vindicated state power against encroachments of national power *in*

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[41] For a discussion of this development, see Alison L. LaCroix, "Federalists, Federalism, and Federal Jurisdiction," 30 *Law and History Review* 205 (2012), 205-244.

[42] See, *e.g.*, *United States v. Morrison*, 529 U.S. 598, 618-619 (2000).

the name of individual rights.[43] Particularly in a context of limited national political capacity, the autonomy of state governments presents myriad opportunities for state institutions to oppose, contest, and frustrate national power. Such has been the case in both historically vindicated efforts, such as western states' expansion of the franchise to include women in the nineteenth century, and historically repudiated efforts, like slave states' attempts to protect the human property of slaveholders in the face of perceived national hostility. Regardless of their merits, both are examples of how states can oppose national power and policy. Though these are only a few considerations of many, they suffice to show that the unifying theory accurately captures how the federal system enables states to frustrate, complicate, and otherwise encumber the exercise of national power.

Sovereignty and the Puzzle of Constitutional Authority

While federalism can serve the ends of the *division of power* conception, it cannot serve the ends of the *separation of powers* conception, which is to say that it cannot produce the positive functions of separated powers. To see why this is the case we must return to the logic of the unifying theory. Recall that Peabody and Nugent's second premise holds that the separation of powers between the national and state governments

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[43] See, *e.g.*, *New York v. U.S.*, 505 U.S. 144, 181 (1992) (arguing that "federalism secures to citizens the liberties that derive from the diffusion of sovereign power"); *Bond v. United States*, 564 U.S. ____ (2011) ("By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power."); *National Federation of Independent Business v. Sebelius*, 567 U.S., slip op. at 47 (arguing that a movement away from "the two government system established by the Framers would give way to a system that vests power in one central government, and individual liberty would suffer."). See also *United States v. Windsor*, 570 U.S. ___ (2013) (recognizing the power of states to confer dignity and class protections on groups excluded from and unprotected by federal legislation).

"leave[s] somewhat open the identity of the political entity ultimately authorized to decide how contested power is to be exercised."[44] The insight here is that the federal system is *underdeterminate*, which means that the constitutional text "constrains, without fully fixing a legal outcome."[45] And it is because of this underdeterminacy, Peabody and Nugent argue, that the states' "distinctive kinds of power"[46] can be exercised, thus furnishing positive functions for the separated powers system. Thus, as regards the *separation of powers* conception, the unifying theory depends on how constitutional underdeterminacy is resolved in the federal system.

It is in this connection that Mariah Zeisberg's relational conception of constitutional authority can serve as a useful analytic guide, for her argument and the unifying theory are both founded on the recognition of underdeterminacy in the constitutional order. According to her conception, interbranch relations can be evaluated according to a set of (a) substantive standards identified by the Constitution and (b) processualist standards derived from "the branches' structural positions in the constitutional order."[47] The second component is itself rooted in a corresponding set of structural conditions from which the processualist standards are derived. Employing these standards allows for the evaluation of branch behavior not in terms of their adherence to putatively "determinate textual meaning" but rather by "how well they bring their special institutional capacities to bear

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[44] Peabody and Nugent, "Unifying Theory," 21.

[45] Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013), 5 n.23. For a discussion of underdeterminacy and its relation to related terms like "vagueness" and "ambiguity," see Ralf Poscher, "Ambiguity and Vagueness in Legal Interpretation," in *The Oxford Handbook on Language and Law*, Lawrence Solum and Peter Tiersma (eds.) (Oxford University Press, 2011).

[46] Peabody and Nugent, "Unifying Theory," 21.

[47] Zeisberg, *War Powers*, 19.

on the problem of interpreting the Constitution's substantive standards[.]"[48] Because this account focuses on the development of the constitutional meaning of the relevant substantive standards and the exercise of underdetermined constitutional powers, Zeisberg argues, constitutional authority is "generated," "created", and "produced" by interbranch deliberation.[49] This notion of constitutional authority is opposed to the conventional Razian account,[50] which holds that constitutional authority consists in reasons to obey that are independent of justificatory content. Zesiberg's relational account, in contrast, is distinguished by its emphasis on the content-dependence of constitutional authority. Whereas the conventional account seeks the authority *by* which government actors act (*i.e.*, the prescribed rules governing the exercise of power), the relational conception seeks the authority *with* which they act (*i.e.*, the substantive justifications animating the process by which power is exercised).

Put succinctly, the connection between the relational conception of constitutional authority and the unifying theory of the separation of powers is that the model Zeisberg advances is intended to evaluate the political phenomena on which the unifying theorists' argument is premised—the occasions for political deliberation that can furnish positive functions of separated powers induced by the underdeterminacy of the federal system. Rendered slightly differently, the positive functions of separated powers that the unifying theory stipulates state-federal relations can produce are themselves a form of

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[48] *Ibid*.

[49] *Id*., 37, 41, and 45.

[50] See, *e.g.*, Joseph Raz, *The Morality of Freedom* (Oxford University Press, 1986), 38-60; and *The Authority of Law* (Oxford University Press, 2009), both cited in Zeisberg, *War Powers*, 46 at n.110.

constitutional authority, which is exactly what Zeisberg's theoretical framework was developed to assess. Our attention, then, must turn to the nature of state-federal deliberations, which the relational conception enables with its identification of the structural conditions for such institutional interactions.

We can concede *arguendo* the first two structural conditions—the relevant political institutions' (1) independent sources of authority and (2) distinctive governing and epistemic capacities—for my main focus is on the third condition: shared powers and the responsive relationships constituted thereby.[51] While such powers and relationships are clearly present in the area on which Zeisberg focuses (*i.e.*, war powers) it is far less clear that they apply to the federal system, as the unifying theory requires. This is the case principally because, whereas institutional relationships at the national level are governed by a principle of formal equality, relationships between state and federal institutions are governed by formal inequality and subordination, as enshrined in the Supremacy Clause's guarantee that national law will trump contrary state law. In turn, national supremacy is required, today as at the Founding, to rebuff state attempts to trench on national concerns,

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[51] Zeisberg, *War Powers*, 30-31. Beyond my purpose of leveling a critique of its applicability to the unifying theory, we are justified in focusing on the third condition because it incorporates the other two conditions. As Zeisberg explains this condition, "[T]he actual exercise of their powers brings the branches into relationship with one another, a relationship that may activate the conflictual possibilities inherent in their independent sources of authority (condition one) and distinctive perspectives on public matters (condition two)" (30).

Though the first two conditions can be granted for the sake of argument, it is important to note a few complications concerning the validity of the second condition—the distinctive governing and epistemic capacities of the states. Recall from the initial elaboration of the unifying theory, this is an important claim in Peabody and Nugent's argument, though one that is not directly addressed in this inquiry. It will suffice for present purposes to highlight the distinction between *distinct capacities* and *variations on the same capacities*. The latter seems to be a more accurate characterization of state functions than the former. (On this point, see Purcell, *Originalism, Federalism, and The American Constitutional Enterprise* (Yale University Press, 2007), 191.) If that is the case, then there are grounds for evaluating them alongside their corresponding national functions. And if we follow Sotirios Barber's ends-oriented account of American constitutionalism—as I do in this limited respect—we are required to give interpretive priority to national ends.

attempts often borne by claims of state sovereignty. When sovereignty is understood as a government actor or institution with "no higher enforcement agency—no political superior,"[52] it becomes clear how claims of state sovereignty run directly counter to the responsive relationships required by a politics that can generate constitutional authority.

The difference here is between the deliberative and consultative relations among the national branches of government, on the one hand, and the independence and completeness of each level of government, on the other. While the implications of this difference may not be widely recognized, the distinction itself is far from novel. Writing to Thomas Jefferson in 1823, Madison discussed a pressing and ongoing constitutional challenge: "after surmounting the difficulty in tracing the boundary between the General & State Govts. the problem remains for maintaining it in practice; particularly in cases of Judicial cognizance."[53] Madison quickly dispenses with the viability of popular resolution, exclusive state interpretive authority, and leaving matters to the disputing parties. He then comes to the possibility of a non-judicial resolution between governmental levels. But the prospects here are no better than the other options he canvassed:

> Nor would the issue be safe if left to a compromise between the two Governments; the case of a disagreement between Governments being essentially different from a disagreement between branches of the same Government. In the latter case, neither party being able to consummate its will without the concurrence of the other, there is a necessity on both to consult and to accommodate. Not so with different Governments, each possessing every branch of power necessary to carry its purpose into compleat [*sic*] effect. It here becomes

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[52] Sotirios A. Barber, *The Fallacies of States' Rights* (Harvard University Press, 2012), 152.

[53] James Madison, Letter to Thomas Jefferson, 27 June 1823, *Letters and Other Writings of James Madison* (J.B. Lippincott & Company, 1884) 3:325.

> a question between Independent Nations, with no other *dernier* resort than physical force. Negotiation might, indeed, in some instance, avoid this extremity; but how often would it happen, among so many States, that an unaccommodating spirit in some would render that resource unavailing?[54]

It is this difference that, for Madison, made the intervention of the federal judiciary "the constitutional resort for determining the line between the federal & State jurisdictions."[55]

It is essential here to return to a point made previously about the decisions made at the Constitutional Convention. The Article III judiciary—the basis for Madison's argument in behalf of judicial oversight—was constructed as a replacement for the national veto, which would have required state legislation to be reviewed and endorsed by the national government before going into effect. The principle of consultation and accommodation identified above in Madison's description of the separation of powers applied as well, though to a considerably more limited extent, to his proposed veto, which would have enabled the national legislature "to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union."[56] The plan of government submitted at the Constitutional Convention by the Virginia delegation also called for a joint executive-judicial "council of Revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final."[57] While these provisions would have enabled consultation both between legislative chambers and between national

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[54] *Id*., 3:326.

[55] *Ibid*. It's important to note here that Madison saw Senate confirmation, the oath of office, and "the surveillance of public Opinion" as important checks on federal judicial behavior.

[56] Virginia Plan, Art. 6. Max Farrand, *The Records of the Federal Convention of 1787* (Yale University Press, 1911), I:21 (May 29, 1787).

[57] *Id*., Art. 8. Farrand, *Records*, *ibid*.

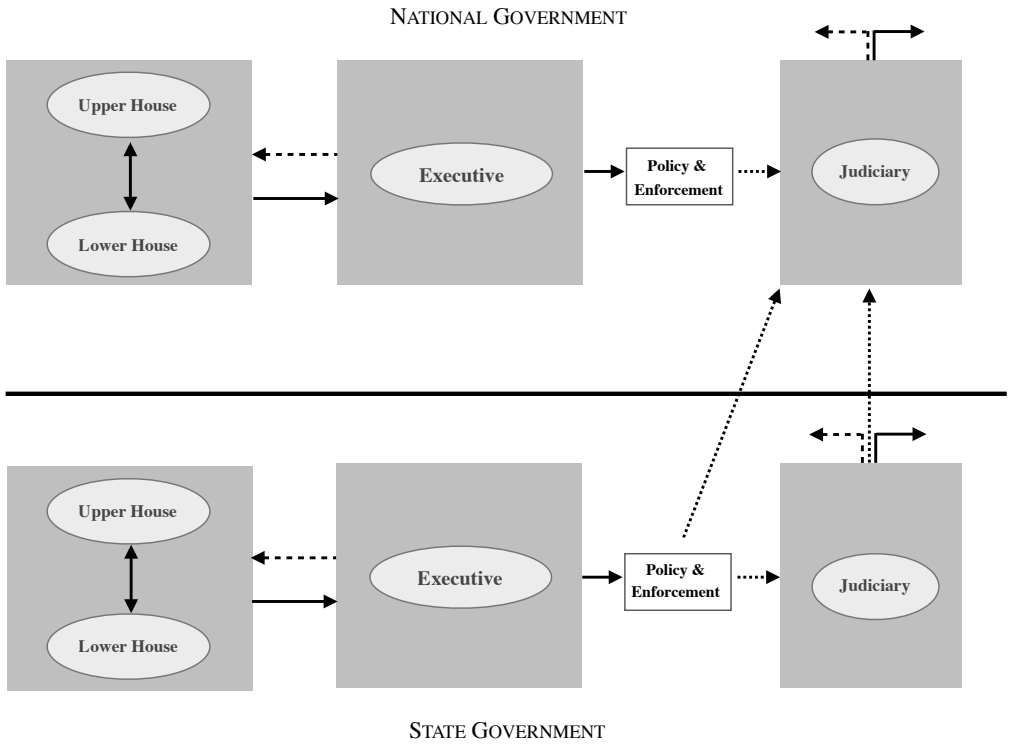
representatives and members of the council of revision, they also would have increased the number of possible veto points in the operation of the federal system. We thus see in Madison's national veto a particularly illustrative example of the simultaneous operation of both the *division of power* and *separation of powers* conceptions. It is important in this connection to recognize the differences between the national veto of state legislative actions and the executive-judicial veto of national legislative actions. Whereas consultation between the national legislature and the proposed council of revision would be fairly straightforward and could consequently produce deliberative benefits, it would be considerably harder for a similar process to occur between levels of government. The multiplication of legislatures at the subnational level, the limitations on communication at the time, and the discrepancy in popular and institutional interests between levels would make ongoing consultation extremely burdensome, if not impossible. We therefore see the fundamental difficulty—even in the case of a veto mechanism that would enable and perhaps even induce greater consultation—of generating meaningful deliberation between levels of government.

Of course, the national veto was defeated at the Constitutional Convention. And as Alison LaCroix documents in her study of the origins of the American federal system, the compensatory mechanisms the Convention selected were judicial resolution of state-federal boundary disputes and a clause explicitly establishing the supremacy of federal law.[58] But unlike the national veto, from the standpoint of guaranteeing the authority of the national government this legal process presents only a partial solution, in that it lacks

[58] LaCroix, *The Ideological Origins of American Federalism*, 158-174.

the completeness and efficiency of a mechanism that routed *all* state legislation into a national forum *prior to* enforcement. Under the compromise that produced Article III, any state infringements of national authority (or actions impermissibly prejudicial to other states) would stand until judicial proceedings were commenced and an injunction staying or decision invalidating such action was handed down. As a consequence, state laws threatening national powers and prerogatives would be invalidated only retrospectively and, in many cases, only after a period of enforcement. Further, their invalidation would come in the language of law, complete with legal justification and elucidation of the constitutional text. This is profoundly consequential for the kinds of politics to which the Constitution would give rise. As an initial matter, it permits states to not only make abstract claims of sovereignty—rooted either in history or in an interpretation of the constitutional text—but also to back up those claims with authoritative actions, establishing policy regimes and enforcing laws reflective of the state governments' sentiments without any intermediation from the national government. So in addition to the constitutional arguments that could be made about the nature of the federal system and the proper understanding of sovereignty, claims about state sovereignty would be grounded as well in *political facts*—in the states' ability to act as they see fit unless and until checked by the national government through the judiciary. Moreover, interpretations of the Constitution would be refracted through and influenced by the states' ability to act in this way, because state and national action would together construct the political and legal context in which the underdeterminate state-federal relationship would be articulated and refined.

FIG. 2.1: POLICYMAKING PROCESS—CONSTITUTION



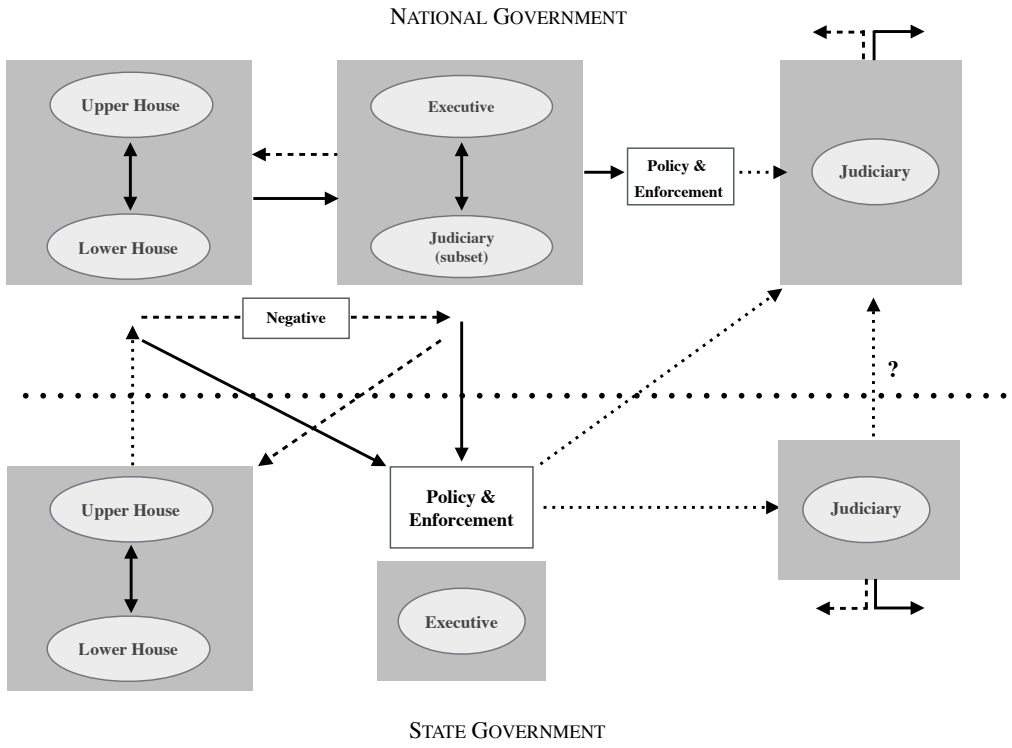
We can get a sense of what has just been described by contrasting the policymaking process under the Constitution with the process under the proposed Virginia Plan. Figures 2.1 and 2.2 provide visual depictions of these two processes. (In both figures, solid lines represent processes linking institutions, dashed lines represent veto points and processes, and dotted lines represent oversight or review processes.)[59] The clearest difference between the two is the relative separation and independence of the levels of government in the policymaking process established by the Constitution, and the permeability of the

[59] While these figures are intended to depict only the policymaking process, it nonetheless warrants mention that they omit a number of important processes and relationships. Most significantly, the modes of representation and electoral constituencies of the relevant institutions are not included. Additionally, second-level processes are also omitted. So under the Constitution, a presidential veto can be overridden by the Congress; and under the Virginia Plan, decisions by the Council of Revision were likewise reviewable by the national legislature.

state-federal boundary under the process proposed by the Virginia Plan. Under the Constitution, it isn't until the last phase—after legislation has been passed and policy enacted—that concerns about the states encroaching on national authority, or vice versa, can be authoritatively addressed. And even then, many of these concerns would first be dealt with by state courts, which despite the formal commitment to national supremacy nonetheless provided leverage for further state resistance and encroachment. Viewed in this light, the expansion of federal jurisdiction, though profoundly important and doubtless an enhancement of national authority, did little to change the underlying fundamentals of the policymaking process. Under the Constitution, the state policymaking process is largely insulated from intervention by the national government. National oversight and review of state actions is relegated to the end of the process, thereby allowing states to back up their claims of autonomy and sovereignty with authoritative action. This oversight and review, moreover, would come in the form of legal adjudication pursuant to the Constitution.

Compare this with the Virginia Plan. As Figure 2.2 makes clear, national oversight would have occurred very early in the policymaking process, with the actions of state legislatures immediately subject to a two-stage review process before any law could be passed or implemented. Even after passage, there remained the possibility of national oversight by legal means. But the primary check on state actions wouldn't come with the force of law or with legal precedent as a consequence. Rather, it was to be reflective of a distinctly *national* interest that would be open to revision and change in a national forum

FIG. 2.2: POLICYMAKING PROCESS—VIRGINIA PLAN



—that, at least, was Madison's intention.[60] In this framework state claims of autonomy and sovereignty would be either reviewed by national authorities or subject to national oversight. While it is important to note that a state could claim sovereignty over its laws and the enforcement thereof, that would only come after those laws had been endorsed by national authorities. And prior to national review, such claims could do little to change the legal substance of the state-federal relationship. For these reasons, claims of sovereignty under the Constitution are, at least in part, a function of the states' ability to act without immediate federal intervention. In short, the inclusion of a judicial and not

[60] Madison's thinking on the national veto was developed (in part) through correspondence with a range of figures. See, with reference to *Letters and Other Writings of James Madison* (J.B. Lippincott & Company, 1865), Madison's Letter to Thomas Jefferson, March 19, 1787, 1:284-286; and Letter to George Washington, April 16, 1787, 1:287-292. See also Letter to Edmund Randolph, April 8, 1787, *The Papers of James Madison*, William T. Hutchinson et al. (eds.) (University of Chicago Press, 1975), 9:369-371.

political solution to the boundary problem inherent in federal systems—Article III instead of the national veto—furnished critics of federal power with both legal and political resources to resist national authority. And these resources would not be deployed in the context of deliberation and reciprocal compromise between co-equal and co-dependent institutions—as can be the case with the separation of powers—but in the context of opposition between two independent and complete governments.

Returning then to the nature of relations between levels of government, we can see that the claim of state sovereignty, just like the assertion of national supremacy, presents a content-independent reason for obedience. That is, both depend not on the reasons underlying the claim of authority—the very reasons that fuel the generation of constitutional authority—but on the validity of the claim itself, whether or not the states are sovereign in a relevant respect or the national government is supreme. As a result, deliberation between state and national institutions cannot produce the positive goods claimed by the unifying theory; indeed, deliberation is not a feature of state-federal relations in the way that it is for relations between the branches of the national government. Where content-independence obtains, any appearance of responsive relationships will have been the result of national discretion. It should, therefore, be unsurprising that the opportunities unifying theorists commonly identify for states to produce the positive functions of separated powers—congressional testimony, high-level meetings between state and national officials, cooperation between state and federal administrators—are entirely matters of national discretion.[61] Furthermore, any powers

[61] Peabody and Nugent, "Unifying Theory," 18.

that are "shared" between the two levels of government will similarly be the result of national discretion and determination, meaning that they are not shared powers in the sense required for the production of constitutional authority.[62]

This, then, is the puzzle of constitutional authority in the American constitutional order. The generation of robust constitutional authority as regards the federal system is impossible where claims of state sovereignty have legal purchase or national supremacy must be invoked, both of which are products of the design of the constitutional system. But if state sovereignty is surrendered and national supremacy is rendered superfluous, though the generation of robust constitutional authority would then be possible, the resulting system of government would be quite different from that established by the Constitution. The creation of deliberative relations between governmental levels, rooted in legal equality and reciprocal dependence along the lines of the separation of powers at the national level, would give rise to a political system in which either the states could exercise veto power over national decisions (as in a confederacy) or states would pose no obstacle to the exercise of national power (as in a consolidated government). In both of these cases, distinguishing features of American constitutionalism would no longer obtain. Hence, while the unifying theory does accurately capture some aspects of how the federal system functions, it ultimately fails to prove its claim that federalism can yield the positive functions of a system of separated powers. This failure is rooted in the unifying

[62] The clear exceptions here are the areas of concurrent regulatory authority, most significantly the power to tax but including as well the powers to make bankruptcy laws, establish courts, borrow and spend money, and regulate elections. But here too state powers are not without limitation, as the doctrine of federal preemption has produced an elaborate system of qualifications and checks on seemingly shared powers. The literature on this topic is sprawling, but for a particularly thorough, and yet still critical, overview see Caleb Nelson, "Preemption," 86 *University of Virginia Law Review* 225 (2000).

theory's ignorance of how the relationships between state and national political institutions impose a limit on what their deliberations can produce. In the final analysis, there are some respects in which federalism and the separation of powers cannot be unified at the level of constitutional theory.

The Puzzle of Constitutional Authority and the Politics of Sovereignty

I've argued thus far that, although it accurately captures one dimension of the federal system, the unifying theory is ultimately falsified by the absence of formally responsive, power-sharing relationships between state governments and the national government. Through an analysis of its component parts, I showed that the argument that federalism is a separation of power makes claims about both the positive and negative functions of separated powers. As such, it entails two different notions of political power: a negative notion and a positive notion. The negative notion is premised on the belief that all political power is liable to abuse and that it must accordingly be properly divided, limited, and checked to protect liberty. The positive notion, on the other hand, holds that the fundamental values of liberal constitutionalism should be incorporated into the exercise of political power and that political institutions must therefore be designed and empowered to express those values through their interactions with one another. Whereas the positive notion is oriented towards the use of political power, the negative notion is oriented towards preventing its abuse. These notions, in turn, give rise to two conceptions of why political power should be separated, as well as how the exercise of separated powers should be evaluated. The *division of power* conception incorporates the negative

notion's emphasis on the potential abuses of political power, and power is accordingly divided wholesale between governmental institutions and levels. In contrast, the *separation of powers* conception incorporates the positive notion of political power and is consequently concerned with sub-dividing powers across institutions that are designed to give expression to the polity's fundamental value commitments.

While the *division of power* conception accurately captures some aspects of how federalism functions in the American constitutional order, the *separation of powers* conception cannot properly be applied to the federal system. Connecting the unifying theory's emphasis on the underdeterminacy of the federal system to recent theorizing of constitutional authority, I argued that, unlike the separation of powers at the national level, federalism cannot generate robust constitutional authority because of the lack of responsive, power-sharing relationships between state and national institutions. The failure of the unifying theory is rooted in what I called the *puzzle of constitutional authority*, by which I mean that so long as state sovereignty is claimed over against national power, and national supremacy must therefore be invoked, state-federal relations cannot produce robust constitutional authority. But enabling these interactions to generate constitutional authority would require a transformation of the fundamentals of American constitutionalism.

The argument presented here has made much of the relevance of claims of governmental sovereignty to the evaluation of the unifying theory. As detailed in the previous section, the political system established by the Constitution did contemplate the continued presence of sovereigntist arguments, in the sense that the political processes it

established would give rise to and even foster claims of state autonomy and exclusive authority in ways that would have been precluded by alternative institutional arrangements. Furthermore, that the states would retain ultimate decisional authority—which is synonymous with sovereignty as used here—in some matters was both a contingent reality[63] and a positive good recognized by many of the Constitution's architects.[64] At the same time, many of the notions of state sovereignty that have cropped-up throughout American history and have dominated interpretations of the federal system have largely denied the underdeterminacy of the state-federal relationship, and have instead substituted a determinate state-federal relationship from which state sovereignty can be derived.[65] On the account I've offered, it is (1) the structure of the constitutional order, (2) the resulting threat and consequences of claimed state sovereignty, and (3) the consequent need for a constitutional principle of juridically enforced national supremacy that, taken together, preclude interactions between state and federal institutions that are generative of robust constitutional authority. The question that now lies before us is

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[63] See, for example, *The Federalist* Nos. 45 and 46, in which Publius responds to the Anti-Federalist charge that the proposed Constitution would, in due course, establish a consolidated government. There Madison identifies the conditions that preclude the national government from "divest[ing] the States of [their] authorities": the people's "attachment" to their states and the governments thereof; the preponderance of state, as opposed to federal, employees; the regulation by state governments of "all the more domestic and personal interests of the people"; the greater familiarity of the people with those "domestic and personal interests"; and stronger personal and familial ties between members of the state governments and the people. Far from legal or institutional protections, each of these safeguards rests on contingent—and thus changeable—foundations.

[64] In *The Federalist* No. 39, for example, Madison notes the connection between state sovereignty and the federal character of the Constitution, arguing that such is a virtue of the proposed charter of government (39:254). There is also the repeated Publian refrain concerning the "residuary sovereignty" (and "authority") of the states. See, *e.g.*, *The Federalist*, 33:207, 39:256, 43:296, and 62:417.

[65] For a sampling of scholarly reliance on notions of sovereignty as definitional components of the federal system, see Malcolm M. Feeley and Edward Rubin, *Federalism: Political Identity and Tragic Compromise* (University of Michigan Press, 2008); William Riker, *Federalism: Origin, Operation, and Significance* (Little, Brown & Co., 1964); and Frank Cross, "The Folly of Federalism," 24 *Cardozo Law Review* 1 (2002).

whether this is the fate of the federal system, to be always beset by a deficit of constitutional authority? Is the puzzle of constitutional authority insoluble?

Throughout this analysis, I've been careful to stress that it is *claims* of state sovereignty rather than state sovereignty as such that is at the root of the puzzle of constitutional authority. The reason for this is twofold. Primarily, as I attempted to show in the previous section, the design of the constitutional order creates legal and political space for states to generate plausible assertions of sovereignty, even though these assertions may conflict with the underlying logic of the regime. These claims issue despite—even against—legal or abstract determinations of sovereignty and, as such, should be the focus of an inquiry into constitutional politics and development, as opposed to strictly constitutional law. And second, the Constitution was predicated on an underdeterminate division of sovereignty authority between the states and the national government that was, in turn, grounded in the sovereignty of the people. As a result, both levels of government could (and would) claim to act authoritatively on behalf of their constituents. Thus, it is the claims of sovereignty, within and beyond the parameters of constitutional underdeterminacy that are of greatest interest to us here, as we're concerned principally with how the structure of the state-federal relationship shapes constitutionally structured politics. Both of these reasons are grounded in the constitutional logic of federalism outlined in the previous chapter. That logic partakes of the same underdeterminacy that underlies both the positive benefits of the separation of powers and the content-dependent understanding of constitutional authority. According to this understanding of the federal system, the Constitution does not draw a clear or

comprehensive line between state and national powers; nor does it definitively resolve the question of how sovereign states can persist under a supreme national government.[66] As a result, the precise contours of the state-federal relationship are constructed through constitutional politics. This means that the very division of powers that structures the federal system is produced through the legal and political processes established by the Constitution, even as the *ex ante* division of power structures those processes. This, in turn, opens the door to the possibility of avoiding persistent standoffs between state sovereignty and national supremacy, thus ameliorating the puzzle of constitutional authority. However—as the formulation of the preceding sentence suggests—the fundamental nature of interlevel relations will persist in the absence of significant structural and operational changes to the federal system. Just as federalism itself is a disharmonious component of American constitutionalism, the puzzle of constitutional authority will remain a feature of state-federal relations as long as the underdeterminate division of power characterizes the federal system.

The constructive processes outlined here and described in Chapter One proceed in two general ways. The first is through judicial oversight and review of questions touching on the state-federal relationship, as contemplated by Article III. The second entails legislative elaborations of the state-federal relationship, a process that involves both the legislative and the executive branches. These two developmental possibilities—legal interpretation and legislative definition—are treated in depth in the subsequent chapters.

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[66] For the clearest descriptions of American federalism along these lines, see Edward Purcell, *Originalism, Federalism, and The American Constitutional Enterprise* (Yale University Press, 2007); and Keith Whittington "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius*, 26(2):1-24 (1996).

It will therefore suffice for present purposes to outline the basic contours and defining features of these developmental processes. Judicial engagements with the state-federal relationship, the subject of Chapter Three, produce legal interpretations of and, in many cases, constitutional precedents concerning the meaning of the federal system. This process is uniquely inflected by the intersection—the conflict, even—of constitutional underdeterminacy and the institutional logic of the judiciary. As explained in the second part of this chapter, the judiciary is structurally and functionally biased to maintain the rule of law and to vindicate individual rights. In the context of federalism, this means that questions that come before courts will, as a matter of course, be transmuted into legal questions requiring legal answers. The questions will sound in constitutional meaning, and the answers will require legal reasoning and constitutional interpretation. This institutionally-induced constitutional perspective supplies the syntax of judicial engagements with the federal system. To the extent that the quest for constitutional meaning and legal determinacy—though the latter isn't a necessary feature of constitutional jurisprudence—entails denying the fundamental underdeterminacy of the federal system, judicial engagements with federalism questions will trade in a different logic of federalism than the constitutional logic outlined here.

In contrast, legislative elaboration of the state-federal relationship is principally oriented not around law but governance and policy. Whereas the question confronting judges concerns constitutional meaning, the question confronting elected representatives is one of prudence and constitutional possibility. Legislative constructions of the state-federal relationship entail the creation of policy programs and regimes that put to use the

powers possessed by the national government, both building on and creating afresh relationships between state and federal institutions. These relationships can be explicitly created by positive law or implicitly created by adjusting the political context in which the levels of government relate to each other. For legislators and presidents alike, the federal system can be either an obstacle or an asset to public policy. Particularly pertinent to this analysis are the influence of political culture and administrative capacity. The resources and capacities of each governmental level condition what is and is not possible, identifying opportunities for policy implementation as well as obstacles to successful policy regimes. And popular support for each level of government similarly conditions what things the national government does and does not undertakes and, at some level, how it goes about doing so.[67] This isn't true—or, more precisely, isn't true in the same way—for judicial engagements with the federal system. When pronouncing constitutional meaning, courts needn't take into account the level of governmental capacity or the degree of popular support for a specific exercise of power. In many cases, interpretive

[67] Though a full presentation of this argument is beyond the scope of the present inquiry, this is a point for which the clear statement of a thesis is warranted. By saying that popular support is connected to both *whether* and *how* government acts, I am drawing a connection between the use of constitutional powers and public opinion. The broader argument, which I've presented in greater detail elsewhere, is that "the constitutional powers available to Congress have their own politics, and those politics shape the processes and procedures that produce legislation." See Connor M. Ewing, "Structure and Relationship in America Federalism: Foundations, Consequences, and 'Basic Principles' Revisited," 51 *Tulsa Law Review* 689 (2015), 724.

moves of this kind would be criticized for straying beyond the proper judicial role.[68] But for elected representatives, such behavior is not only permitted but encouraged.

Moreover, legislative elaborations of the state-federal relationship do not require comprehensive interpretations or reworking of the federal system. Unlike legal questions that demand interpretations of the federal system *as such*—as a foundational commitment of governance requiring coherent, systemic exposition—legislative constructions are (most often) one-off and answer to prudence and popular opinion, rather than to legal coherence or theoretical consistency. We should hope, of course, that legislators and presidents take the Constitution seriously and seek fidelity to its provisions and purposes. But even so, the president, senator, or representative who "takes the Constitution seriously" will not look upon the document in the same way as a jurist, nor will any one of these elected representatives necessarily look upon it in the same way as the other two. The institutions in which these individuals are embedded induce different perspectives on constitutional meaning that fundamentally structure their actions and outlooks. Given that these perspectives are induced by institutional structures, they may produce arguments and outlooks that conflict with an individual's previous statements in office or on the

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[68] A possible counterargument to this point would cite the interpretive approach(es) commonly called sociological jurisprudence to show that judges can, and in fact do, take account of "nonlegal" facts along the very lines I identify as beyond the usual scope of constitutional interpretation. While it is certainly conceivable that a broadly sociological approach could be constructed around political culture and administrative capacity, it is instructive to reflect on the tension between the emphasis on means-ends analyses in seminal articulations of sociological jurisprudence and the contingent limitations identified here, which are distinct from the purposes embedded in legislative acts and the means chosen to effect those purposes. While the former may properly and naturally be the focus of judicial inquiry, the latter are a more traditional, and similarly natural, focus for elected representatives in their construction and implementation of legislation. See, for example, Benjamin Cardozo, *The Nature of the Judicial Process* (Yale University Press, 1921), 98-141; Roscoe Pound, "The Scope and Purpose of Sociological Jurisprudence. [Concluded] III. Sociological Jurisprudence," 25 *Harvard Law Review* 489 (1912); and James A. Gardner, "The Sociological Jurisprudence of Roscoe Pound (Part I)," 7 *Villanova Law Review* 1 (1961), 9-19.

campaign trail. But as Jeffrey Tulis has provocatively argued, hypocrisy, though a defect of individual character, can be a virtue of institutional design.[69] To the extent that such instances give voice to the fundamental values of a constitutional regime, they should be seen as an indication of institutional resilience. Their absence, moreover, should raise concerns about institutional decay.[70]

In the main, the constructions of the state-federal relationship described here will define the scope of national power and, either implicitly or explicitly, define the corresponding scope of state power. But they will not generate responsive and reciprocally dependent relationships along the lines of those present among institutions at the national level. In other words, the puzzle of constitutional authority can be only provisionally and temporarily solved by constructions of the state-federal relationship, not wholly removed from the constitutional system. The degree to which this tension can properly be thought to be resolved will be a function of the congruence between the prevailing construction of the state-federal relationship and contemporaneous political practice. As this congruence decreases, claims of state sovereignty will be increasingly present, thus necessitating assertions of national supremacy. Conversely, to the extent that the prevailing construction of the state-federal relationship is consistent with political practice, relations between levels of government will proceed more or less harmoniously. If all of this is true, then the constitutional commitment to a federal system in which claims of sovereignty by both governmental levels have purchase and retain substantive

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[69] Jeffrey K. Tulis, "On Congress and Constitutional Responsibility," 89 *Boston University Law Review* 515 (2009), 523. See also Tulis, "Deliberation Between Institutions," in *Debating Deliberative Democracy,* 205

[70] Jeffrey K. Tulis, *Democratic Decay and the Politics of Deference* (Princeton University Press, forthcoming).

meaning may not be an insurmountable obstacle to the generation of some measure of constitutional authority. Rather, it can be an ongoing tension of constitutional politics, one that provokes and anticipates contestation over the meaning and purpose of one of the Constitution's defining features: the commitment to multilevel governance.

Chapter Three: Constitutional Law vs. Constitutional Logic

But the question respecting the extent of the powers actually granted is perpetually arising, and will probably continue to arise so long as our system shall exist. In discussing these questions, the conflicting powers of the General and State Governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.
— John Marshall, *McCulloch v. Maryland* (1819)[1]

I have always supposed that the meaning of a law, and for a like reason, of a Constitution, so far as it depends on Judicial interpretation, was to result from a course of particular decisions, and not these from a previous and abstract comment on the subject. The example in this instance tends to reverse the rule and forego the illustration to be derived from a series of cases actually occurring for adjudication.
— James Madison, Letter to Spencer Roane (1819)[2]

In the fraught union of these two passages is found the essential tension of American federalism, and one of the fundamental dynamics of American constitutional development. The issue of what powers can be exercised by which level of government is a recurring concern because it addresses the basic questions of politics. All polities must decide what things government should (and should not) do, and in federal systems a determination must be made as to which level of government should (and should not) do those things. As a result, the nature and scope of governmental powers and the relationships between and among governing institutions constitute inherent tensions in the American constitutional order. The state-federal relationship, as argued in each of the preceding chapters, is a disharmonic component of the American constitutional order, provoking contestation over its very identity.[3]

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[1] 17 U.S. 316, at 405 (1819)

[2] Letter to Spencer Roane, Sept. 2, 1819, The James Madison Papers at the Library of Congress, Series 1, General Correspondence, 1723-1859, Reel 19.

[3] Gary J. Jacobsohn, *Constitutional Identity* (Harvard University Press, 2010), 1-33.

And yet, in a political order that aspires for some measure of popular control—to act legitimately and authoritatively in the name of "We the People"—there is a reluctance to cede the resolution of these questions entirely to one governing institution. Nor should they be resolved in a single moment of political time. If at all possible, Madison argues in his response to Marshall's *McCulloch* opinion, questions of such significance should be resolved over time rather than in one fell swoop, and through the interaction of governing institutions instead of by a single institution or actor. His claim suggests that, considering the alternatives, *working towards* a resolution of questions concerning the scope and location of government powers in the American federal system can be a constitutional good. It is not desirable, Madison advises, to seek to harmonize constitutional disharmonies, especially if the one doing so is an enrobed judge whose pronouncements claim the authority of fundamental law and have the force of precedent.[4]

There is also in Madison's and Marshall's claims a deeper recognition about American federalism, one that unifies rather than divides them. Indeed, both acknowledge the defining characteristic of the American federal system: its underdeterminacy. That is, they both recognize that the Constitution does not establish a comprehensive jurisdictional division between the states and the national government. Had that been the case, then "the question respecting the extent of powers actually granted" to each level of government could be answered by recourse to the constitutional text. Similarly, if the Constitution's meaning with respect to the state-federal relationship

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[4] As is discussed below, it's important to note that what Madison warns against is not the *per se* involvement of the judiciary in questions concerning the federal system but the immediate supremacy or exclusivity of the judicial voice. Madison's letter to Spencer Roane, among others, makes clear that he saw a legitimate role for judicial review of congressional powers and their limits.

was clearly directive, then encouraging a prolonged, inter-institutional debate over that meaning, as Madison can be read to encourage, would be tantamount to resisting the requirements of the fundamental law.

But the Constitution does not do this. Instead, it grants powers to the national government,[5] specifies limits to national power,[6] acknowledges the existence and operation of state governments[7] while putting limitations on the same,[8] and situates both levels of government in a regime of national supremacy in the event of conflicts between state and national laws.[9] The Constitution emphatically does not include an explanation of or rule for determining where one set of powers must yield to the other; nor does it spell out the ways in which the enumerated powers can and cannot be put to use beyond the identification of general purposes and prohibitions. Put another way, the Constitution does not delineate the precise relationship between the states and the national government, though it does establish the initial parameters of the state-federal relationship. But to put the federal system into action—to create policy in a context of multiple levels of government—the relationship between state and federal powers must be elaborated, either implicitly or explicitly. And because this is the case, our attention is drawn to the relationships between national powers and state powers, as well as the interactions between the institutions of the national government and those of the state

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[5] U.S. Constitution, Art. I, Sec. 8.

[6] *Id*, Sec. 9.

[7] For two examples see *id*., Sec. 2, cl. 1 and Sec. 3, cl. 2.

[8] *Id*, Sec. 10.

[9] *Id*., Art. IV, Sec. 2.

governments. We must, therefore, take seriously the relational dimensions of the state-federal *relationship*.[10]

What would such a relational understanding look like? The few who've emphasized this conception of American federalism have by and large taken a juricentric approach, focusing on some aspect of how courts do or should engage with the federal system. Charlton Copeland, for example, has argued that analyses of the judicial enforcement of federalism (specifically state court obligations to vindicate federal claims) should focus less on the Constitution's substantive division of powers than on the interactions between state and federal institutions. Eschewing enforcement models predicated on the allocation of legal authority, Copeland has offered a relational model of federalism enforcement "based on an understanding of federalism as an enduring relationship" that "generates norms of behavior capable of constraining the national and states actors, even where there is a clear possession of substantive authority by one or both spheres of government."[11] Another variant of the juricentric relational model focuses on constitutional interpretation, in particular the Supreme Court's federalism jurisprudence. Here the work of the self-styled "new nationalists,"[12] led by Heather Gerken, looms largest. In her root

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[10] The touchstone for this argument is Charles Black's *Structure and Relationship in Constitutional Law* (Louisiana State University Press, 1969), in which he juxtaposes the "method of purported explication or exegesis of the particular textual passage considered directive of action" with "the method of inference from structures and relationships created by the constitution in all its parts or in some principal part" (7).

[11] Copeland, "Federal Law in State Court: Judicial Federalism Through a Relational Lens," 19 *William & Mary Bill of Rights Journal* 511, 516 (2011).

[12] See, generally, "Symposium: Federalism as the New Nationalism," 123 *Yale Law Journal* 1626-2133 (2014).

and branch reconsideration of "Our Federalism,"[13] Gerken has called for the Court to "think hard about how the states and the federal government interact."[14] For the new nationalists, though, it's crucially important that this "relational account" does not start from claims of state (*i.e.*, subnational) sovereignty; it must instead take seriously the fact that the "states' most important form of power lies not in presiding over their own empires but in administering the federal empire."[15] It is here that Gerken's preferred relational account departs from what she characterizes as a relational variant whose analytical starting point is state power. Precisely because sovereignty is an unworkable doctrinal foundation, the Court must develop an account of federalism that reflects the realities of state-federal interactions in the modern policy state.

While juricentric in focus, the relational accounts offered by Copeland and Gerken are distinctly normative in purpose. For different reasons and in different ways, both are concerned with the ways judicial actors *should* engage the federal system and its legal requirements. This focus looks at what the Court ought to do with the underdeterminacy of the American federal system. A separate and, indeed, analytically prior question reverses this order and asks, what has underdeterminacy done to the Court? That is, how has the underdeterminacy of the state-federal relationship influenced judicial engagements with the federal system? Such a question forces us to consider the judiciary not as an observer of or neutral participant in the underdeterminate federal system

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[13] *Younger v. Harris*, 401 U.S. 37, at 44 (1971) (Black, J.J.)

[14] Gerken, "Slipping the *Bond*s of Federalism," 128 *Harvard Law Review* 85, at 113 (2014).

[15] *Ibid*.

established by the Constitution, but as an institution embedded in political processes and debates that are decisively shaped by the constitutional logic of federalism. This question is made all the more pressing when one considers the institutional logic of the judiciary: the nature and mandate of the judicial function is to find (or establish) legal meaning and, in many cases, determinacy. What, then, is the result of the intersection of the constitutional logic of federalism and the institutional logic of the judiciary? That is the question under consideration in this chapter.

In the pages that follow, I seek to assess the consequences of constitutional underdeterminacy for judicial engagements with the federal system. This is, to be sure, but one part of a much broader picture. A complete account of the consequences of constitutional underdeterminacy would attend also to the ways in which legislative, executive, and administrative behavior are shaped by this feature of the federal system. Accordingly, these issues are taken up in the following chapter. We must also avoid mistaking jurisprudential development for the whole of constitutional development. Indeed, that is one of the central arguments of this chapter. An examination of the development of federalism jurisprudence reveals the emergence of a logic of federalism strikingly at odds with the constitutional logic of federalism. This logic, in turn, clearly illustrates the tensions between the constitutional law and the constitutional logic of federalism, while also revealing the salience of judicial reasoning about sovereignty in order to arrive at directive legal principles.

I begin by briefly restating the constitutional logic of federalism, adding to the account that has been presented in the preceding chapters a number of considerations

relevant to the institution under examination here: the judiciary. This discussion is intended both to identify and to limn the contours of the fundamental tension between the constitutional logic of federalism and the institutional logic of the judiciary. With this as background, I then turn to consider the development of federalism jurisprudence over a period of roughly one century, outlining the emergence of a constitutional law of federalism which, I argue, partakes of a logic strikingly different from the constitutional logic of federalism. The cases covered in this section run from the ratification of the Constitution in the late eighteenth century through the Civil War. Though this section covers only a small portion of all "federalism cases" the analysis is intended not to offer a comprehensive review of the jurisprudence but to identify the patterns of reasoning that characterize judicial engagement with the underdeterminate federal system. In the final section, I reflect on this jurisprudential development and identify two main lessons. I argue, first, that the constitutional law of federalism and the constitutional logic of federalism exist in considerable tension with one another. This tension results from judicial attempts to elaborate the state-federal relationship in order to resolve constitutional disputes, attempts that were occasioned by the underdeterminacy of the federal system. And second, I argue that the connection between constitutional underdeterminacy and invocations of sovereignty to adjudicate state-federal disputes suggests an endogenous dimension of sovereignty in American constitutional politics. In this way, notions of sovereignty are a product of constitutional politics, a legal and political concept that is produced by the interaction of constitutional logics, institutional structures, and contested visions of the American constitutional order.

The Constitutional Logic of Federalism & the Institutional Logic of the Judiciary

Reading the Constitution, one is struck not by the prominence of the states but by their relative absence—by the negative space resulting from the constitutional drafters' articulation of national powers and purposes that left the presence and operation of state governments largely implied. In contrast to the constitutions of many other federal systems, the U.S. Constitution does not specify a set of legal entitlements or protections for the states; nor does it enumerate a list of subnational powers.[16] In short, the Constitution does not constitute the state governments in the same way that it constituted a new central government. Instead it assumes their continued existence while fundamentally changing the political context in which they would exist after ratification. The Constitution, it must be remembered, was created in the shadow of failure. The Articles of Confederation, which had been in force since 1781, had proven insufficient to

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[16] A small sampling: the German Basic Law Sec. II, Art. 32, para. 3 (granting treaty powers to the Länder, subject to federal approval); Sec. VII, Art. 70, para. 1 (granting the Länder "the right to legislate insofar as this Basic Law does not confer legislative power on the Federation"); and Sec. X, Art. 105, para. 2(A) (recognizing the qualified power of the Länder to "legislate with regard to local taxes on consumption and expenditure"). Similarly, the South African Constitution contains an entire section defining the legislative authority of the provinces. See the Constitution of the Republic of South Africa, Ch. 6, Part A, sec. 104.

Of course, the U.S. Constitution does, in the Ninth and Tenth Amendments, make reference to powers and rights not granted to the national government. But as the uses and consequences of those amendments over the course of American political history have shown, a *reference* to such a body of powers and rights is quite different from an enumeration (or even general description) of the same. See, *e.g.*, *United States v. Sprague*, 282 U.S. 716, at 733 (1931) (the Tenth Amendment "added nothing to the instrument [i.e., Constitution] as originally ratified"); and *United States v. Darby*, 312 U.S. 100, at 124 (1941) ("The amendment states but a truism that all is retained which has not been surrendered."). But see *Fry v. United States*, 421 U.S. 542, at 547 n.7 (1975) (the Tenth Amendment "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system") and the (temporary) codification of this understanding in *National League of Cities v. Usery*, 426 U.S. 833 (1976).

the challenges of the day. The litany of failures is all too familiar: domestic instability, international insecurity, economic inadequacy, and near insolvency.[17] Central to these failures were the strict limitations on the powers of the confederation government and the high barriers to collective action. The confederation's dependence for tax revenue on requisitions on the states,[18] its limitation of confederal powers to those "expressly delegated,"[19] and the requirement that all states assent to proposed amendments[20] had so enervated the United States that, by 1786, it had received far less than one percent of its requisitions and the leading reform efforts were facing certain failure.[21] These failures, in turn, were rooted in rivalries and frustrations between states, all of which produced a resistance to centralized political authority while also stymying efforts at coordinated action.

The challenge facing the convention that assembled in Philadelphia in the summer of 1787, then, inhered principally in *reconstituting* the relationship between the states and the United States, an objective that entailed establishing a novel kind of government: a

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[17] Max Edling, *A Revolution in Favor of Government: Origins of the U.S. Constitution and the Making of the American State* (Oxford University Press, 2008).

[18] Articles of Confederation, Art. 8.

[19] *Id*., Art. 2.

[20] *Id*., Art. 13.

[21] See Calvin H. Johnson, *Righteous Anger at the Wicked States* (Cambridge, 2009), 15-39. Johnson puts the exact figure of "mandated" requisitions at $3,800,000, most of which was intended for debt financing, and the amount collected at $663 (15 and text accompanying n. 6). The reforms referenced are the seven amendments proposed in August of 1786, which included strengthening congressional regulatory powers and enhancing the likelihood of state compliance with requisitions. See *Report of Continental Congress*, Aug. 7, 1786, 31:494-498.

compound republic.[22] Unlike federal regimes of old, the Constitution did not preserve the complete sovereignty of the states by erecting a central government that was legally dependent upon them.[23] Rather, it created a central government endowed with the inherent powers of national sovereignty—preservation of national security, superintendence of conflicts between and among states, management of the national economy, and the conduct of foreign diplomacy. Decisively, the new national government had a direct relationship with citizens as well as greatly enhanced fiscal and military powers, precluding at least some of the state obstruction that gave rise to calls for a new constitution.[24] Though they weren't expressly enumerated in the constitutional text, the states would retain "most of the policy tools for governing everyday life," which included the powers to maintain peace, preserve and further local welfare, and regulate local commerce.[25]

While the Constitution provided a framework for the federal system, it stopped short of specifying the exact jurisdictional line dividing levels of government. The state-federal relationship outlined by the Constitution was just that—an outline. While the parameters set forth by the Constitution constrained the permissible configurations of the state-

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[22] Much of what is said here follows the argument laid out in Martin Diamond's "*The Federalist*'s View of Federalism," in *As Far as Republican Principles Will Admit: Essays by Martin Diamond* (William A. Schambra, ed.) (AEI Press, 2011). For a treatment of how this novelty played out in the debate between Federalists and Anti-Federalists, see Jeffrey K. Tulis and Nicole Mellow, "The Anti-Federal Appropriation," *American Political Thought* 3(1):157-166 (2014).

[23] Diamond, *id*., 108-110.

[24] On this second point, see especially Max Edling, *A Revolution in Favor of Government*, 89-148 and 163-190.

[25] David Brian Robertson, *Federalism and the Making of America* (Routledge, 2012), 32

federal relationship, it did not specify a defined set of options, much less fix a single jurisdictional division of power and authority. This is what is meant when the federal system is characterized as underdeterminate. The constitutional text did not determine the specific nature and substance of American federalism. Instead, it left the federal system open to elaboration, definition, and revision through the political and legal processes it established. As is explained in greater detail in Chapter One, there were both practical and functional reasons underlying the structure of the federal system. Whereas the explanation from expediency holds that underdeterminacy was an inevitable consequence of the circumstances surrounding the creation of the Constitution, the functional explanation holds that it can be beneficial for the purposes of government. By empowering the national government to energetically and effectively engage the problems of the day and by permitting citizens' attachments to consequentially shift from one governmental level to the other, the underdeterminate federal system grounded the quest for good governance on the authority of the People in whose name the Constitution spoke.

Fully understanding the nature and development of the federal system established by the Constitution requires recognizing the significance of the institutions created thereby. For it is these institutions, corresponding to the three branches of government, whose operation would both shape and be decisively shaped by the underdeterminacy of the federal system. This is the case because efforts to enact policy and pursue the ends for which the Constitution was created would require the elaboration of the state-federal relationship. Though underdeterminacy is a feature of constitutional design, it cannot in

an absolute sense be a feature of public policy, which requires specifying how governmental institutions relate to one another in the provision of a particular service or the exercise of certain powers. Because legislation puts to use the powers granted by the Constitution, it must build on the underdeterminacy of the initial constitutional relationship by supplying greater detail and determinacy. It is, therefore, crucially important to understand how the logics of governing institutions interact with the constitutional logic of federalism.

For our purposes here, the relevant interaction is that concerning the logic of judicial institutions and the constitutional logic of federalism, the distinctiveness of which can be illustrated by comparison with the interactions of legislative and executive institutions with the constitutional logic. The judiciary was created with the principal purpose of resolving questions of law, up to and including the Constitution. While debates can be had about the status and reception of judicial interpretations of the Constitution, it shouldn't be inordinately controversial to claim that among the central judicial functions is the interpretation of the fundamental law when disputes arise over its meaning and requirements.[26] Conversely, the legislature was created to express (some version of) the will of the people and to devise and pass laws in pursuance of the preambular ends "to form a more perfect Union, establish Justice, insure domestic Tranquility, promote the general Welfare, and secure the Blessings of Liberty[.]" And finally, the executive was

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[26] Jeremy Waldron is perhaps the most prominent critic of judicial review and may, as a result, be one who takes issue with this claim. For a direct statement of his argument, see "The Core of the Case Against Judicial Review," 115 *Yale Law Journal* 1346 (2006).

designed to execute the laws and, especially, to preserve domestic security.[27] These institutional purposes are complemented by broad institutional capacities rooted in the structure of each, capacities that inflect the behavior of the actors embedded in those institutions. And so the legislature has the capacity of deliberation, the judiciary judgement, and the executive dispatch or energy. The result, in Jeffrey Tulis' formulation, is "an institutional design to make productive the tension between popular will, rights, and security both within and among major institutions of government."[28]

These institutional logics fundamentally shape the engagement of governmental institutions with the underdeterminate federal system. Structured to pursue popular interests, the legislature approaches underdeterminacy with an eye towards possibility, treating the state-federal relationship as something that can be adjusted to best pursue policy goals, even as it is constrained by both the prevailing configuration of the state-federal relationship and the capacity of government institutions. To the extent that the executive is concerned with implementing and administering the measures passed by the legislature, much the same could be said for that institution. And where the executive has a distinctive concern with administration, the state-federal relationship is viewed through

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[27] While these institutional purposes are described in the past tense (e.g., "the executive *was* structured") this argument shouldn't be taken to imply a historical disconnect between the establishment of these institutions and some future point. It has been suggested by some that those seeking to make arguments about institutional purposes and capacities need to prove continuity between the founding and the period under examination. See Jeremy D. Bailey, "It's the War Power, Again," 50 *Tulsa Law Review* 649, at 655 (2005) (arguing that "institutional capacities are far from fixed"). Despite the many changes that have occurred since the drafting of the Constitution, the argument I am advancing in this chapter assumes that the basic institutional identities and capacities of the three branches of government have not changed so much as to preclude the application of the fundamental characteristics used here.

[28] Jeffrey K. Tulis, "Impeachment in the Constitutional Order," in *The Constitutional Presidency* (Johns Hopkins University Press, 2009), 242.

the lens of efficiency or practicality. For presidents seeking to implement or further a policy agenda, the federal system presents a set of opportunities and constraints. In this respect, presidents and their administrations are doubly constrained—first (and like the legislature) by the prevailing condition of state-federal relations and governmental capacity, and second by the laws passed by Congress.

But for the judiciary, the federal system presents questions of meaning and interpretation. In their interactions with the state-federal relationship, courts must identify what is permissible and what is impermissible.[29] The disputes that come before courts arise because of disagreements over the compatibility between the Constitution and laws passed pursuant or subordinate thereto. Whether a federal law is within the power of Congress to pass, whether a state can sever its relationship with the Union, what the Constitution requires of national and subnational governments—these and innumerable other possibilities present questions about legal and constitutional meaning. Therefore, resolving them requires the application of legal texts and the interpretation thereof. This feature of judging is most apparent in the work of jurists and theorists whose approach is grounded in some notion of original meaning, authorial intention, or contemporaneous

[29] For the sake of simplicity, and because the focus of this chapter is Supreme Court (*i.e.*, an apex court's) jurisprudence, I am setting aside distinctions between higher and lower courts that are relevant within judicial systems.

public understanding.[30] But even among those who reject such an approach, the determination of legal meaning and, moreover, which meanings are relevant to a given case are basic components of interpretation.[31] For it is fundamental to the judicial enterprise to reason by example, to identify the controlling rules in previous cases and apply the rule from the most similar case(s) to the controversy at hand.[32] This is not only a feature that characterizes constitutional reasoning and jurisprudence; it also serves an end of constitutional governance, namely the rule of law. Because of the judiciary's relatively diminished democratic character—which is a virtue of institutional design—

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[30] As this list of emphases is intended to convey, there is considerable diversity among the interpretive camp conventionally labeled "originalist." This diversity is due in part to significant methodological developments over time, which have yielded a distinction between "old originalists" and "new originalists." Among the former, the works of Robert H. Bork and Antonin Scalia are most prominent. See Bork, *The Tempting of America: The Political Seduction of the Law* (Free Press, 1990); and Scalia, "Originalism: The Lesser Evil," 57 *University of Cincinnati Law Review* 849 (1989) and *A Matter of Interpretation: Federal Courts and the Law* (Amy Gutmann, ed.) (Princeton University Press, 1997). Central early works among the "new originalists" include Randy E. Barnett, "An Originalism for Nonoriginalists," 45 *Loyola Law Review* 611 (1999) and Keith E. Whittington, "The New Originalism," 2 *Georgetown Journal of Law & Public Policy* 599 (2004). For an overview of originalism's development, see Lawrence B. Solum, "What is Originalism? The Evolution of Contemporary Originalist Theory," in *The Challenge of Originalism: Theories of Constitutional Interpretation* (Grant Huscroft and Bradley W. Miller, eds.) (Cambridge University Press, 2011), 12-41.

[31] There is as much diversity among non-originalist thinkers as there is division between originalists and non-originalists. As a result, it is common to subdivide this second camp into distinct schools or approaches. Due to their prominence, three warrant identification here. (1) Ronald Dworkin's "moral reading" approach; see especially *Freedom's Law: The Moral Reading of the American Constitution* (Harvard University Press, 1996), 73-76. (2) Sotirios A. Barber and James E. Fleming's philosophic approach; see *Constitutional Interpretation: The Basic Questions* (Harvard University Press, 2007). And (3) a related group of approaches that seek the synthesis of post-founding developments or the translation of founding commitments; see Bruce Ackerman, *We the People: Foundations* (Belknap, 1991), 88-89 and Lawrence Lessig, "Fidelity in Translation," 71 *Texas Law Review* 1165 (1993), 1263-1264. Somewhere between these methodologies and originalism lies Jack Balkin's "text and principle" approach, which purports to synthesize originalism and living constitutionalism. See Balkin, *Constitutional Redemption: Political Faith in an Unjust World* (Harvard University Press, 2011), 103-138; and *Living Originalism* (Harvard University Press, 2011), 3-5.

[32] Edward H. Levi, "An Introduction to Legal Reasoning," 15 *University of Chicago Law Review* 501 (1948), 501-506. I do not pretend that the end of constitutional interpretation is perfect determinacy. What has been said here is entirely consistent with the recognition that a legitimate purpose of interpretation is, at times, the reduction (not eradication) of either ambiguity or underdeterminacy.

judicial inquiry should be constrained by past decisions. But even where it is not caselaw but constitutional commitments that are under examination, judges must first determine the meaning of and then apply the provisions of the Constitution. In Chief Justice Marshall's formulation—which perhaps does more to highlight rather than resolve the central question—it is "the province and duty of the Judicial Department to say what the law is."[33]

The juxtaposition of the institutional logic of the judiciary and the constitutional logic of federalism presents a clear tension, if not a fundamental contradiction. Whereas the constitutional logic is predicated on underdeterminacy and the consequent possibility of multiple manifestations of the state-federal relationship, the institutional logic of the judiciary is oriented towards removing uncertainty, identifying legal boundaries, and presenting the justificatory rationale for its determinations. Though the preceding analysis has identified a theoretical tension between the institutional logic of the judiciary and the constitutional logic of federalism, it is far too abstract to derive any meaningful insights about the consequences of judicial engagements with the federalism system. Moreover, the question of how constitutional underdeterminacy has shaped judicial engagements with the federal system is an empirical question that should direct our attention to the history of those engagements. We must, in other words, consider particular disputes that have come before the Court and the jurisprudence they have produced. That is the matter now before us.

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[33] *Marbury v. Madison*, 5 U.S. 177 (1803).

The Constitutional Law of Federalism

While the foregoing description of the constitution logic of federalism and the institutional logics of the branches of the national government paints a picture of the nature of the American federal system, it limns only the broadest and most general contours of these institutions' engagements with federal underdeterminacy. To see how this has played out in practice and, importantly, what the consequences have been, we must attend to the details of political and constitutional development. As the object of concern here is how constitutional underdeterminacy has shaped judicial engagements with the federal system, those details consist principally in the particular legal disputes over the meaning of the federal system. For that reason, this section examines the development of federalism jurisprudence across Supreme Court cases in order to illustrate the consequences of judicial engagement with the federal system, each of which, I've argued, partake of different animating logics. Through that interaction, I argue below, a new logic of federalism was created, one that is decisively shaped by the institutional logic of the judiciary.

As noted at the outset of this chapter, the goal here is to offer an account of this interaction and its consequences, not a comprehensive narrative of the underlying jurisprudence. This distinction is possible because the new logic that I argue emerges from the interaction of the judiciary with the constitutional logic of federalism is discernible within and across a wide range of cases the Supreme Court has decided. As such, the imperative is to address cases with sufficient scope to adequately present the argument; the inclusion of other cases would only underscore the argument advanced via

the smaller set of cases considered here. Additionally, my intention is not to rewrite the history of federalism jurisprudence, which would indeed require a comprehensive treatment of the caselaw. It is, rather, to identify and assess the principal consequences of the intersection of two logics—one constitutional, the other institutional—that I've argued appear to be at odds. Such a method permits scrutiny and objections on the basis of the cases discussed as well as those omitted. The cases are presented in a method that is both chronological and topical, moving from the ratification of the Constitution through the Civil War but focusing on defining tensions and issues. As a result, the analysis is divided into two sections. The first addresses the first fifty years under the Constitution, focusing on several cases concerning the division of power between the state and national governments. Picking up where the first section leaves off, the second section focuses on a number of cases dealing with related questions of slavery, secession, and the nature of the American Union.

The Early Republic: 1787-1837

The first three decades under the Constitution saw the rise of the federal judiciary as the guarantor of national supremacy.[34] The next two would make clear the consequences of that role in American constitutional politics. Having effectively routed disputes over

[34] As this introduction makes clear, the period covered in this chapter picks up after crucially important jurisprudential and political developments in the domain of federal jurisdiction. That issue is not taken up here, as the jurisdictional expansion that occurred largely due to the efforts of the Marshall Court is beyond the scope of the present inquiry. See Alison LaCroix, "Federalists, Federalism, and Federal Jurisdiction," 30 *Law and History Review* 205 (2012). This is the principal reason why *Chisholm v. Georgia*, 2 U.S. 419 (1793), is excluded from analysis, as that case is best addressed in the context of early battles over federal jurisdiction.

the Constitution's meaning before the federal bar, the Court was positioned to leave its mark on constitutional interpretation. And in the domain of state-federal relations, that is precisely what it did. The period following the War of 1812 into the late 1830s is often treated as a tumultuous time for federalism jurisprudence.[35] Running from the middle years of John Marshall's chief justiceship to the early years of Roger Taney's, and spanning significant changes in federalism jurisprudence wrought by the transition from the former to the latter, there is much evidence for this belief. But it was during this period that a new logic of federalism emerged from the engagement of the judiciary with the underdeterminacy of the American federal system. While the Marshall Court would articulate one dimension of this logic, the Taney Court would supply a corresponding dimension. In truth, the new logic of federalism was only partially constructed in the period of each man's tenure at the head of the Court. It is only when the substantive and formal transitions over time are accounted for that the new logic begins to appear in its fullness. The opposing convictions of the Courts' nationalists and its advocates of robust state sovereignty drove the development of a new understanding of federalism that entailed the elaboration of the state-federal relationship far beyond the broad outlines provided in the Constitution. This new understanding forsook the underdeterminacy of the jurisdictional division between state and nation in favor of settled legal meaning.

Though judicial engagement with questions touching on the nature of the federal system arose in earlier cases of the Marshall Court, such questions are treated most fully, and most consequentially, in its opinions in *McCulloch v. Maryland* (1819) and *Cohens v.*

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[35] See, for example, William P. Murphy, *The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Making of the Constitution* (Quadrangle Books, 1967), 409-417.

Virginia (1821).[36] At issue in *McCulloch* was Congress's power to incorporate the Second Bank of the United States and Maryland's power to tax it. Writing for the Court, Marshall upheld the exercise of congressional power and held that a state could not tax an instrumentality of the federal government. Two years later, with the *McCulloch* controversy still simmering, the Court heard *Cohens*, which involved the Supreme Court of Virginia's contention that it—and not the Supreme Court—had final say over the commonwealth's criminal cases. In an opinion evocative of the political finesse exhibited nearly two decades earlier in *Marbury v. Madison* (1803),[37] Marshall denied Virginia's claim of possessing exclusive jurisdiction, claimed federal jurisdiction over the case, and ultimately affirmed the lower court's decision.

Crucially, in both *McCulloch* and *Cohens* Marshall did not cite narrow grounds for upholding the exercise of congressional power and claiming federal jurisdiction, respectively. Rather, in lengthy disquisitions on the nature, scope, and extent of national power he sought a principled constitutional basis for the Court's holdings. Asked whether Congress could do what it did in *McCulloch*, Marshall attempted to clarify the *kinds of things* the national government could lawfully do. And asked whether the Court could hear a case decided by a state high court in *Cohens*, he set his opinion in the context of an elaborate constitutional relationship between states and the national government. The foundation of both opinions is Marshall's elaboration of the nature of sovereignty in the federal system. While it was true that the states possessed some sovereignty and that the

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[36] 19 U.S. 264 (1821).

[37] 5 U.S. 137 (1803)

sovereignty of the federal government was defined by its enumerated powers, he argued, it was also true that where the federal government was granted power it was supreme. Moreover, the sovereignty of the national government depended upon the efficacy of the powers it was granted. It was on this basis that Marshall interpreted the Necessary and Proper Clause to mean that the Congress had significant discretion to select the means it deemed necessary to pursue legitimate ends. Accordingly, state sovereignty was limited by the means Congress employed to "carry into execution powers conferred on that body."[38]

In explicating the state-federal relationship implied by the Constitution—for that is how he saw the connection—Marshall was not content to leave room for state infringement on the proper domain of national power and thus took the opportunity to demarcate the line that separated the sovereign states from the sovereign national government.[39] This was a far cry from the underdeterminacy of the state-federal relationship set out in the Constitution. And that was precisely the point. For as Marshall wrote in *Cohens*, it was the "different opinions on the true construction of the constitutional powers of Congress" that compelled federal jurisdiction in the case. In order to protect the constitutionally established federal system, Marshall argued, its

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[38] 17 U.S. 316, at 429.

[39] Though it may seem incongruous to attribute sovereignty to the states in the context of Marshall's opinion, it should be remembered that this is how Marshall himself formulated the matter: "In the case now to be determined, the defendant, a sovereign State…" (17 U.S. 316, 400).

vulnerabilities must be shored up and strengthened against state hostilities.[40] To be truly sovereign, the national government's powers must be secure and to be secure they must be clearly defined. Under this theory of sovereignty, underdeterminacy was not a virtue but a threat to the integrity of the national government. In the absence of a clearly demarcated scope of national authority, state infringements would erode not only the reality but also the possibility of national sovereignty.

Thus, in addressing questions about the federal system the Court fundamentally transformed the way federalism was conceived of and enforced. Where the Constitution left room for political deliberation and definition, the Court sought legal precision; where the Constitution established an underdeterminate state-federal relationship, the Court sought directive constitutional meaning. What had been a political question about what the federal system *could and should be* was transmuted into a legal question about what the federal system was *as a matter of law*. In short, in elaborating the theory of sovereignty implied by Constitution's underdeterminate federal system, the Court attempted to resolve a question that the Constitution itself did not answer—that is, what are the precise contours of the state-federal relationship? The result of the interaction between the logic of the judiciary and the constitutional logic of federalism was a new logic, one in which the proper domains of state and national responsibility and sovereignty could be discerned from the Constitution's text and structure. By elaborating

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[40] In this respect, Marshall's argument echoed the concerns expressed by Publius in *The Federalist*. In No. 17, for example, Hamilton writes, "It will always be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the state authorities" (106). And in No. 45 Madison argues that "all the examples of ancient and modern confederacies" reveal a stronger tendency "to despoil the general government of its authorities, with a very ineffectual capacity in the latter to defend itself against the encroachments" (310).

the relationship between the levels of government and arriving at categories of behavior appropriate to each, the actions of both levels could be measured against a constitutional standard. Conceived thusly, underdeterminacy was replaced by definitive meaning and the dynamism of the political realm was exchanged for the codification of legal reasoning.

The last decade of Marshall's time on the bench, from 1825 to 1835, is widely seen as a period of accommodation and retreat on questions of national power.[41] Due in part to the appointment of new justices—three between 1823 and 1830—the Court began issuing opinions more supportive of state (*i.e.,* subnational) power.[42] Furthermore, with the increase of dissenting opinions—a practice Marshall had actively opposed in favor of opinions of the Court as a whole—the Court began to *seem* more sympathetic to state

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[41] See, *e.g.*, Charles F. Hobson, "The Marshall Court (1801-1835): Law, Politics, and the Emergence of the Federal Judiciary," in *The United States Supreme Court: The Pursuit of Justice* (Christopher Tomlins, ed.) (Houghton Mifflin Co., 2005), 61.

[42] For examples, see *Ogden v. Sanders*, 25 U.S. 213 (1827) (upholding a New York bankruptcy law applying to contracts made after the passage of the law); *Wilson v. Blackbird Creek Marsh Company*, 27 U.S. [2 Pet.] 245 (1829) (holding that Delaware's damming of the Blackbird Creek did not infringe on congressional regulatory powers under the Commerce Clause); *Providence v. Billings*, 29 U.S. [4 Pet.] 514 (1830) (upholding a Rhode Island law taxing the capital stock of all banks in the state against a Contracts Clause challenge); and *Barron v. Baltimore*, 32 U.S. [7 Pet.] 449 (1829) (rejecting a Takings Clause challenge against Baltimore development efforts on the grounds that the Fifth Amendment limited actions of the national government and not the states).

claims.[43] This process continued, with one notable exception,[44] until Marshall's death in 1835. The vacancy at the center of the bench presented President Andrew Jackson with yet another opportunity to shape the court to his liking: in the six years preceding 1835, Jackson had put three new justices on the bench. (And by 1838, after Congress added two additional seats to the Court, he had appointed seven of the nine sitting justices.) His choice to lead the Court was Roger Brooke Taney, the son of a Maryland planter whom Jackson had tapped to be his Attorney General. During Taney's chief justiceship, the Court would (attempt to) negotiate the sectional disputes preceding the Civil War and, of course, issue the infamous *Dred Scott* decision. Though Taney would occupy the Court's middle seat until 1864, we needn't look far from his confirmation in 1836 to see how the new logic of federalism fared in the post-Marshall Supreme Court. In just the first term, the Taney Court would "set the stage for the jurisprudence of the newly remade Jacksonian Court."[45] In so doing, it would mark a significant point of departure from the substance of the Marshall Court's federalism jurisprudence but not, as I'll argue, from its logic. By 1837, it was clear that the Taney Court was committed to the same logic of

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[43] For examples, see *Brown v. Maryland*, 25 U.S. [12 Wheat.] 419 (1827) (Justice Johnson dissenting from a decision invalidating a licensure law); and *Weston v. City Council of Charleston*, 27 U.S. [2 Pet.] 449 (1829) (Justice Johnson dissenting from a decision striking a state law imposing a tax on stock issued for loans made to the United States). For the development of norms governing judicial opinions, see Karl M. ZoBell, "Division of Opinion in the Supreme Court: A History of Judicial Disintegration," 44 *Cornell Law Quarterly* 186 (1959). See also Ruth Bader Ginsburg, "The Role of Dissenting Opinions," 95 *Minnesota Law Review* 1 (2010).

[44] *Worcester v. Georgia*, 31 U.S. [6 Pet.] 515 (1832) (voiding a state law regulating the access of non-Native Americans to Native American lands and establishing the federal government's sole authority to regulate relations with Indian tribes).

[45] Paul Finkelman, "The Taney Court (1836-1864): The Jurisprudence of Slavery and the Crisis of the Union," in *The United States Supreme Court: The Pursuit of Justice*, 79.

federalism promulgated by Marshall in *McCulloch* and *Cohens*, though in the service of quite different ends.

For present purposes the first case of note is *Charles River Bridge v. Warren Bridge* (1837),[46] a dispute out of Massachusetts that concerned the state's ability to build a bridge over the Charles River that would effectively revoke a preexisting charter held by a ferryboat company. Writing for the Court, Taney invoked a principle of construction from English common law, holding that contractual ambiguity should be decided "in favor of the public." The decision thus facilitated state attempts to pursue economic development on their own terms, while also sanctioning state promotion of technological and industrial advancements even where extant contracts could otherwise stand in the way. More important for the development of the logic of federalism were the Court's decisions in *New York v. Miln* (1837)[47] and *Briscoe v. Commonwealth of Kentucky* (1837).[48] In *Miln* the Court faced a state law that imposed fines on ships that did not report their passengers to authorities. When a shipmaster failed to comply with the law, George Miln, the ship's consignee, was fined $15,000. Miln argued that the New York law was an unconstitutional regulation of interstate commerce. Despite the (Marshall) Court's holding thirteen years earlier in *Gibbons v. Ogden*,[49] which gave an expansive

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[46] 36 U.S. 420 (1837).

[47] 36 U.S. 102 (1837).

[48] 36 U.S. 257 (1837).

[49] 22 U.S. 1 (1824) (striking down a New York licensure law for out-of-state steamboat operators on the grounds that it infringed on Congress's power to regulate interstate commerce).

reading to Congress's power to regulate commerce, in *Miln* it decided in favor of New York and upheld the shipping regulation.

The basis for the Court's decision, Justice Philip Barbour wrote, was that, "we are of the opinion that the act is not a regulation of commerce, but of police; and that being thus considered, it was passed in the exercise of a power which rightfully belonged to the states."[50] These "police powers," identified as the basis for a constitutional decision for the first time in *Miln*, recognized a body of traditional state powers according to which,

> [I]t is not only the right, but the bounden and solemn duty of a state, to advance the safety, happiness and prosperity of its people, and to provide for its general welfare, by any and every act of legislation, which it may deem to be conducive to these ends; where the power over the particular subject, or the manner of its exercise is not surrendered or restrained, in the manner just stated. That all those powers which relate to merely municipal legislation, or what may perhaps, more properly be called internal police, are not thus surrendered or restrained; and that, consequently, in relation to these, the authority of a state is complete, unqualified, and exclusive.[51]

Just as Marshall had attempted to secure the national government from state encroachment in *McCulloch* and *Cohens*, through the articulation of police powers Barbour sought to protect the states from the expansion of the national government. Doing so required elaborating the state-federal relationship to clarify how, to his and the majority's mind, state powers related to national powers.

In *Briscoe*, the Court employed similar reasoning to uphold Kentucky's incorporation of a bank to issue bank notes. Six years earlier, in *Craig v. Missouri*,[52] the Marshall Court

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[50] 36 U.S. 102, at 132.

[51] 36 U.S. 102, at 139.

[52] 29 U.S. [4 Pet.] 410 (1830).

had invalidated state attempts to issue paper money. In response to that ruling, Kentucky created a state-chartered bank that would issue its own *bank notes* instead of currency. In 1837, this was enough to satisfy a majority of the Court, which in a 6-1 decision upheld the state's actions. Without explicitly grounding the decision in the states' police powers, Justice McClean argued that the power to create a corporation to issue bank notes was constitutional precisely because it wasn't precluded by the Constitution. This line of reasoning put the power to issue bank notes firmly in the category of powers "not… surrendered or restrained" that Justice Barbour had announced in *Miln*. That power had belonged to the states before 1787 and because it was not withdrawn, it still belonged to them. As in *Miln*, the majority in *Briscoe* read into the Constitution a theory of sovereignty and state-federal relations that empowered states to serve their traditional purposes.

For McLean, the Constitution's lack of determinacy was the basis not for a malleable relationship between levels of government—much less for deference to Congress—but for a broad reservoir of rights reserved to the states. This impulse to derive specific, directive meaning from an underdeterminate constitutional text, whether done in service of national or state interests, is the hallmark of the new logic of federalism produced by judicial engagement with the federal system. Though it was a consensus view that states had certain powers that were theirs alone, not to be infringed by the national government, nowhere, least of all in the Constitution, were those powers spelled out. What the Court did in *Miln* and *Briscoe* was recognize legal categories—police powers and traditional functions—to remedy or supplement the Constitution's silence about the precise extent of

powers possessed by the states. For both the Marshall Court's nationalist jurisprudence and the Taney Court's states' rights opinions, underdeterminacy was a threat to what each saw as the sovereign relationship implied by the Constitution. The result was a logic of federalism predicated not on jurisdictional negotiation through constitutional politics but on defining and preserving a balance of powers between the state and national levels.

The conventional account of the federalism jurisprudence of the post-Marshall Court attributes much significance to the states' rights sentiments of President Jackson and the justices he appointed to the bench. This telling give considerable weight to the power of judicial review, without which the Court would have been unable to substantially limit earlier pro-nationalist decisions.[53] There is doubtless some truth to this view. Jackson's justices, Taney foremost among them, were frequently skeptical of national power, particularly when it collided with areas of traditional state concern, and they weren't reluctant to express as much in their opinions. But when we examine the reasoning of the decisions surveyed here, we see in the early years of the Taney Court the persistence of the same logical form that characterized the Marshall Court's most expansive opinions. Whereas in *McCulloch* and *Cohens* the Court explicated the scope of national powers up to the point it was delimited by state powers, in *Miln* and *Briscoe* the Court began with state powers and defined a domain of sovereign authority limited at its outer edge by national powers. The latter decisions erected a category of government powers that corresponded to the category of nation powers articulated by Chief Justice Marshall in *McCulloch* and *Cohens* and later extended in *Gibbons*. Neither category was fully

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[53] William P. Murphy, *The Triumph of Nationalism*, 51.

deducible from the Constitution. But both were attempts to elaborate the state-federal relationship there set out and, in the process, elucidate directive and determinate legal principles from a text whose logic was fundamentally underdeterminate.

The central difference between the decisions of the Marshall and Taney Courts in these cases concerns the interpretation of the relationship between sovereign entities. Chief Justice Marshall prioritized the efficacy of national constitutional powers and national governance, thus interpreting the sovereignty of the national government as extending as far as necessary to achieve these ends. The limitation on national powers, then, were traditional areas of state concern that, more often then not, the national government could not practicably reach. Conversely, Chief Justice Taney and Justices Barbour and McLean accorded most value to the states' traditional functions and accordingly defined the scope of national power by first giving an expansive reading to the necessary domain of state control. To arrive at these conclusions, each justice had to construct a state-federal relationship that, while drawing on the constitutional text, went far beyond the underdeterminacy of the federal system found there. It was this effort to elaborate a robust and directive theory of the federal system that caused the Court to read underdeterminacy out of the Constitution.

Though the two often reached opposing substantive conclusions, the Taney Court in its early years continued the new logic of federalism forged under the Marshall Court, treating federalism as something far more determinate than a fair reading of the constitutional text would support. In this way, the states' rights jurisprudence of the late 1830s had more in common with the Marshall Court's nationalist jurisprudence than with

the constitutional logic of federalism. Both sought to apply legal rigor and precision to the question of the state-federal relationship's meaning, identifying a principled basis on which to deem as lawful and unlawful not only particular state or federal actions but also the *categories* of actions that were appropriate to each. In the course of acquitting the judicial duty "to say what the law is," Marshall strove to delineate that which was within the realm of national power and that which was beyond the realm of state power. The Taney Court decisions reversed Marshall's deductive process, seeking to clarify the proper domain of state power and the improper domain of national power. Though fundamentally different in their emphases, both modes of reasoning partook of the same impulse: to provide clarity where the Constitution left underdeterminacy. That is the essence of the new logic of federalism produced in the early decades of the nineteenth century by judicial engagements with the constitutional logic of federalism.

Slavery, Secession, and Union: 1842-1873

It is impossible to separate the history of federalism from the institution and legacy of slavery.[54] Conspicuous in its literal absence from the constitutional text, the existence and protection of slavery were undeniable considerations during the construction of the

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[54] The unfortunate consequence of this relationship is captured by William Riker's striking assertion: "If one approves the goals and values of the privileged minority, one should approve of federalism. Thus, if in the United States one approves of Southern white racists, then one should approve of American federalism. If, on the other hand, one disapproves of the values of privileged minority, one should disapprove of federalism. Thus, if in the United States one disapproves of racism, one should disapprove of federalism." *Federalism: Origin, Operation, Significance* (Little, Brown, 1964), 155. Legal historians Sara Bayeux and Karen Tani have recently argued that this sentiment, in conjunction with the increasing nationalization of domestic politics, led scholars of American politics and history to neglect the federal system. See "Federalism Anew," *American Journal of Legal History* 56:128-138 (2016). For an attempt to remedy this situation, see Karen Tani, *States of Dependency: Welfare, Rights, and American Governance, 1935-1972* (Cambridge University Press, 2016).

federal system and are apparent in the structure of government established by the Constitution. From the formula for representation of "three fifths of all other Persons,"[55] to the electoral college's consequent privileging of slaveholding states, to the Fugitive Slave Clause of Article IV[56]—slavery pervaded not just the Constitution but also the politics it was meant to structure. While the status of slavery in the Constitution was (and remains) a much controverted question of legal theory and history,[57] it is difficult to defend the proposition that the federal system did not provide constitutional resources for slavery's endurance. For that reason, myriad legal cases arose that, despite their individual characteristics, all stemmed from the presence of slavery in some states, its absence in others, and the host of phenomena—ranging from economic structure to political culture—generated by this difference.[58] Those surveyed here, like many among the set from which they're drawn, present fundamental questions about the extent of state power, the scope of national regulatory authority, and the nature of citizenship in the American federal system. Taken together, they demonstrate how the Court conceptualized

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[55] U.S. Constitution, Art. I, Sec. 3., cl. 3.

[56] *Id*., Sec. 2, cl. 3.

[57] The most famous disagreement, of course, is that between the positions of William Lloyd Garrison—that the Constitution was "a covenant with death" and "an agreement with hell"—and Frederick Douglass—that there "is no word, no syllable in the Constitution to forbid" the abolition of slavery—who himself had previously affirmed Garrison's position.

[58] For primary sources and analysis of some of the cases not covered here, see Paul Finkelman, *Slavery in the Courtroom: An Annotated Bibliography of American Cases* (Lawbook Exchange, 1998). See also Don E. Fehrenbacher, *The Slaveholding Republic: An Account of the Unites States Government's Relations to Slavery* (Oxford University Press, 2001). Important also is the emergence of antislavery argumentation in the late eighteenth and nineteenth century. In this connection, see Justin Buckley Dyer, *Natural Law and the Antislavery Constitutional Tradition* (Cambridge University Press, 2012),

the underdeterminate state-federal relationship in the context of slavery and what the consequences were of its interaction with the constitutional logic of federalism.

Among the most significant cases that directly broached the constitutional foundations of slavery was *Prigg v. Pennsylvania* (1842). *Prigg* concerned the 1793 Fugitive Slave Act, specifically whether it precluded Pennsylvania's law prohibiting the removal of slaves and criminalizing efforts to do so. Upon attempting to remove a former slave from Pennsylvania to Maryland, Edward Prigg was arrested and found guilty under the Pennsylvania law. His appeal to the Supreme Court claimed that the state law should be displaced by the federal law. Reversing the conviction, the Court affirmed the constitutionality of the Fugitive Slave Act and, moreover, held that "the power of legislation upon this subject is exclusive in the national government[.]"[59] Writing for the majority, Justice Story grounded national authority in a Marshallian understanding of national sovereignty. National powers should be construed to extend to the point required for their efficacious use and, for that reason, must be understood to include "powers which were necessary and proper as means to carry into effect rights expressly given, and duties expressly enjoined" by the Constitution.[60] And like Marshall, Story included a gesture towards (though not a clear demarcation of) the limit of national power: "the police powers belonging to the states in virtue of their general sovereignty."[61] Paralleling the logical structure of the Court's opinions in *McCulloch* and *Cohens*, Story's opinion

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[59] 41 U.S. [16 Pet.] 539, at 542 (1842).

[60] 41 U.S. [16 Pet.] 539, at 618-619.

[61] 41 U.S. [16 Pet.] 539, at 625.

for the Court in *Prigg* proceeded by articulating the full scope of national power and only then acknowledging the body of state powers on the other side of that legal horizon. Even as—or, perhaps, *because*—he gave an expansive construction to national powers, Story outlined the powers of government on the other side of that horizon. As was argued above in the context of Marshall's opinions, this mode of reasoning—in which state and national powers are understood as a function of their relationship to each other—was induced by the underdeterminacy of the federal system.

In an opinion that concurred only in judgement, Chief Justice Taney rejected Story's conception of the state-federal relationship and offered his own elaboration. Though the substance of the two opinions differed starkly their logical forms were quite similar, with Taney taking as his starting point the powers of the states rather than a full articulation of the enumerated powers of Congress. This approach to the state-federal relationship was buttressed by what could be thought of as a strict constructionist approach to the constitutional text. For Taney, the absence of an explicit prohibition on state legislation enforcing the rights of slaveholders to reclaim their property, in conjunction with the explicit prohibition on impairing that right, yielded the conclusion that "the [states'] power to pass laws to support and enforce it, is necessarily implied."[62] On this basis, he rejected the majority's assignment of exclusive regulatory power to the national government. In so doing, he located the states' concurrent power to legislate in behalf of slaveholders' rights in a vision of the state-federal relationship according to which constitutional underdeterminacy was to be read in a way that maximized state power.

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[62] 41 U.S. [16 Pet.] 539, at 628.

Though often overshadowed by *Prigg*, a case decided the prior year broached matters of comparable significance. In *Groves v. Slaughter* (1841), the Court affirmed the validity of a contract for the sale of slaves in Mississippi over objections that it was abrogated by the state constitution's prohibition on the importation and sale of slaves. Though the case was resolved on fairly narrow grounds—the state constitutional provision was found to require enabling legislation in order to go into effect—the opinions issued by the Court nonetheless addressed a question of considerable constitutional importance: what was the scope of Congress' power under the Commerce Clause vis-à-vis state regulatory powers? As in *Prigg*, the opinions in *Groves* addressed the question of whether commercial regulation was a concurrent power or a power exclusive to the national government. But unlike *Prigg*, *Groves* includes a more explicit engagement with the vision of union that informs the interpretation of Congress' enumerated powers. And for this reason, it is an illustrative example of how the structure of the federal system induces judicial reasoning about the nature of union for which the Constitution is the charter of government.

In the absence of an exhaustive division of power between governmental levels, the conflict between Congress' enumerated right to regulate interstate commerce and an implicit right for states to regulate their own commerce induced justices on both sides of the issue to reason about the nature of the polity established by the Constitution. As the three opinions that take up this matter demonstrate, depending on how one understands the union and the place of the component governments therein, the question of the proper state-federal relationship can be answered differently. Hence, Justice McLean's conclusion that Congress possessed exclusive power to regulate commerce followed from

his argument that the "spirit of the constitution" required national powers to face no opposition from the states, even if Congress has chosen not to act. "The necessity of a uniform commercial regulation," he wrote, was the principal motivation for writing a new constitution. If not exclusive to Congress, "the Constitution must fail to attain one of the principal objects of its formation."[63] But where did this power end? Like the endorsements of national power we've already seen, McLean's came with the identification of a class of activities under the states' control: "The power over slavery belongs to the states respectively. *It is local in its character, and in its effects*; and the transfer or sale of slaves cannot be separated from this power."[64] Locality, then, defined the line of separation between state and national powers, as the police powers had for Story in *Prigg*.

In his opinion affirming state regulatory powers, Justice Baldwin proceeded in a manner quite similar to McLean, reasoning about the relationship of one level of government to the other. But rather than reason from national power to state power, he began by emphasized the states' police powers. Most relevant to this analysis is not only Baldwin's acknowledgment of the underdeterminacy of the federal system, but also his proposed solution to this problem of constitutional interpretation. The jurisdictional line, which he confesses can be difficult to identify, is buttressed by a body of state powers that must be inferred from both the constitutional text and some notion of the union it

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[63] 40 U.S. 449, at 504 (1841).

[64] 40 U.S. 449, at 508 (emphasis added).

established. After conceding that *Gibbons* "conclusively settled" that Congress' power to regulate interstate commerce is exclusive, he writes:

> Cases may indeed arise wherein there may be found difficulty in discriminating between regulations of 'commerce among the several states' and the regulations of 'the internal police of the state,' but the subject matter of such regulations of either description will lead to the true line which separates them when they are examined with a disposition to avoid a collision between the powers granted to the federal government by the people of the several states and those which they have reserved exclusively to themselves.[65]

Baldwin's effort to identify and protect state power involved first asserting that a construction must be made that avoided conflict between state and national power; what was needed was a clear separation of the two. Doing so required identifying the *objects* of regulation, which in turn drew on the premise that congressional powers yielded to a set of definite state powers, namely their internal police powers. While this understanding would seem consistent with McClean's emphasis on locality as the line between the extent of state and national powers, Baldwin reaches exactly the opposite substantive conclusion as McClean. This is the result of similar patterns of relational reasoning, induced by constitutional underdeterminacy, that are distinguished by the analytical starting point. The line dividing state from national powers will differ depending on which powers and which level of government is given analytical priority. What appears to be a disagreement about constitutional—and primarily *textual*—interpretation, is actually a much more consequential disagreement about the relationship between state and nation and how that relationship should be understood. This disagreement takes on its distinctive

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[65] 40 U.S. 449, at 511.

appearance because it occurs within the institutional context of the judiciary and is thus animated by the imperatives of finding constitutional meaning and legal determinacy.

There is, perhaps, no case as significant to the history of, or revealing of the relationship between, federalism and slavery as *Dred Scott v. Sanford* (1857).[66] At issue in the case was whether Scott, a slave who had been moved into and lived for some time in a free state, could sue for this freedom.[67] The suit thus presented the threshold question of his standing to sue. But in the course of rejecting Scott's standing, the Court made the case about much more. Writing for the seven justice majority, Chief Justice Taney went on from the jurisdictional question to address two further questions. The first was whether Dred Scott, or any former or current slaves, was a citizen of the United States; the second whether Congress had power to regulate slavery in the territories acceded to the federal government after the Constitution was ratified. To both questions Taney's answer was no. These two issues—citizenship and the scope of national power—are at the core of the federal system, especially when one acknowledges the centrality of popular attachment to the distribution of power in the state-federal relationship. To this point citizenship hasn't figured in the analysis of federalism jurisprudence. This is partly for reasons of case selection but also because it was not a significant focus of early

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[66] A seminal treatment of this case, as well as the legal and historical background, is Don E. Fehrenbacher's *The Dred Scott Case: Its Significance in American Law and Politics* (Oxford University Press, 2001). For an analysis of the broader jurisprudence of which *Dred Scott* was a part, see Austin Allen, *Origins of the Dred Scott Case: Jacksonian Jurisprudence and the Supreme Court, 1837-1857* (University of Georgia, 2006); and Mark Graber, *Dred Scott and the Problem of Constitutional Evil* (Cambridge University Press, 2006).

[67] The facts of the case are much more complicated than this simplification undoubtedly suggest. In addition to the sources cited previously, one should consult Lea VanderVelde's *Mrs. Dred Scott: A Life on Slavery's Frontier* (Oxford University Press, 2009) for an excavation and examination of many commonly overlooked aspects of the circumstances surrounding the case.

Supreme Court rights jurisprudence. As Michael Vorenberg has observed, "the lodestar of rights in early nineteenth-century America was not citizenship but freedom."[68] But as *Dred Scott* reveals, citizenship would become an increasingly pivotal piece of the relationship between state governments and the national government. This will become clear throughout the remainder of this section, as the post-Civil War changes to American law are surveyed and the changed position of American citizens with respect to the governments that represent them are examined.

Chief Justice Taney's answers to the questions he deemed implicated by the threshold question of jurisdiction were undergirded by a robust theory of the American union and the nature of the constituent power that created it. His argument rests on a sharp distinction between "the rights of citizenship which a State may confer within its own limits, and the rights of citizenship as a member of the Union."[69] Appearances to the contrary notwithstanding, this is not an argument for dual citizenship if that term is understood to entail separate and independent legal statuses with respect to both the state and national governments. It is, rather, a relationship of separate but dependent citizenships. After making the distinction between the two modes of citizenship, Taney clarifies the relationship between the two: citizenship as a member of the union depended on citizenship in the states that formed the union. If the latter status did not obtain, neither could the former. Moreover, this dependence referred to the concrete historical moment at

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[68] "Citizenship and the Thirteenth Amendment: Understanding the Deafening Silence," in *The Promise of Liberty: The History and Contemporary Relevance of the Thirteenth Amendment* (Columbia University Press, 2010) (Alexander Tsesis, ed.), 61.

[69] 40 U.S. 393, at 405 (1856).

which the Constitution was established. If one was not among the classes of individuals included in state citizenship at the time of ratification, one could not be a citizen of the United States nor enjoy the rights and privileges conferred thereby. Though they could enjoy the benefits and protections offered by their own states, classes of individuals admitted to state citizenship subsequent to the founding could not enjoy the advantages of "citizenship as a member of the Union" because they were not party to the creation of the union.[70] At this point in Taney's argument, we begin to see more clearly the interdependence of citizenship, sovereignty, and government power. Only citizens can delegate sovereign authority that is otherwise and ultimately their own. Citizenship in a broader union, moreover, is derivative of and dependent upon citizenship in the component parts of that union, namely the states. Once delegated, the sovereign authority held by government can be used only on and for the benefit of those who were party to the original delegation. To do otherwise—for example, by extending citizenship or the rights of citizenship to groups who weren't part of the initial delegation of authority to the union—would amount to violating the sovereignty of both individual citizens and the state governments that are the trustees of those citizens' initial delegations of power.

Despite the many differences between Taney's opinion and the dissents by Justices McClean and Curtis, both of the latter present a broadly similar picture of citizenship in the United States. It bears mention, though, that McLean stresses Congress' exclusive power of naturalization and defines "citizen" in very simple terms as "a freeman," that is,

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[70] *Ibid*.

one "born under our Constitution and laws."[71] But this qualification still fits within the relationship of dependence and state primacy that Taney outlines. As McLean concludes, "No person can legally be made a citizen of a State, *and consequently a citizen of the United States*, of foreign birth, unless he be naturalized by the acts of Congress."[72] Curtis is much more direct in his formulation of citizenship, though much longer in his analysis of the issue. Under the Constitution, he concludes after surveying citizenship under the Confederation and through the establishment of the Constitution, "every free person born on the soil of a State, who is a citizen of that State by force of its Constitution or laws, is also a citizen of the United States."[73] In all three of these opinions, then, the picture of citizenship that emerges is one in which, despite separate modes corresponding to each level of government, citizenship as a member of the United States depended on state citizenship. In connecting rights to citizenship, the opinion of the Court increased the legal import of the latter. If the denial of citizenship entailed the denial of rights, then protecting rights would require extending and protecting citizenship. But that would require an understanding of citizenship, and of the state-federal relationship in which it was embedded, that didn't yet obtain.

The final thing to note about the *Dred Scott* opinions is that the restrictions, both temporal and participatory, that Taney puts on citizenship in the union also serves as a foundational premise for his argument that the federal government had (limited)

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[71] 60 U.S. 393, at 531.

[72] 60 U.S. 393, at 532 (emphasis added).

[73] 60 U.S. 393, at 576.

regulatory power over only those territories ceded to the union upon ratification of the Constitution. This argument is supported by an additional premise that illustrates another aspect of the relational reasoning that is induced by the structure of the federal system. In conjunction with the restrictions on Congress' power over territories ceded to the union following ratification, Taney asserts that territories "are acquired [by the union] for the benefit of the people of the several States who created it."[74] The power of the national government over the territories cannot be discretionary, he continues, because the national government is a government of enumerated, not discretionary, powers. According to this theory of union and national power, the formation of territories into states is a requirement. The relationship established by the Constitution is a twofold relationship: the first is between the states and the national government; the second between citizen and the governments that represent them. We've already seen how Taney understood the latter relationship, identifying citizenship in the union as derivative of and dependent upon state citizenship at the time of the founding. His treatment of the former reveals that, on his understanding of the union, the binary relationship between the state and national governments left no room for permanent territories. To be constitutionally intelligible—to fit the legal grammar of the regime established by the Constitution—there could be no permanent addition to the relationship between state and nation. The powers of the national government were understood and, most importantly, limited in relation to the states. This division of power would be undermined and distorted by the addition of an entity that didn't similarly bind the national government. This is yet another example

[74] 60 U.S. 393, at 448.

of the relational mode of reasoning induced by the interaction of the institutional logic of the judiciary, governed as it is by the imperative to resolve questions of constitutional meaning, with the underdeterminate division of power between the states and national government.

For the most part, the fight over secession was fought not in federal courtrooms but in legislative chambers, state conventions, and, before long, on the contested battlefields and coastal waters of the once united states. With a few notable exceptions, this would remain true for the duration of the Civil War.[75] However, following Lee's surrender at Appomattox and the cessation of hostilities, a case did come to the Court that presented, albeit somewhat indirectly, the central constitutional question on which the war was predicated: could a state secede from the union? *Texas v. White* (1869) dealt with a dispute over U.S. bonds once held by Texas that, its Reconstruction government claimed, had been sold illegally by the state legislature during the war. At the behest of plaintiff's counsel, the Court considered the legality of Texas' actions during the war and, by extension, the legality of secession. A five justice majority held that, because "the union between Texas and the other States was as complete, as perpetual, and as indissoluble as the union between the original States," Texas could not, in fact, leave the union.[76] Accordingly, the state's declaration of secession and subsequent implementation of the secession ordinance were invalid, making the actions of the Confederate legislature

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[75] Perhaps chief among those exceptions are the *Prize Cases*, 67 U.S. 635 (1863), which affirmed President Lincoln's power under Article II to seize ships that attempted to evade the blockade of Southern ports. Notable also, though not heard by the Supreme Court, is *Ex Parte Milligan*, F. Cas. No. 9487 (1861), rejecting Lincoln's power to suspend *habeas corpus*.

[76] 74 U.S. 700, at 726 (1868).

"absolutely null." The bonds, then, still properly belonged to Texas, who was entitled to possess them or to receive compensation from those who had redeemed them.

The majority opinion, written by Chief Justice Chase, reflects the enduring, and yet evolving, influence of the relational framework evidenced by opinions as varied as *McCulloch* and *Dred Scott*. The conclusion that the union was perpetual and indissoluble follows from the definition of "state," which was needed in order to determine if the Court had original jurisdiction in the case. After reviewing the different senses in which the term is used, Chase concluded that for constitutional purposes, "A 'state'…is a political community of free citizens, occupying a territory of defined boundaries, and organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed." The union of these states under the Constitution "forms the distinct and greater political unit" designated the United States "and makes of the people and states which compose it one people and one country."[77] Such a union was not new with the Constitution; instead, it was formed at first in the colonial period and given explicit legal shape with the Articles of Confederation. Through this process, the relationship of union was deemed to be "perpetual" and, when governance under the Articles cast doubt on that proposition, "the Constitution was ordained 'to form a more perfect Union." Chase ends this part of his opinion with a rhetorical question meant to clarify the nature of the state-federal relationship: "What can be indissoluble if a perpetual Union, made more perfect, is not?"[78]

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[77] 74 U.S. 700, at 721.

[78] 74 U.S. 700, at 725.

Central to the indissolubility of union, then, is the nature of the relationship between the national government and the states. Here we see a variation on the relational mode of reasoning already identified. Because of the constitutional underdeterminacy of the state-federal relationship, Chase's opinion had to draw on historical developments and commitments that filled in the details and supplied context for that relationship. Whereas in previous cases we saw that the *powers* of governmental levels are understood in relation to each other, in *White* we see that the place and purpose of each level within the broader constitutional regime is understood in relation to the other level. Thus, without the states-in-union, there could be no such political entity as the United States. But at the same time, the "preservation of the States, and the maintenance of these governments" are constitutional ends on a par with the preservation and maintenance of the national government.[79] This relationship of reciprocal duties—to stay and be kept in union while the independent existence of the states is preserved—gives rise to the overriding responsibilities of each level of government. The states must not—indeed cannot—sever their ties with the United States, while the United States must guarantee to the states a republican government and guard against domestic insurrection. Hence, the status, powers, and rights of both level of government were identified by clarifying the relationship of each to the other.

From a contemporary vantage, the decision in *White* is striking for what it does *not* contain, namely much emphasis on citizenship. It would seem, after all, that citizenship in the United States would furnish sufficient grounds for national action to protect the

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[79] *Ibid*.

rights that, in the estimation of the national government, were violated or threatened by secession. But this is not the justification the Court offered. Instead, the interests of individual citizens were located in the political communities that composed the states, which in turn composed the union. This definition of citizenship mirrors that set out in *Dred Scott*, in which individual citizenship in the union was a function of state citizenship, thus precluding national action directed towards vindicating rights of an independent national citizenship. By presenting a capacious definition of "state," one that emphasized the aspect of *political community* over against the aspect of the *state governments*, the *White* majority was able to equivocate on what the national government's duties to the states actually entailed and from what precisely they arose. Nonetheless, the opinion rejects the legitimacy of secession and justifies the actions of the national government to restore rebellious states to the union on the grounds of the proper relationship between governments, not on a duty to citizens. As a result, the national government's actions to restore states to the union were only indirectly connected to the claims of those citizens and required the elaboration of the state-federal relationship just discussed. This feature of the decision reflects the status and understanding of citizenship even after the Civil War and puts into stark relief changes that were already in motion when the Court handed down its opinion.

Far more consequential than the Court's decision in *Texas v. White* were the actions a few years earlier of the 39th Congress, which had passed the Thirteenth and Fourteenth Amendments. Although the Thirteenth was ratified by 1866, it took another two years

and considerable political maneuvering for the Fourteenth to enter into force.[80] It is difficult to overstate the significance of the Fourteenth Amendment to both the structure of the federal system and the course of modern constitutional jurisprudence.[81] With its definition of citizenship in the United States and prohibition on state abridgment of the privileges and immunities of national citizens, deprivation of due process of law, and denial of equal protection, Section 1 alone signaled a profound alteration to the formal relationship between state and nation. Equally important was Section 5, which granted Congress "power to enforce this article by appropriate legislation." Nonetheless, the extent to which the changes to the state-federal relationship would be not merely formal would depend on congressional action, executive enforcement, and—what is the focus of the remainder of this section—judicial reception.

The first case to test the meaning of the Fourteenth Amendment came before the Court in 1873. Arising out of Louisiana, the *Slaughter-House Cases* questioned the constitutionality of the state-created monopoly that required all butchers to use the services of a single slaughterhouse company. A group of New Orleans butchers brought suit claiming that the law establishing the monopoly violated the Thirteenth and Fourteenth Amendments because it "creates an involuntary servitude…abridges the privileges and immunities of citizens of the United States…denies [them] the equal

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[80] For a history of the construction and ratification of these amendments, see Akhil Reed Amar, *The Bill of Rights*: *Creation and Reconstruction* (Yale University Press, 1998), 163-214.

[81] For two notable accounts of the history and, especially, jurisprudential development of the Fourteenth Amendment, see Alexander Tsesis, *We Shall Overcome: A History of Civil Rights and the Law* (Yale University Press, 2008) and Michael Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (Oxford University Press, 2004). And for an account that focuses less on the Court than on Congress, see Rebecca E. Zietlow, *Enforcing Equality: Congress, the Constitution, and the Protection of Individual Rights* (New York University Press, 2006).

protection of the laws; and…deprives them of their property without due process of law[.]"[82] The significance of the case stems from the Court's narrow reading of the Privileges or Immunities Clause, which it held protected only "those privileges and immunities which are *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by citizens of the several States which compose this Union[.]"[83] Given this construction, the butchers' Fourteenth Amendment claims were rejected. However, from the standpoint of the development of the federal system, the case is more significant for revealing how the Fourteenth Amendment's definition of national citizenship affected judicial reasoning about the relationship between the two levels of government and the scope of their respective powers.

The case produced four separate opinions, with Justice Miller delivering the opinion of the Court and Justices Field, Bradley, and Swayne each writing a dissent. While the opinions are divided on the question of scope of the Privileges or Immunities Clause, they are united on at least one issue: the nature of citizenship in the United States. Each opinion affirmed not just the dual nature of citizenship under the Constitution, but also the independence of citizenship in the United States from citizenship in the states. With the ratification of the Fourteenth Amendment, Miller wrote, "It is quite clear…that there is a citizenship of the United States, and a citizenship of a State, which are distinct from each other, and which depend upon different characteristics or circumstances in the

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[82] 83 U.S. 36, at 62-61 (1873).

[83] 83 U.S. 36, at 76.

individual."[84] In his dissent, Justice Field highlights the significance of the Fourteenth Amendment with respect to citizenship. After recounting the "diversity of opinion among jurists and statesmen" ranging from Calhoun to *Dred Scott*, he declares,

> The first clause of the fourteenth amendment changes this whole subject, and removes it from the region of discussion and doubt. It recognizes in express terms, if it does not create, citizens of the United States, and it makes their citizenship dependent upon the place of their birth, or the fact of their adoption, and not upon the constitution or laws of any State or the condition of their ancestry.[85]

Justice Bradley viewed the matter in similar terms, writing that after the Fourteenth Amendment "citizenship of the United States is the primary citizenship in this country; and that State citizenship is secondary and derivative[.]"[86] This is a striking change from previous jurisprudence and is made all the more striking by the fact that, with the exception of Justice Bradley, each opinion writer in the *Slaughter-House Cases* had been a member of the Court that decided *Texas v. White* four years earlier. Though the Privileges or Immunities Clause wouldn't enjoy the same reception, at least one consequence of the Fourteenth Amendment was clear: American citizens now enjoyed two independent citizenships, one corresponding to each level of government.

But the agreement on the new nature of American citizenship didn't preclude disagreement on the substantive question presented by the case. The clarity of the Citizenship Clause would guarantee neither the clarity of nor consensus on the meaning of the Privileges or Immunities Clause. Even so, the citizenship distinction acknowledged

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[84] 83 U.S. 36, at 74.

[85] 83 U.S. 36, at 95.

[86] 83 U.S. 36, at 112.

by all opinions provided the structure for Justice Miller's opinion for the majority. It is, moreover, an opinion animated by the explicit purpose of assimilating the Fourteenth Amendment to the basic structure and understanding of the American federal system. Accordingly, it is yet another example of the mode of reasoning induced by the institutional imperatives of the judiciary when confronted with the underdeterminacy of the federal system. Accepting the plaintiff's proposition that the Privileges or Immunities Clause transferred to the national government superintendence of "the entire domain of civil rights heretofore belonging exclusively to the States" was inconceivable, Miller argued.[87] And it was inconceivable because it conflicted so deeply with the majority's understanding of the state-federal relationship, a relationship rooted more in historical practice and structural inference than constitutional text. Immediately after acknowledging the potential weakness of consequentialist arguments, Miller writes:

> But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress, in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other and of both of these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.[88]

We see in this passage the role played by (interpretations of) history and (perceptions of) settled practice in the majority's opinion, a move occasioned by the need to clarify how the two levels of government were to relate to each other in light of the addition of the

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[87] 83 U.S. 36, at 77.

[88] 83 U.S. 36, at 78.

Fourteenth Amendment. The reliance on history mustn't obscure the fact that this history is a stand-in for "the whole theory of the relations of the State and Federal governments to each other, and of both of these government to the people," which in turn furnishes the grounds for rejecting a more expansive reading of the Privileges or Immunities Clause.

An alternative to Miller's interpretation is put forth in Justice Swayne's dissent, which argues that the "serious" and "far-reaching" consequences Miller sought to avoid were, in fact, the very goals of the Thirteenth and Fourteenth Amendments.[89] These amendments "are a new departure, and mark an important epoch in the constitutional history of the country. They trench directly upon the power of the States, and deeply affect those bodies."[90] The new constitutional epoch Swayne describes is to be understood in contrast with the previous era, which he portrays as animated by "a spirit of jealousy on the part of the States" that had, with the first eleven amendments, tried to bind and limit the national government created by the Constitution. Central to this "new departure" is the codification of independent and separate national citizenship relationship from which flow new obligations and powers.

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[89] If the opinions of Miller and Swayne are taken to represent two poles of a spectrum, the dissents of Justices Field and Bradley fall somewhere in between. Field understood the Fourteenth Amendment "to obviate objections which had been raised and pressed with great force to the validity of the Civil Rights Act, and to place the common rights of American citizens under the protection of the National government" (83 U.S. 36, at 93). This interpretation, as noted previously, conclusively settled in the affirmative the question of whether there existed a national independent of state citizenship. For his part, Bradley, who joined Field's dissent, sought to downplay how disruptive the Fourteenth Amendment would be to the "internal affairs of the States." More specifically, he argued that (1) little legislation would be needed to give effect to the amendment, (2) federal jurisprudence would soon define the scope of privileges and immunities protected, and (3) "the recognized existence of the law would prevent its frequent violation" (83 U.S. 36, at 124).

[90] 83 U.S 36, at 125.

The disagreement between Miller and Swayne demonstrates that, while the underdeterminacy of the federal system induces judges to reason about the broader relationship between levels of government and the notions of sovereignty appropriate to that relationship, it does not overdetermine the content of that reasoning. It is possible to elaborate the state-federal relationship—to *reason from* the federal system established by the Constitution—in a way that advantages claims of the states to continue regulating areas of traditional control, just as it is possible to do so in a way that vindicates national claims over against assertions of state power. What matters here is not so much the substantive conclusion or result of such reasoning but the fact that, when confronted with the underdeterminacy of the federal system, judges revert to elaborations of the state-federal relationship, often couched in terms of sovereignty, that supply the rationale for sustaining or dismissing claims of power. The addition of citizenship, to both the Constitution and the interpretation thereof, codified another relational dimension, one that complicated the relationship between state and nation by adjusting the context in which the powers of each were articulated.

Logic, Law, and Sovereignty

The federalism jurisprudence just canvassed illustrates two principal consequences of the interaction between the constitutional logic of federalism and the institutional logic of the judiciary. The first is that the constitutional law of federalism produced by these interactions exists in considerable tension with the constitutional logic of federalism. This tension results from judicial attempts to elaborate the state-federal relationship in order to

resolve constitutional disputes, attempts that were occasioned by the underdeterminacy of the federal system. The second consequence concerns the connection between constitutional underdeterminacy and notions of sovereignty that are invoked to adjudicate state-federal disputes. Specifically, the pattern and content of sovereigntist reasoning suggest an endogenous dimension of sovereignty in American constitutional politics. In this way, notions of sovereignty are a product of constitutional politics, a legal and political concept that is produced by the interaction of constitutional logics, institutional structures, and contested visions of the American constitutional order. Each of these consequences is discussed in turn below.

Constitutional Law vs. Constitutional Logic

The interaction of the judiciary with the underdeterminacy of the federal system reveals a stark contrast between constitutional law and constitutional logic. The constitutional law of federalism in the early years of the Republic was characterized by the imposition of legal determinacy on an underdeterminate state-federal relationship. This, in turn, entailed elaborating the state-federal relationship in order to define the proper roles and powers of the levels of government. As Court personnel changed and questions about the nature of the federal system continued to arise, this elaborated relationship, rather than the underdeterminate state-federal relationship, became the central point of dispute. But whereas a return to constitutional underdeterminacy would have required justifying the imposition of determinate meaning, the creation of doctrinal categories (*e.g.*, police powers) and juridical concepts (*e.g.*, state and national

sovereignty) through the development of constitutional law facilitated the entrenchment of the judicially contrived logic of federalism.

Also relevant to this point is the nature of the relational reasoning employed by the justices in the cases surveyed. It was noted at the outset of this chapter that the relational approach to federalism has been invigorated by Heather Gerken's recent call for an account that does justice to the innumerable and innumerably varied state-federal interactions in the modern American state.[91] In that piece Gerken responds to what she characterizes as the contemporary Court's flawed understanding of the federal system, which she characterizes as "relational." This relational understanding entails an analysis that begins with some notion of state power and proceeds to determine how that relates to the constitutionally defined powers of the national government. The alternative to this relational approach is an analysis that "defines federal power in isolation."[92] But if the analysis presented here demonstrates anything, it is that there are many more options than these. Specifically, what Gerken casts as a *single* relational approach is but one version or mode of relational reasoning. As Barbour's and McLean's opinions in *Miln* and *Briscoe*, respectively, demonstrate, one can follow the model Gerken identifies and reason from the powers of the states to the powers of the national government. But, as Marshall's

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[91] Gerken, "Slipping the *Bond*s of Federalism," 14.

[92] *Id*. at 98. It is important to note that while Gerken disagrees with the Court's use of this "relational" approach in the case in question (*Bond v. United States*, 134 S. Ct. 2077 [2014]), she admits that "[b]ad theory can make good law or at least halfway decent doctrine" that (in this case, at least) is "reasonably manageable and coherent" (123). See also Alison LaCroix, "Redeeming *Bond*? The Court's quiet transformation of federalism doctrine," 128 *Harvard Law Review Forum* 31 (Nov. 10, 2014).

reasoning in *McCulloch* and *Cohens* demonstrates, one can also begin with the powers of the national government and reason to the power of the states.

With the addition of citizenship considerations, an additional component was added to the state-federal relationship. In this context, the relationships between citizens and their governments factored into the articulation of state and national sovereignty. Far from reducing the underdeterminacy of the federal system, the Fourteenth Amendment in general, and the Privileges or Immunities Clause specifically, posed anew the same question of jurisdictional division as did the 1787 Constitution. What had changed, though, was the constitutional context of this question, specifically with respect to the institutions and relationships that shape the federal system. In the *Slaughter-House Cases* we encountered the significance of national citizenship, a new vector of attachment between individuals and government in the federal system. No longer were state or national powers affecting fundamental rights or privileges and immunities articulated in isolation; nor too were they articulated strictly in relation to each other, as had been the case in the decisions of the late Marshall and early Taney Courts. With the Fourteenth Amendments's establishment of national citizenship came a new relationship between citizen and government. And because this relationship was separate and independent from state citizenship, it augmented the powers and obligations of the national government. The nature of the citizenship relation, therefore, had profound consequences for the powers and prerogatives of both levels of government.

As the differences between and among these cases show, the directionality of this relational reasoning—whether it runs from national to state power or state to national

power, or instead prioritizes the rights of citizenship—is decisively important. Depending on the analytical starting point (and the substantive priorities that entails) one can arrive at quite different jurisdictional lines dividing state and national power. And because judges inherit the doctrinal categories and juridical concepts of their predecessors, it is essential to ascertain the jurisprudential influences on any particular Court's or justice's relational reasoning. Thus, perhaps ironically, making good on Gerken's call for a relational account fit for *modern* politics requires returning to the foundations and development of American federalism jurisprudence.

Reflecting on these developmental dynamics, one must ask whether it could have been otherwise. After all, it is the responsibility of the Court to say what the law is and, as the discussion of the constitutional logic of federalism made clear, it is necessary to elaborate the state-federal relationship—to reason *relationally*—in order to put it to work. So what was the alternative? This question draws our attention to the logistics of judicial administration. The quotation from James Madison cited at the outset of this Essay speaks to these issues. In his letter to Spencer Roane reflecting on Marshall's opinion in *McCulloch*, he advocates something along the lines of a common law jurisprudence of federalism, according to which disputed constitutional meaning would be established only over time "from a course of particular decisions, and not these from a previous and abstract comment on the subject."[93] Here Madison seems to suggest that abstractions from the constitutional text on the matter of the state-federal relationship are an inappropriate basis for determining the meaning and requirements of the federal system.

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[93] Letter to Spencer Roane, Sept. 2, 1819.

Rather than abstract theory dictating the outcomes in specific cases, those cases should give rise to constitutional meaning in areas, such as the federal system, where in certain circumstances there is no determinate legal meaning to be "found" through interpretation.

Later in the same letter, Madison takes issue with the manner in which the Court's opinion was presented in *McCulloch*. In that case there was only one opinion—"the opinion of the court." This had the effect of putting the whole weight of the federal judiciary behind a decision establishing meaning on a hotly disputed constitutional question. For his part, Madison would have preferred that the justices deliver their opinions seriatim, as had been the dominant practice before Marshall's tenure and would reappear towards the end and continue after his term. He wrote to Roane:

> The case was of such magnitude, in the scope given to it, as to call, if any case could do so, for the views of the subject separately taken by them. This might either by the harmony of their reasoning have produced a greater conviction in the Public mind; or by its discordance have impaired the force of the precedent now ostensibly supported by a unanimous & perfect concurrence in every argument & dictum in the judgment pronounced.[94]

Madison was joined in this sentiment by Thomas Jefferson, who sharply criticized the practice of delivering a single opinion with the judgment of the Court for (among other things) concealing possible disagreements in the guise of unanimity.[95] These considerations, in conjunction with the tensions between constitutional law and constitutional logics discussed above, demonstrate the significance of both the form and the substance of the interaction between the institutional logic of the judiciary and the

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[94] *Ibid*.

[95] See, for example, Thomas Jefferson, Letter to Thomas Ritchie, Dec. 25, 1820, in *The Works of Thomas Jefferson* (Paul L. Ford, ed.) (1905), 12:175.

constitutional logic of federalism. They also point to a possible resolution of the tensions created by judicial engagement with the nature of the federal system that does not entail invoking the political questions doctrine or, more significantly, simply abandoning judicial review of federalism questions in favor of a process-based approach to the federal system. Both of these are prominent responses to the Court's seeming inability to forge a stable federalism jurisprudence, and the latter even enjoyed partial acceptance by the Supreme Court.[96]

But in Madison's critique of the *McCulloch* decision can be found another possibility, one that acknowledges the fundamental underdeterminacy of the federal system and yet recognizes as well the broader constitutional order in which that system is embedded. That possibility is a jurisprudence that self-consciously resists the creation of precedent that reduces the underdeterminacy of the federal system, a jurisprudence wary of the tension between legal doctrine that establishes determinate constitutional meaning and a federal system predicated on underdeterminacy and, as a consequence, responsiveness to the claims of exigency and democratic desire. As critics of the process-based view have stressed, judicial review of conflicts between state and federal powers was both a feature of constitutional design and a widespread expectation at the time of the Constitution's

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[96] For an articulation of the political question avenue, see Keith E. Whittington, "The Political Constitution of Federalism in Antebellum America: The Nullification Debate as an Illustration of Informal Mechanisms of Constitutional Change," *Publius* 26(2):1-24, 1-2. The seminal source for arguments against judicial review of federalism questions—commonly called "process federalism"—is Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition of and Selection of the National Government," 54 *Columbia Law Review* 543 (1954). See also Jesse H. Choper, *Judicial Review and the National Political Process: A Functional Reconsideration of the Role of the Supreme Court* (University of Chicago Press, 1980). Both Wechsler and Choper are cited in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), in which the Court rejected the "traditional" or "integral" governmental functions standard set out in *National League of Cities v. Usery*, 426 U.S. 833 (1976), in favor of a process-based approach.

creation.[97] Absent a mechanism along the lines of the national veto proposed by Madison at the constitutional convention, conflicts between governmental levels and laws are bound to arise. Though developments over the course of American history, principally the ratification of the 14th Amendment, have done much to mitigate or control such conflicts, the basic phenomenon remains. There are, moreover, clear limitations on both national and state actions bearing on the nature of the federal system that require enforcement beyond what can be expected to issue from the political process. Thus, judicial review of "federalism questions" is a practical consequence and an important part of our constitutional order. And yet, the tension between the institutional logic of the judiciary and the constitutional logic of federalism remains. Perhaps the best that can be hoped for, then, is a jurisprudence that acknowledges this tension and, through procedural reforms like seriatim opinions and substantive efforts to resist the reduction of constitutional underdeterminacy, seeks to mitigate its negative effects.

The Endogeneity of Sovereignty

The second consequence brought to light by the federalism jurisprudence developed over the first century under the Constitution concerns the notions of sovereignty deployed. Sovereignty has long been a fixture of federalism debates, as both an organizing principle and a principle criticized for its failure to supply any meaningful

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[97] See, for examples, John C. Yoo, "The Judicial Safeguards of Federalism," 70 *Southern California Law Review* 1311 (1977); and Saikrishna B. Prakash and John C. Yoo, "The Puzzling Persistence of Process-Based Federalism Theories," 79 *Texas Law Review* 1459 (2001). It should be noted, in this connection, that in his letter to Spencer Roane, Madison also seems to support judicial review, saying that seriatim opinions could have the consequence of producing "a greater conviction in the Public mind" that the Court's resolution of a disputed question was correct or otherwise acceptable.

organization.[98] For those analyses that take sovereignty seriously, it often serves as a pre-constitutional[99] or constitutionally specified[100] theory defining the roles, powers, and authority of governmental levels. Under this approach, government actions and judicial determinations are evaluated by their conformity to the stipulated theory of sovereignty. But the analysis presented here suggests that notions of sovereignty may be *produced* by the interaction of institutional logics with constitutional logics, even as they are informed by pre-constitutional or foundational understandings. If so, then there is an endogenous dimension to sovereignty's appearance and use in constitutional politics and it is rooted in the underdeterminacy of the federal system.

There are two aspects of this endogeneity. The first is formal, the second substantive. As to the first, judicial engagements with the underdeterminacy of the federal system demonstrate the need to elaborate the state-federal relationship, which can be done by searching for directive textual meaning or by reasoning inferentially from the relationships established by the Constitution and laws made pursuant thereto. At least for the cases covered here, answering constitutional questions concerning the "zone of underdeterminacy" entailed supplementing the Constitution's definition of national power *vis-à-vis* the states with a more robust notion of state-federal relations. For both the

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[98] For a review of this literature, see Heather K. Gerken, "Foreword: Federalism All the Way Down," 124 *Harvard Law Review* 4, 4-21 (2010).

[99] These works are often historically oriented, as with Alison LaCroix's *The Ideological Origins of American Federalism* (Harvard University Press, 2010) and Samuel Beer's *To Make a Nation: The Rediscovery of American Federalism* (Belknap Press of Harvard University Press, 1993).

[100] The most forceful articulation of the nationalist side of this approach is, perhaps, Sotirios A. Barber's. See *Welfare and the Constitution* (Princeton University Press, 2003), 1-22; *The Fallacies of States Rights* (Harvard University Press, 2013), 172-179; and *Constitutional Failure* (University Press of Kansas, 2014), 26-52.

Marshall Court and the Taney Court, that involved defining the sovereign claims of each level of government and how they relate to each other. We saw this as well in the jurisprudence of slavery and secession, where considerations of citizenship were added to the picture. Most notably in the *Slaughter-House Cases*, the claims of each level of government derived in part from their relationships with their citizens and how those relationships, in turn, related to each other. This can also be seen in the negative. In *Dred Scott*, where a whole class of individuals was put outside the citizenship relationship, the powers of each governmental level were defined without reference to the excluded individuals. Citizenship entered the picture only to the extent that governments were to act as agents for the protection of other citizens' (*i.e.*, slaveholders') property rights. And it was on the basis of *those* claims that limitations on and requirements of the national government were defined. In this way, the underdeterminacy of the federal system shaped the form of judicial reasoning, inducing justices to utilize sovereignty as a concept that underlies different notions of state power, national power, and the relationships between the two. As a functional matter, theories of sovereignty structure the state-federal relationship judges reason to and elaborate in order to resolve questions about the structure of the federal system that the Constitution, because of its underdeterminacy, doesn't answer.

The second aspect of the endogeneity of sovereignty identified in the cases covered is substantive. Not only does constitutional underdeterminacy induce judicial actors to reason *about* sovereignty or *in the language of* sovereignty; it also influences the *content* of that reasoning. This is illustrated especially clearly in the development of federalism

jurisprudence from *McCulloch* and *Cohens* to *Briscoe* and *Miln.* In those cases, the picture of sovereignty that emerged over time consisted in a balance of opposing governments and their roles. As I've attempted to show, this was due in part to the relational reasoning of the justices writing the opinions. Every articulation of state or national power brought with it a recognition of the other set of powers, whether through correspondence or entailment. This is most apparent in the nationalist opinions of Chief Justice Marshall, for whom the assurance that the federal government was a government of enumerated powers served as something of a leitmotif, a regular accompaniment to his robust articulations of national powers. But this is also true across time, because the conflicts between state and national power that arose from iterated political and legal disputes over the nature of the federal system in the early Republic yielded a constitutional law of federalism that was structured by categories and kinds of power appropriate to each level of government. In this way, an articulation of national power reciprocally defined a category of state powers; and the invocation of local concerns over which states had authority reciprocally defined national concerns over which the national government had authority. The salience of either category of powers or level of government—and the strength with which it was articulated—frequently hinged on which governmental interests were being vindicated.

Thus, under certain conditions—namely those prevailing through the mid-nineteenth century—the underdeterminacy of the federal system made sovereignty a disputed touchstone of political and legal discourse. This is relevant to contemporary federalism

debates, as sovereignty continues to carry rhetorical and legal weight.[101] Moreover, the balance of powers framework that undergirds the notions of sovereignty at play in the Marshall and Taney Court cases parallels the framework employed in some of the most high profile federalism cases of the late twentieth and early twenty-first centuries. From *United States v. Lopez* to *NFIB v. Sebelius*, "concern for the federal balance"[102] has been put forward as a justification for judicial enforcement of limitations on congressional powers. Perhaps sovereignty's critics are right about it being an unhelpful, antiquated, or inaccurate guide for understanding the American federal system. But if a fundamental characteristic of that system—its underdeterminacy—has the effect of foregrounding and shaping notions of governmental power, then regardless of one's normative position in that debate, we must come to terms with the causes and consequences of the endogeneity of sovereignty in our constitutional politics.

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[101] See, *e.g.*, *Shelby County v. Holder*, 570 U.S. ____ (2013), which struck down Section 4(b) of the Voting Rights Act on the grounds that it violated the "equal sovereignty" of the states. See also *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), on which the *Shelby County* majority relied. Also relevant are the sovereign immunity cases decided in the late 1990s: *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) and *Alden v. Maine*, 527 U.S. 706 (1999).

It is worth noting here that the conceptual ground of the Court's decisions in *Northwest Austin* and *Shelby County*, the "fundamental principle of equal sovereignty," first emerged in the context of congressional powers concerning the admission of new states to the Union. This was one of the central issues at play in *Dred Scott* and, in a slightly different way, *Texas v. White*, though this connection has only infrequently been acknowledged. Fortunately, the Court's reinvigoration of "equal sovereignty" hasn't gone wholly unnoticed. For an important exception to the just mentioned lacuna, see James Blacksher and Lani Guinier, "Free at Last: Rejecting Equal Sovereignty and Restoring the Constitutional Right to Vote: *Shelby County v. Holder*," 8 *Harvard Law & Policy Review* 39 (2014). See also Abigail B. Molitor, "Understanding Equal Sovereignty," 81 *University of Chicago Law Review* 1839 (2014); and Leah M. Litman, "Inventing Equal Sovereignty," 114 *Michigan Law Review* 1207 (2016). For a rare defense of the principle, see Jeffrey M. Schmitt, "In Defense of *Shelby County*'s Principle of Equal State Sovereignty," 68 *Oklahoma Law Review* 209 (2016).

[102] *National Federation of Independent Business v. Sebelius*, 567 U.S. ____ (2012) (joint dissent of Scalia, Kennedy, Thomas, and Alito, JJ.), quoting *United States v. Lopez*, 514 U.S. 549, 578 (Kennedy, J., concurring).

Conclusion

The American federal system is characterized by underdeterminacy. While the Constitution establishes a relationship between the states and the national government, the exact jurisdictional line dividing governments and the precise contours of the relationship are not spelled out. This constitutional logic of federalism induces a distinctively relational mode of reasoning, according to which state and national powers are understood in relation to each other, implicitly or explicitly delimiting each other, with each level of government shaping the powers of and limitations on the other. But the consequences of this mode of reasoning depend on how governing institutions interact with the underdeterminacy of the federal system. This chapter provided an account of the interaction of the institutional logic of the judiciary and the constitutional logic of federalism over the first century under the Constitution. An examination of federalism jurisprudence spanning the chief justiceships of John Marshall and Roger Taney and bracketing the Civil War revealed the essence and development of this mode of reasoning, showing how, in the hands of the judiciary, the constitutional logic of federalism was transmuted into a different, markedly determinate, logic of federalism. This new logic reveals deep tensions between the constitutional law of federalism and the constitutional logic of federalism, the significance of which derived in part from the logistics of judicial administration. Furthermore, it suggests an endogenous dimension to notions of sovereignty in American constitutional politics, according to which the underdeterminacy of the federal system both induces reasoning about sovereignty and shapes the precise notions of sovereignty employed over time.

Chapter Four: From Law to Governance

American history is replete with efforts to determine the proper division of power between the national and state governments. As Chief Justice Marshall put it in *McCulloch v. Maryland*, the question of the scope of national power, and the relationship with the states that it implies, "is perpetually arising, and will probably continue to arise, as long as our system shall exist."[1] Federalism is, after all, "America's oldest constitutional debate."[2] But when in 1953 President Eisenhower called for "the creation of a commission to study the means of achieving a sounder relationship between federal, state, and local governments," the need for clarity was particularly acute.[3] In the previous two decades, the country had endured the Great Depression and Second World War and, as a result of both, seen an unprecedented expansion of federal authority and capacity. More importantly, the need for national unity and mobilization necessitated by the war

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[1] 17 U.S. 405 (1819).

[2] Sotirios Barber, *The Fallacies of States' Rights* (Harvard University Press, 2013), 1

[3] Message to the Congress from the President of the United States, March 30, 1953.

cut short debate over the expanded role of the federal government in American life. This debate resurfaced when the war ended, with the New Deal inheritance posing unresolved questions about the compatibility of the modern American state and the constitutional commitment to federal governance.

For students of American political development the New Deal represents a hinge of political history, the point at which a new understanding of the constitutional order emerged with both legal sanction and widespread political support. In this respect, the New Deal stands beside the Founding, Reconstruction, and (in some accounts) the Civil Rights era as revolutionary "constitutional moments."[4] On this telling, the New Deal moment was defined by the destruction "of the old notion that Congress had limited powers over the economy,"[5] with the constitutional basis for claims of state sovereignty diminishing *pari passu*. While this narrative picks up on fundamentally important developments in American law and politics, it overlooks the significance of World War II to the development of the American state and the evolution of the federal system. Within a decade of the first New Deal program and five years of the Court decisions that endorsed expanded federal powers, the United States was waging total war. On the way to winning the war, the country would undergo a transformation that both built on and superseded the New Deal. Most pertinently, the period from the beginning of the New Deal through the end of the War reconfigured the foundations of the federal system, though this change had yet to be fully recognized and evaluated.

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[4] The primary exponent of this view is Bruce Ackerman. See *We the People,* Vols. I-III (Belknap, 1992, 1998, 2014).

[5] Bruce Ackerman, *We the People: Transformations* (Belknap, 1998), 372.

Hence, Eisenhower's call for a reassessment of governmental roles came at a crucial point in American history. And Congress answered his call, creating the Commission on Intergovernmental Relations (CIR) and charging it to conduct a full-scale assessment of the activities and relationships of the federal system. Staffed by sitting senators and House representatives, current and former governors, academics, and business leaders, the CIR was charged with clarifying the jurisdictional lines that defined and separated state and national authority, all while striving to improve service provision and maintain accountability. It sought, in other words, the assimilation of the constitutional commitment to federal governance to the post-New Deal, post-World War administrative state. But its eventual report ended up offering a quite different picture of American federalism, one in which the focus shifted from the constraints of constitutional law to the desiderata of administration and efficiency. Federalism was conceptualized less as a matter of law than one of governance. Despite its contemporaneous and enduring importance, this episode of American political development has been woefully understudied.[6] As a result, our understanding of both the development of American federalism and the emergence of the modern American state is incomplete.

In this chapter, I seek to rectify this shortcoming by examining the political construction of the federal system carried out by the Commission on Intergovernmental Relations. Situating its work in the context of the epochal changes wrought by the New

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[6] But see Tim Conlan, "From Cooperative to Opportunistic Federalism: Reflections on the Half-Century Anniversary of the Commission on Intergovernmental Relations," *Public Administration Review* 66(5): 663-676 (2006); Bruce D. McDowell, "Advisory Commission on Intergovernmental Relations in 1996: The End of an Era," *Publius* 27(2): 111-127 (Spring, 1997); and Selma Mushkin, "Report of the Commission on Intergovernmental Relations," *The Review of Economics and Statistics*, 39(3): 334-341 (Aug., 1957).

Deal and the Second World War, I argue that the Commission responded to the changes in the foundations of the federal system by reconceptualizing, and thus reconstructing, federalism along the lines of effective governance and administration rather than clear divisions of legal authority. Within the larger context of this inquiry, this chapter is intended to illustrate how the state-federal relationship is constructed by the legislative and executive branches. More specifically, I aim to show how, like the judiciary, the engagement of the so-called political branches with the federal system is inflected by their respective institutional logics. But because the institutional logics of the legislative and executive branches differ from that of the judiciary, the nature and consequences of their interactions with federalism differ from those of the judiciary. In that respect, this chapter is oriented towards complementing the previous chapter. Taken together, these two chapters are intended to present an account of how the distinctive characteristics and capacities of the branches of the national government influence their engagements with the federal system.

To accomplish these goals I proceed in three steps, which correspond to the main sections of the chapter. First, drawing on the theoretical framework elaborated in Chapter One, I describe the *political construction of federalism*, that is, how the political branches respond to constitutional underdeterminacy by supplying greater detail to the relationship between the states and the national government. These constructions are decisively shaped by the interaction of each branch's institutional logic with the contingent foundations of the federal system. These foundations (or determinants) fall into two broad categories: political culture and administrative or governmental capacity. Second, I argue

that the growth of central state capacity spurred by the New Deal must be considered in a wider temporal frame, namely one that includes the state building that occurred during the Second World War. To do so, I survey the development of the American state during the New Deal and Second World War, documenting how changes in public finance, government employment, and political culture altered the determinants of the state-federal relationship identified in the first section. Finally, I turn to the work of the CIR. Drawing on the Commission's report as well as archival sources from the Eisenhower Presidential Library, I seek to demonstrate how it re-conceived and reconstructed American federalism in terms of administration and governance rather than constitutional law and formal divisions of power. Using the model of the federal system developed in the previous two sections, I strive to understand the work, as well as the significance, of the Commission. The state-federal relationship, I argue, is a product of American political development, one that responds to and is decisively shaped by the contingent foundations of the federal system.

The Political Construction of Federalism

It is a revealing feature of modern American constitutionalism that the term "political" stands in stark contrast with—and even, at times, opposition to—the term "legal." Increasing polarization is no doubt a contributing factor to the effort to distinguish what is contested and partisan from what is ostensibly settled and objective. Moreover, the Court routinely speaks of the "political branches" as a way to both clarify the limits of its purview and, more consequentially, define the scope of its review

authority.[7] On this view, politics is the domain of discretionary authority and mutability, and is therefore deserving of judicial deference. Conversely, law is the domain of clear rules that permit neutral arbitration.[8] Though such a view of law and the legal process has been subject to sustained criticism, particularly since the early twentieth century, it still supports the Supreme Court's vision of the constitutional division of labor.[9] A central argument of the previous chapter, though, was that constitutional jurisprudence is *inscribed within* constitutional politics, fundamentally shaped and inflected by the constitutional logic of federalism. In other words, judicial institutions are far from neutral in their engagement with the Constitution. Rather, the distinctive institutional logic of the judiciary—namely the imperative of resolving legal questions through constitutional interpretation—shapes both its interactions with constitutional logics as well as the consequences of those interactions. Nonetheless, distinctions not only can but must be made between the work of courts and other constitutional actors. Whereas the judiciary is not directly electorally accountable at the federal level, legislators and the president of

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[7] One of the earliest occurrences of this exact formulation appears to be *United States v. Lee*, 106 U.S. 196 (1882) ("In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming antagonistic jurisdiction."). By far the most significant usage, though, occurred in *Baker v. Carr*, 369 U.S. 186 (1962), in which the distinction figured prominently in the Court's reformulation of the political questions doctrine. For an analysis of the doctrinal dimensions of this distinction in the context of separation of powers disputes, see Jonathan L. Entin, "Separation of Powers, the Political Branches, and the Limits of Judicial Review," 51 *Ohio State Law Journal* 175 (1990). For a more theoretical discussion of this distinction, see Jesse H. Choper, "The Supreme Court and the Political Branches: Democratic Theory and Practice," 122 *University of Pennsylvania Law Review* 810 (1974).

[8] A seminal work in this vein is Herbert Wechsler, "Toward Neutral Principles in Constitutional Law," 73 *Harvard Law Review* 1 (1959).

[9] An overview of this literature, and the broader movement that produced it, is offered by Allan C. Hutchinson and Patrick J. Monahan, "Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought," 36 *Stanford Law Review* 199 (1984). See also Mark V. Tushnet, "Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles," 96 *Harvard Law Review* 781 (1983).

course are. Moreover, in the American constitutional order the branches are constructed not only to do different work but to do that work differently from each other. These differences, in turn, underlie the prerogatives and possibilities of the legislature, executive, and judiciary. While the distinction between law and politics so eagerly urged by the Court risks obscuring profoundly consequential phenomena, it corresponds to a basic differentiation of functions in the American constitutional order. It is in this context, then, that I speak of the "political construction of federalism," which is the subject of this chapter. The focus here is how the underdeterminacy of the federal system influences the actions of the "political branches." As I argue below, it is in this context that the distinction between the political branches and the judiciary illuminates more than it obscures.

The argument in the previous chapter began with the institutional logic of the judiciary and, on that basis, proceeded to ascertain the consequences for its engagement with the underdeterminacy of the federal system. We shall start here, then, with the institutional logics of the legislative and the executive branches.[10] The constitutional values these branches are structured to advance are democratic will and general welfare, respectively, purposes reflected in their structures. Whereas the legislature is composed of numerous representatives drawn from different constituencies, the executive is a single actor whose constituency is the entirety of the American People. Hence, the former is

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[10] The argument presented here rehearses and extends that advanced in Chapter Two, which drew heavily on the work of Jeffrey Tulis. See, generally, "Deliberation Between Institutions," in *Debating Deliberative Democracy,* James S. Fishkin and Peter Laslett (eds.) (Blackwell Publishing, 2003); "On Congress and Constitutional Responsibility," 89 *Boston University Law Review* 515 (2009); and "Impeachment in the Constitutional Order," in *The Constitutional Presidency* (Johns Hopkins University Press, 2009).

structurally well adapted to the aggregation of divergent viewpoints, deliberation of mutual concerns, and the reconciliation of differences where agreement is possible. The executive, on the other hand, is designed to act with energy and dispatch, to put into effect the laws passed by the legislature, and to represent a national constituency. These institutional characteristics, it will be remembered, are contrasted with the judiciary, which is structured to advance the rule of law and (especially in its modern form) protect individual rights. Insulation from direct electoral accountability and life tenure are structural features of the federal judiciary calibrated towards the realization of these ends.

How, then, do the political branches approach the federal system? Whereas federalism presents the judiciary with questions of interpretation and legal meaning, for the legislative and executive branches the federal system presents a system of opportunities and constraints. Considered in its fullness, the state-federal relationship can both facilitate and frustrate the enactment of public policy. In its engagements with the federal system, the political branches supply further specificity to the underdeterminacy of the federal system, constructing relationships between state and federal institutions and defining how political power is wielded in the federal system. In this way, as argued at some length in Chapter One, the state-federal relationship is *constructed through* constitutional politics. This is what is meant by the *political construction of federalism* as the expression is used here.[11]

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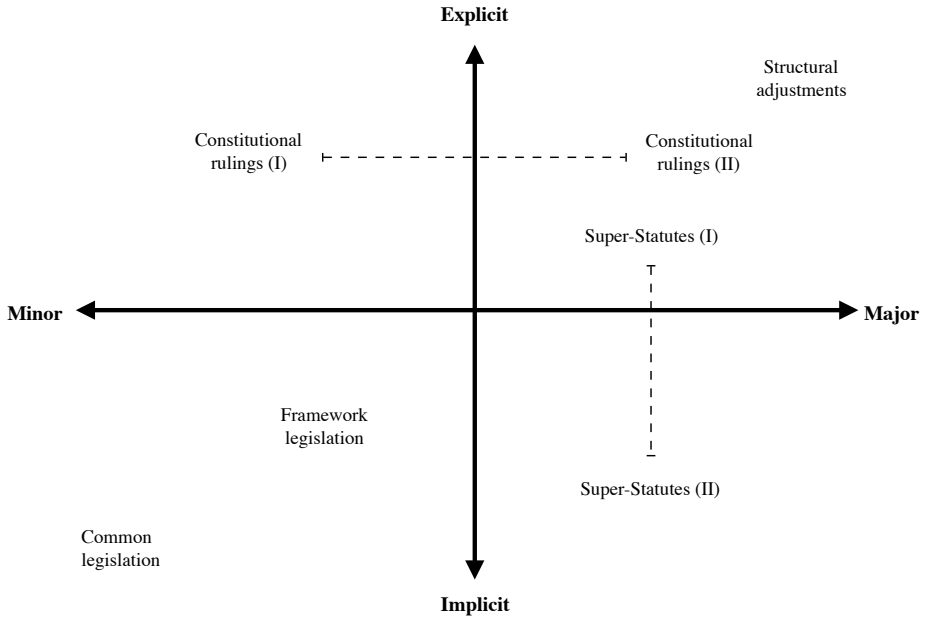
[11] This usage is broadly consistent with the literature that has taken a similar approach to these questions. See especially Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999). For a sophisticated application of this concept, see Mariah Zeisberg, *War Powers: The Politics of Constitutional Authority* (Princeton University Press, 2013).

FIG. 4.1: CONSTRUCTIONS OF THE STATE-FEDERAL RELATIONSHIP



Political constructions of the state-federal relationship come in many forms. (Figure 4.1 attempts to illustrate the salient differences and relative relationships among the constructions discussed below.) The first dimension of variation concerns the extent of the construction. Whereas some bring about major or large-scale changes to the contours of the federal system, others operate only at the margins. At one end of the spectrum is common legislation—ordinary, workaday uses of governmental powers. In putting public power into action, they inaugurate or adjust relations between the powers and institutions of the state and national government. At the other end of the spectrum are structural adjustments to the federal system in the form of constitutional amendments. The Fourteenth Amendment looms particularly large in this regard, as it was the first formal

addition to national power since the ratification of the Constitution and couched this enhancement in the context of supervising state behavior. In between these extremes are all manner of actions that, in different ways to to different degrees, define the powers, purposes, and responsibilities of the two levels of government in the American federal system. Included in this range are framework legislation that regulates congressional procedures in certain areas (*e.g.,* 1995 Unfunded Mandates Reform Act),[12] so-called "super-statutes" (*e.g*, Civil Rights Act of 1964, Patient Protection and Affordable Care Act),[13] and constitutional rulings redefining the scope or location of governmental power (*e.g.*, *McCulloch v. Maryland*, *Wickard v. Filburn*, *Obergefell v. Hodges*). As the figure shows, there can be variations within each genre of political constructions, with some bringing about greater changes than others. Though constitutional rulings are chosen to demonstrate this variability, the same could be true of any of the constructions identified. Nonetheless, the relative positions of the constructions are intended to show where the average or exemplar instance of each might fall on the spectrum.

On a second dimension of variation, constructions of the state-federal relationship differ in how explicitly they define the relationships between state and federal powers, purposes, and institutions. Again, common legislation and structural adjustments can be

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[12] Elizabeth Garrett has done the most insightful and pertinent work on this issue. See especially "Framework Legislation and Federalism," 83 *Notre Dame Law Review* 1495 (2008). See also "The Purposes of Framework Legislation," 14 *Journal of Contemporary Legal Issues*, 717 (2005).

[13] For an overview of such statutes and their relevance to the federal system, see William N. Eskridge, Jr. and John A. Ferejohn, *A Republic of Statutes: The New American Constitution* (Yale University Press, 2010). Eskridge and Ferejohn present an earlier version of this argument in "Super-Statutes," 50 *Duke Law Journal* 1215 (2001). For a critical engagement with this argument—one that contests the central premise that super-statutes affect fundamental change—see Bruce A. Ackerman, "Constitutional Politics/ Constitutional Law," 99 *Yale Law Journal* 453 (1989).

taken to represent ends of the spectrum. The former often only implicitly define the state-federal relationship because the consequences for state powers and institutions are not explicitly identified in the legislation. Structural adjustments, on the other hand, frequently specify the details of relationships and interactions between levels of government or identify the standards to which levels of government are to be held. Despite their variation in extent, constitutional rulings typically offer explicit and systematic treatments of the federal system, a result (in part) of the institutional logic and imperatives of the judiciary. [14] And while super-statutes have the potential to transform the relationship between levels of government, often that effect—or its magnitude—can be the result of implementation rather than the expressed terms of the legislation. However, because there is considerable variation on this score—to say nothing of interpretive disagreements—Fig. 1 represents a possible range in the explicitness of such constructions.

Political constructions of the state-federal relationship do not occur in a vacuum. They are, rather, deeply embedded in contemporaneous political conditions and circumstances. Political constructions of the state-federal relationship both respond to and influence a range of contingent facts of politics and political life. Drawing on founding-era debates, the theoretical framework developed in Chapter One identified a range of

[14] For greater context, see my discussion of the institutional logic of the judiciary in Chapter Three. There I attempt to distinguish how courts envision and approach the federal system in contrast with the political branches. In the course of doing so, I sketch a picture of the judicial function similar to the one presented here.

variables that influence the structure of the state-federal relationship.[15] More precisely, these components of political life condition the scope and efficacy of political power in the federal system established by the Constitution. The purpose in the first chapter was to make the connection between the structure of the American federal system and the developmental and constructive processes it anticipates. As our purpose here is to examine one such constructive episode, we can take a further step and more formally identify and categorize the determinants of the state-federal relationship. These fall into two broad groups: political culture and administrative or governmental capacity. In the first category are four variables:

(1) the *personal influence* possessed by each level of government
(2) the *attachment of the people* to the governments that represent them
(3) the *posture* of each government towards the other
(4) the number and quality of *connections* between the people and their governments

As a component of political culture, each of these variables bears on the distribution of powers between governmental levels—either facilitating or frustrating claims to or exercises of power. At the same time, each of these variables can serve as an indicator of the condition of the state-federal relationship, reflecting different facets of popular support for and attachment to each governmental level relative to the other. Turning to the second category, the domain of administration and governmental capacity, there are five variables:

(1) the nature and degree of *dependences* of each government on the other
(2) the *powers* vested in each government

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[15] The principal sources from which these determinants are drawn are Nos. 45 and 46 of *The Federalist* (Jacob E. Cooke, ed.), which, in turn, were occasioned by the Anti-Federalist arguments also discussed in Chapter One.

(3) the *number of individuals employed* by each level of government
(4) the extent of *governmental positions and salaries*
(5) the governmental *regulation of intimate matters*

As with the previous set of variables, each of these bears on the shape of the state-federal relationship. However, unlike determinants rooted in political culture, those grounded in administration and government capacity concern the practical ability of each governmental level to carry out particular actions. The effective use of governmental power requires the means to achieve the purposes of the underlying legislation. Absent sufficient power, an exertion of authority could be rendered nugatory; conversely, the possession of the requisite power can underwrite a credible threat or commitment to using it.

Recall that these considerations were identified by the advocates of the Constitution when they were pressed to explain why and how it would not lead to a consolidated government. Taken together, they comprise a set of critical variables that shape the state-federal relationship. These are precisely the factors that legislators and executives—and not judges—are immediately responsive to in their interactions with the federal system. Put differently, the creation of public policy is influenced by each of these determinants in a way that the adjudication of law and official conduct is not. We expect legislators to be mindful of the sentiments of their constituents when considering an exertion of federal power. If they are not, they may not be legislators for long. Similarly, we expect federal policy to be shaped by the capacity of governing institutions. Proposals to solve social problems or structure economic exchange will, as a matter of course, be influenced by the resources under the control and tools at the disposal of governmental institutions. In a

different time and with different resources, proposals to address the same problem would look dramatically different. Policy regimes will build on existing resources, even as they can augment or repurpose those resources, changing the political and governing context for future actors.[16]

Perhaps the most salient characteristic of these determinants—what unites them despite their considerable diversity—is that they are *contingent* facts. They obtain not as a matter of natural or constitutional stipulation, but as a result of both decisions made pursuant to the Constitution and the responses of citizens to those decisions. In his exposition of these facets of the state-federal relationship, James Madison argued that they, in effect, define the compass of possibility for government action. After discussing these determinants in *The Federalist* No. 46, he explains that "it is only within a certain sphere, that the foederal [*sic*] power can, in the nature of things, be advantageously administered."[17] It is the variables of political culture and administrative capacity just identified that structure this sphere. However, as I argued in Chapter One, because these determinants aren't established by law—constitutional or natural—"the nature of things" is bound to change. Indeed, in politics the nature of things *is* change. Each of the determinants identified in Publius' defense of the federal system is liable to modulate, responding to changes in governance, popular evaluations of governmental performance, and events exogenous to politics. Public policy will change, popular attachments will

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[16] Though it will not be pursued here, the connection between this line of reasoning and observed developmental processes in American politics should be noted. For a particularly helpful overview, see Adam Sheingate, "Institutional Dynamics and American Political Development," *Annual Review of Political Science* 17:461-477 (2013).

[17] *The Federalist*, 46:317.

shift, governmental capacity will vary—as this happens, the "sphere" in which federal power can be advantageously administered will similarly change. This, then, is precisely why the long New Deal moment, when considered not as a discrete legislative or judicial event but an extended and layered process of state building, presents such a fertile case study for the construction of the state-federal relationship. For during this period, each of the nine determinants identified above underwent significant change, bringing to the fore questions about the correspondence between contemporary circumstances and constitutional structures. It is against this backdrop that the Commission on Intergovernmental Relations confronted the meaning of federalism in the age of modern administrative governance.

The New Deal, World War II, and the American State

If there is a truism in twentieth century American political development, it is that the New Deal was an epochal phenomenon. "With the realignment of the 1930s," Sidney Milkis and Jerome Mileur write, "the New Deal took the shape of a 'regime' that marked a critical departure in the governing principles, institutional arrangements, and policies that shaped American political life."[18] Though the period is commonly divided into two constituent parts (1933-1935 and 1935-1937) they are united by the common thread of a proactive central government whose energies were directed towards the stabilization and management of the economy, the regulation of the financial sector, and the provision of new and expanding social services. This spirit animated early New Deal programs like

[18] Sidney Milkis and Jerome Mileur, "The New Deal, Then and Now," in *The New Deal and the Triumph of Liberalism* (University of Massachusetts Press, 2002), 2.

the Emergency Banking Act, the Civilian Conservation Corps, and the Tennessee Valley Authority, as well as later programs, such as the Emergency Relief Appropriation Act, the National Labor Relations Act, and the Social Security Act. This legislative effusion set off scores of legal challenges that would, in time, redefine federal power. Perhaps the most popularly salient of these is the decision in *West Coast Hotel Co. v. Parrish* (1937), the famous "switch in time that saved nine." The importance of this decision, though, has less to do with the enhancement of federal regulatory authority than with the perceived end of the Court's resistance to government intervention in the market and workplace.[19] More pertinent from the standpoint of federal power are the decisions in *Stewart Machine Co. v. Davis*, *Helvering v. Davis*, and *NLRB v. Jones & Laughlin Steel*, each of which marked a break from the Court's previous jurisprudence and an expansion of federal power to tax, spend, and regulate commerce.

The New Deal casts a long shadow over modern scholarship of American politics and constitutionalism, shaping everything from assessments of presidents[20] to notions of constitutional change.[21] Its shade has nurtured the growth and development of the modern

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[19] It warrants mention that the argument that Roosevelt's court-packing plan was responsible for changing the Court's jurisprudence has been subject to strong criticism. See, for example, Barry Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford University Press, 1998).

[20] See, for example, Stephen Skowronek, *The Politics Presidents Make: Leadership from John Adams to Bill Clinton* (Harvard University Press, 1997); and "Franklin Roosevelt and the Modern Presidency," *Studies in American Political Development*, 6:322-358 (1992). Roosevelt is also routinely ranked among the greatest presidents by political scientists and historians alike. See Nate Silver, "Contemplating Obama's Place in History, Statistically," *New York Times,* Jan. 23, 2013 (available at http://nyti.ms/1jctHw0); and Brandon Rottinghaus and Justin Vaughn, "New ranking of U.S. presidents puts Lincoln at No. 1, Obama at 18,' *Washington Post*, Feb. 16, 2015 (available at http://wapo.st/1WAnLNU).

[21] The most influential work here is Bruce Ackerman's *We the People: Transformations* (Belknap, 1998).

state, and its academic reception reflects that legacy. As Morton Keller put it, "the New Deal…came to be the true watershed dividing the American political and governmental past from the regime under which we live today[.]"[22] Far more than just a period of drastic political, legal, and social change, the New Deal has come to represent a national ethos about the proper role of government in society—"New Deal Liberalism."[23] But its shadow has also obscured both the significance and the relevance of subsequent events to assessments of American political and constitutional development. Foremost among those is, perhaps ironically, the Second World War. Within a decade of the passage of the first New Deal program—and within five years of the jurisprudential "revolution" of 1937—the United States was engaged in total war. Prosecuting and ultimately winning the war entailed national mobilization that further expanded federal authority and capacity, indelibly changing the nature and operation of the national government. It is necessary, then, to view the development of the American state in this light. More specifically, we must take account of the fact that the New Deal was but one phase in the emergence of the modern administrative state. While New Deal precedents and programs crucially shaped the context of later decisions, subsequent developments left their own imprint on a federal government that would look drastically different at the end of the 1940s than it did at the end of the previous decade. What is of particular significance for constitutional development, the state building that occurred from 1933 through the end of the war touched on every determinant of the state-federal relationship discussed in the previous

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[22] Morton Keller, "The New Deal and Progressivism," in *The New Deal and the Triumph of Liberalism*, ed. Sidney M. Milkis and Jerome M. Mileur (University of Massachusetts Press, 2002), 315.

[23] See Alan Brinkley, *The End of Reform: New Deal Liberalism in Recession and War* (Vintage, 1995).

section, setting the stage for an even more formal and wide-ranging transformation of the federal system than had occurred over the course of the New Deal.

The second quarter of the twentieth century brought a transformation in American public finance.[24] Federal receipts totaled $2.9 billion in 1930, falling by nearly fifty percent over the ensuring two years. But by 1940, that figure was $8.2 billion. As dramatic as this increase was, the next five years—spanning the build-up and duration of the war effort—were nothing short of revolutionary. Aided by the passage of the Revenue Acts of 1941 and 1942,[25] federal receipts surged from $8.2 billion in 1940 to $41.5 billion in 1945, increasing by roughly fifty percent or more annually between 1940 and 1943. And while expenditures dropped from $73.6 billion to $40.4 billion between 1945 and 1947, receipts held steady through the late 1940s. Thus, after fighting both depression and war, the federal government left the 1940s taking in thirteen times as much as it had when it entered the 1930s. Over the same period, its expenditures jumped even more, going from $1.7 billion to $26.4 billion. Table 4.1 summarizes this epochal transition, providing disaggregated figures by revenue sources and expenditure areas.[26]

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[24] Here I follow Bartholomew Sparrow's use of "public finance" in his study of the influence of World War II on the American state: "'Public finance'…refers to how the government secures its funding," and includes tax policy, fiscal policy, and governmental borrowing. See *From the Outside In: World War II and the American State* (Princeton University Press, 1996), 99.

[25] The Revenue Act of 1941 permanently extended a range of taxes that had been increased the previous year. Additionally, the Act raised both the corporate tax rate and the excess profits tax rate. The 1942 Act increased corporate tax rates and individual tax rates, imposed a "Victory tax," modified the excess profits tax, and lowered the personal exemption amount.

[26] Fig. A1 in Appendix A presents federal expenditures in this period alongside per capita expenditures. As those figures demonstrate, while the population grew steadily over the course of these decades the increase in expenditures was considerably more rapid. This trend, then, is not simply the result of growing population.

Table 4.1: Federal Government Receipts and Expenditures, 1930-1950

	1930	1935	1940	1945	1950
Receipts (in billions)	**$2.9**	**$3.7**	**$8.2**	**$41.5**	**$48.8**
Personal taxes	1.0	0.6	1.0	18.6	17.4
Production & import taxes	1.0	2.1	2.6	6.9	8.7
Corporate income taxes	0.7	0.8	2.6	10.2	17.2
Social insurance contributions	0.1	0.1	1.9	5.3	5.3
Expenditures (in billions)	**$3.0**	**$5.9**	**$9.2**	**$73.6**	**$47.0**
Defense consumption	1.0	1.0	1.9	60.9	19.0
Non-defense consumption	0.7	1.3	3.2	2.0	4.9
Social benefits	0.7	0.5	1.3	4.1	10.2
State & local grants-in-aid	0.1	1.7	0.7	0.8	1.8
Other transfer payments	0	0	0	0.3	3.6
Interest payments	0.3	0.6	1.0	4.0	6.2
Subsidies	0.2	0.8	1.0	1.6	1.2

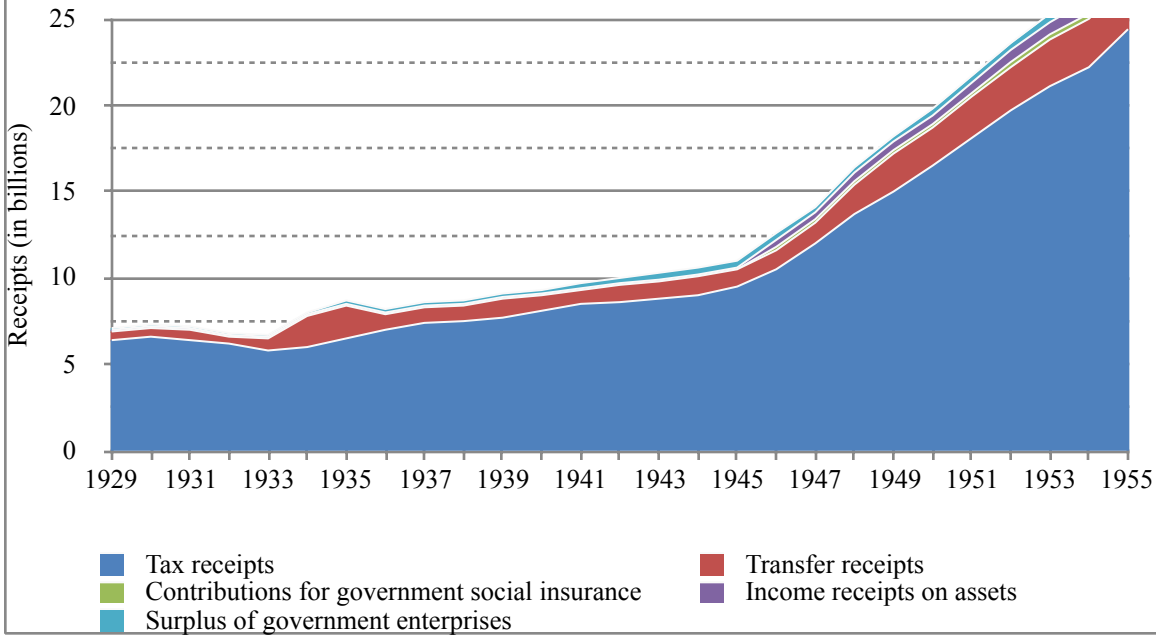
Source: Bureau of Economic Analysis. Composite data drawn from Federal Government Current Receipts and Expenditures (Table 3.2) and Government Consumption Expenditures and General Government Gross Output (Table 3.10.5). Last revised Mar. 25, 2016.

This public finance transformation was part and parcel of the federal government's increasing role in Americans' day-to-day lives. Building on the institutional foundation bequeathed by the New Deal, changes in tax, fiscal, and public debt policies further extended the regulatory hand of the federal government. While it may be true, as Bartholomew Sparrow argues in his study of the effects of World War II on the American state, that forgone opportunities in the early 1940s reveal the possibility of an even more *dirigiste* state than that which emerged from the war, the federal government nonetheless left the war years victorious and operating at an unprecedented size and scope.

Within this public finance revolution is concealed another consequential shift. Not only did the magnitude of federal spending increase, but so did the *form* of this spending. New Deal programs relied heavily on grants-in-aid—sums of money transferred to the states and localities in exchange for their participation in national programs and, often, compliance with federal directives. This was largely due to the lack of central government capacity to fulfill the new responsibilities entailed by New Deal legislation paired with the increasing access to revenue brought about by the establishment, entrenchment, and expansion of the personal income tax (among other taxes). Between 1930 and 1940, the number of grant-in-aid programs more than doubled, going from 15 to 31. During this period, the amount of federal revenue transferred from the federal government to state and local governments increased from approximately $100 million in 1930 to $700 million in 1940, hitting a high-water mark of $1.7 billion in 1935. But this amount remained virtually unchanged during the war years, staying between $600 and $800 million between 1941 and 1945. And yet, attesting to the relative independence of this category from other budgetary items, the size of these transfer payments actually increased during the drawdown between 1945 and 1947, when federal expenditures decreased precipitously. Figure 4.2 charts these developments in the context of state receipts during the period.[27] Between 1940 and 1950, the number of grant-in-aid programs again doubled, with outlays for federal grants increasing from just under one

[27] The data for Figure 4.2 is drawn from the Bureau of Economic Analysis, State and Local Current Receipts and Expenditures (Table 3.3) (rev. March 25, 2016).

Fig. 4.2: State and Local Government Receipts, 1929-1955



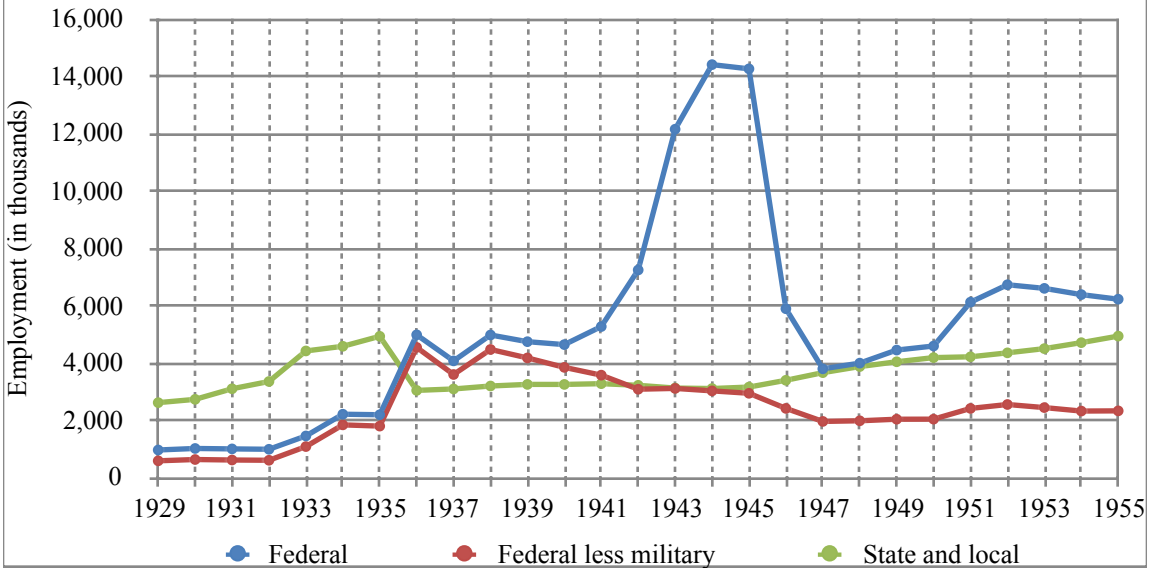
billion dollars to over two billion.[28] These figures suggest that, to the extent grants-in-aid raised questions about the integrity of the federal system, the war did not exacerbate the concerns initially raised by New Deal programs in the 1930s. But by the same logic, they suggest that those concerns were primed to reemerge in the postwar years.[29]

The same trend of central government growth occurred as well in the area of government employment, here perhaps most clearly. The level of federal government employment had traditionally been less than state and local government employment during peacetime, a reflection of the historical scope and distribution of government activities in the United States. But, as Figure 4.3 makes clear, those figures crossed between 1935 and 1936 and federal employment would exceed state and local

[28] See Table A1 in Appendix A for further details on these figures; and see Figure A1 for trends in state receipts from 1929-2015.

[29] For a modern articulation of this argument, accompanied by a history of these programs, see James L. Buckley, *Saving Congress from Itself: Emancipating the States and Empowering Their People* (Encounter Books, 2014).

Fig. 4.3: Government Employment, 1929-1955



employment until 1960.[30] It is a common practice to disaggregate defense from non-defense figures—whether in the area of expenditures or employment—on the presumption that war is the exception and not the rule and, as such, distorts rather than clarifies the phenomena under investigation.[31] Moreover, national defense is (by and large) the prerogative of the national government and thus should not be used to comparatively assess government relations. (For these reasons, the disaggregated figures are reported in Figure 3.) However, for the present inquiry the defense figures are profoundly relevant. To the extent we are concerned about the standing of the federal government vis-à-vis the states, its reach into the lives of American citizens, and the distribution of powers across levels of government, national defense employment is as important an area of civil and political life as any other. Indeed, it may be an even more consequential area, for service in the national armed forces (or associated industries) has

[30] The data for Figure 4.3 is drawn from the Bureau of Economic Analysis, Full-Time and Part-Time Employees by Industry (1929-1948, 1948-1969; Table 6.4A, 6.4B) (rev. August 6, 2015).

[31] But see Stephen M. Griffin, *Long Wars and the Constitution* (Harvard University Press, 2013).

an affective dimension, constituting a deeply important connection between citizens and the federal government. For each enlisted man and every woman drawn into war production, there was a family and social group who had an intimate connection to and stake in the national cause; each federal job and paycheck contributed to the support of a

Table 4.2: Government Employment and Compensation, Selected Years 1930-1950

	1930	1935	1940	1945	1950
Total Employment (thousands)	**3,779**	**7,150**	**7,919**	**17,431**	**8,802**
Federal Government	1,034	2,209	4,652	14,258	4,603
Non-military	649	1,813	3,859	2,956	2,055
Military	385	396	793	11,302	2,548
State & Local Government	2,745	4,941	3,265	3,173	4,199
Total Compensation (millions)	**$5,686**	**$7,094**	**$9,453**	**$40,088**	**$27,069**
Federal Government	1,742	2,654	4,710	34,028	15,499
State & Local Government	3,944	4,440	4,743	6,060	11,570

Source: Bureau of Economic Analysis, Data Archive: National Accounts (NIPA); Full-Time and Part-Time Employees by Industry (Table 6.4A) and Compensation of Employees by Industry (Table 6.2A). Last revised Aug. 6, 2015.

family, a community, and an economy. Table 4.2 captures some of this picture, providing employment and compensation figures for both levels of government between 1930 and 1950. As documented there, this period brought a reversal in the traditional employment discrepancy between levels of government.

As James Sparrow details in his study of the emergence of "big government" during World War II, the relationship between citizen and government ran both ways. Widespread service and, more broadly, participation in the war effort fueled the

emergence of a postwar expectation of government support and assistance, a new political consciousness rooted in an "Americanism" cultivated during the war.[32] (In this way, New Deal liberalism is refracted through, and thus inextricably bound up in, America's experience in the war.) These are precisely the dimensions of political culture that were so important in the debate between Federalists and Anti-Federalists—popular attachment, confidence in government, and the government's connections with citizens. And they were important because they constituted the social and cultural contexts in which the underdeterminate state-federal relationship would take shape. The *political* context of the state-federal relationship is constituted by the capacity—both absolute and relative—of the two levels of government. As the developments covered in this section demonstrate, the New Deal began and the Second World War extended an astonishing increase in the capacity of the federal government. These changes fundamentally altered the foundations of the federal system. But they had yet to be assessed in full.

The Commission on Intergovernmental Relations

While overt disputes over the structure of the federal system had been largely suppressed during the war, they quickly reemerged in the postwar years. With new vim and vigor, the same coalition of conservative Republicans and Democrats that had shaped but not defeated Roosevelt's legislative initiatives a decade earlier began to question both the constitutionality and the desirability of the state that the New Deal and the World War had produced. While there are certainly important earlier events, the run-up to the

[32] James Sparrow, *Warfare State: World War II Americans and the Age of Big Government* (Oxford University Press, 2011), 3-4.

presidential election of 1948 provides a convenient starting point for understanding Dwight Eisenhower's election in 1952 and the reassessment of the American federal system that he precipitated with the establishment of the Commission on Intergovernmental Relations (CIR). After providing a brief account of the political background and origins of the CIR, I evaluate the Commission's *Report*, detailing how it sought to accommodate the constitutional commitment to federal governance to the development of state capacity that had occurred as a result of the New Deal and World War II. This reconstruction of federalism's purposes and applications shifted the focus from legal constraints to the desiderata of good governance—efficient administration, responsive government, and self-rule.

Postwar Politics

Having assumed office upon Roosevelt's death in 1945, Harry Truman presided over the conclusion of the war in both the Pacific and Atlantic theaters. Military demobilization and the economic transitions it entailed quickly led to dislocation and unrest. Republicans capitalized on Truman's tumbling popularity, reclaiming Congress for the first time since the New Deal in the 1946 midterm elections. Opposition on Capitol Hill stymied Truman's "Fair Deal" agenda, which consisted of a range of proposals designed to entrench and extend New Deal programs. Moreover, in a break with precedents set by Roosevelt, Truman moved to enhance civil rights protections for

African Americans, advocating a permanent Fair Employment Practices Commission and issuing an executive order to integrate the armed services.[33]

The emphasis on civil rights, embraced strongly in parts of the Democratic Party, sparked intense opposition from southern states and representatives, leading to a walkout by southern delegates at the 1948 Democratic National Convention and the formation of the States' Rights Democratic Party (or Dixiecrats). In their party platform, the States' Rights Party called for "a strict adherence to our Constitution and the avoidance of any invasion or destruction of the constitutional rights of the states and individuals." Opposing "the totalitarian, centralized bureaucratic government and the police nation called for by the platforms adopted by the Democratic and Republican Conventions,"[34] the States Rights ticket of Strom Thurmond and Fielding Wright looked to stand athwart the changes in the state-federal relationship that had taken root over the past decade and a half. The Democratic and Republican Parties also expressed their positions on the federal system, with both affirming the necessity of continued state-federal participation in national programs. While Democrats advocated federal aid programs that were to be "administered by and under the control of the states,"[35] Republicans called for "restoring

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[33] For the most explicit articulation of this agenda, see Harry S. Truman, "Annual Message to the Congress on the State of the Union," Jan. 5, 1949 (available at http://www.presidency.ucsb.edu/ws/?pid=13293). See also Executive Order 9981, July 26, 1948 (available at http://www.trumanlibrary.org/9981a.htm).

[34] "Platform of the States Rights Democratic Party," Aug. 14, 1948, The American Presidency Project (available at http://www.presidency.ucsb.edu/ws/index.php?pid=25851).

[35] "Democratic Party Platform of 1948," July 12, 1948, The American Presidency Project (available at http://www.presidency.ucsb.edu/ws/index.php?pid=29599).

to America a working federalism."[36] Though Truman would go on to convincingly defeat the listless Republican candidate Thomas Dewey in the election, the Thurmond-Wright ticket managed to win four states, fueling a resistance to national authority that would reverberate throughout American politics for decades to come.

This, then, is some of the background for the 1952 election, which would bring to office the first Republican president since 1932. After refusing entreaties from Truman to run as a Democrat, Dwight D. Eisenhower, then president of Columbia University and former Supreme Commander of Allied Forces in Europe, would go on to secure the Republican nomination and defeat Adlai Stevenson in a landslide. Though no strong pro-state candidate emerged during the election, the concern over state-federal relations persisted and Republicans pledged "a thorough reorganization of the Federal Government in accordance with the principles set forth in the report of the Hoover Commission."[37] More specifically, they called for an "immediate study directed towards reallocation of fields of taxation between the Federal, State, and municipal governments so as to allow greater fiscal freedom to the States and municipalities, thus minimizing double taxation and enabling the various divisions of government to meet their obligations more efficiently."[38] Eisenhower made good on these commitments in his 1953 State of the Union address. After describing the challenges faced in the areas of social insurance, employment, education, civil rights, immigration, and consumer protection, he stated his

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[36] "Republican Party Platform of 1948," June 21, 1948, The American Presidency Project (available at http://www.presidency.ucsb.edu/ws/index.php?pid=25836).

[37] "Republican Party Platform of 1952," July 7, 1952, The American Presidency Project (available at http://www.presidency.ucsb.edu/ws/index.php?pid=25837).

[38] *Ibid*.

intention to call for a commission to conduct "a thorough study of the proper relationship among Federal, State, and local programs."[39]

On March 30, 1953, he sent to Congress a message to "recommend the enactment of legislation to establish a commission on governmental functions and fiscal resources to make a thorough study of grants-in-aid activities and the problems of finance and Federal-State relations which attend them." Describing his vision for this commission, Eisenhower wrote,

> The maintenance of strong, well-ordered State and local governments is essential to our Federal system of government. Lines of authority must be clean and clear, the right areas of action for Federal and State Governments plainly defined. This is imperative for the efficient administration of governmental programs in the fields of health, education, social security, and other grants-in-aid areas. The manner in which best to accomplish these objectives, and to eliminate friction, duplication, and waste from Federal-State relations is therefore a major national problem.[40]

By July, the Republican controlled Congress passed Public Law 109, establishing the Commission on Intergovernmental Relations (CIR).[41] Just a few years later, William Anderson, who served as a presidential appointee on the Commission, would write that from the first it was unclear what precisely Congress intended the CIR to accomplish.[42]

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[39] Dwight D. Eisenhower, "Annual Message to the Congress on the State of the Union," Feb. 2, 1953.

[40] "Commission on Governmental Functions and Fiscal Resources: Message from the President of the United States," March 30, 1953, Folder: Information and Public Relations—Speeches, Lectures and Statements, The President, Box 63, U.S. Commission on Intergovernmental Relations: Records, 1953-1955, A67-5, DDEL.

[41] The enabling legislation identifies how the Commission was to be structured, requiring a total of 25 members assembled from presidential, Senate, and House appointments. Though I don't discuss the individuals who served on the Commission here, a list of its members is provided in Appendix B.

[42] William Anderson, "The Commission on Intergovernmental Relations and the United States Federal System," *The Journal of Politics* 18(2): 213-214 (May, 1956).

Section 3 of the enabling legislation outlined the duties of the Commission, requiring a broad examination of "all of the present activities in which Federal aid is extended to State and local governments, the interrelationships of the financing of this aid, and the sources of the financing of governmental programs."[43] But the same section directed the Commission to "carry out the purposes of section 1," which employed much more pointed language to describe the need for such a body. Raising the specter of federal encroachment on state interests protected by the Constitution, in addition to inefficiency and complexity, section 1 declared, "it is necessary to study the proper role of the Federal Government in relation to the States and their political subdivisions…to the end that these relations be clearly defined and the functions concerned may be allocated to their proper jurisdiction."[44]

The language of jurisdictional clarity, separate governmental roles, and clear lines of authority are evocative of an understanding of the federal system closer to the one replaced by the New Deal than that inaugurated by it. And for good reason. The congressional debates over the enabling legislation reflect the sense, shared by both Republicans and Democrats, that the previous several years had brought about a change in government functions and constitutional law that threatened (their understanding of) the federal system established by the Constitution. Looming behind these debates, one can see the grievances and anxieties that the Dixiecrats had tapped into in 1948. Nonetheless, in Congress' directions to the Commission, one can also see the recognition

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[43] Pub. Law 109, Sec. 3, 83rd Congress, approved July 10, 1953; reprinted in *The Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (June 1955), 282.

[44] *Id*., Sec. 1, 281.

that the role of the federal government had changed so significantly that there may be little hope of returning to a more limited scope of activity. The focus, then as it had been for critics of federal power throughout American history, was on managing the operations of the recently aggrandized federal government and claiming state power where possible on the margins, rather than seeking a root and branch rejection of the state that had developed during the New Deal and Second World War.[45] This ambivalence—the opposition to some aspects of enhanced federal power paired with a commitment to or acceptance of its continued use—was evident throughout the Commission's operation between 1953 and 1955, during which it undertook a thorough analysis of governmental functions and intergovernmental relations. And it is an ambivalence that shaped its assessment of American federalism.

The Reconstruction of American Federalism

[45] The most significant exception to this, of course, is the Civil War, in which the rejection of the federal government's authority led to secession and war. But this is an exception that proves, or at least illustrates, the rule. Time and again, politicians and jurists who favored state power have, upon gaining power at the national level, sought to stem the tide of federal power and manage its use rather than repudiating it wholesale.

In June of 1955, after occasionally tumultuous proceedings,[46] the Commission released its report. At over 300 pages, it reflected the comprehensive scope and practical utility that the Commission's chairman, Meyer Kestnbaum, sought to achieve.[47] The report is broadly divided into two sections. The first provides an overview of the evolution of the federal system and a statement on the role of the states, followed by three chapters identifying general principles about the terms for cooperative relationships between government, the financial dimensions of the state-federal relationship, and federal grants-in-aid. The second part consists of twelve policy-specific chapters that evaluate national policy regimes and express the Commission's recommendations. The

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[46] Though there isn't space here to explore the many conflicts and challenges that arose over the course of the Commission's existence, they are nonetheless pertinent to the political context in which its work proceeded. Foremost among these episodes is the tenure of its original chairman, Clarence Manion. The former dean of Notre Dame Law School, Manion was a conservative firebrand who used his position to criticize much of the New Deal legacy and oppose what he saw as creeping socialism in postwar America. Manion resigned his post in February 1954 because of what, in the public estimation, appeared to be disagreements with President Eisenhower. During his tenure, Manion had, among other things, given speeches attacking the Tennessee Valley Authority and supporting the Bricker Amendments, which would have limited presidential authority under the treaty power. Manion's initial appointment, service, and eventual resignation provide valuable insights into how critics of national power viewed the purpose and potential of the CIR and, ultimately, what those hopes came to. See "Manion Ousted by White House as Head of Governmental Survey," *New York Times*, Feb. 18. 1954; and "Assails Administration: Manion Asserts Centralization Aids 'Communist Scheme,'" *New York Times*, Apr. 9, 1954. For a sense of how controversial Manion had become, see "Removal of Manion Demanded by A.D.A.," *New York Times*, Oct. 21, 1953.

During his tenure, Manion attempted to bend the administration to his views of the importance and purpose of the Commission, going as far as proposing draft language to be included in the President's 1954 State of the Union message. See Elmer Staats, "Memorandum for The Honorable Bryce Harlow," Dec. 30 1953, transmitting "Proposed Revision of Last Paragraph, Page 28," and "Proposed Revision of Last Paragraph, Page 30, Fourth Draft, State of the Union Message," Folder: Information and Public Relations—Speeches, Lectures and Statements, The President, Box 63, U.S. Commission on Intergovernmental Relations: Records, 1953-1955, A67-5, DDEL. For a flavor of the kinds of speeches Manion delivered while chairman, see "The Constitution is Your Business," 65th Annual Convention of the National Paint, Varnish & Lacquer Association," Oct. 26, 1953. Folder: Information and Public Relations—Speeches, Lectures and Statements, The President, Box 63, U.S. Commission on Intergovernmental Relations: Records, 1953-1955, A67-5, DDEL.

[47] For the circumstances surrounding Kestnbaum's appointment, see Joseph A. Loftus, "Chicagoan Named to Head U.S. Board," *New York Times*, Apr. 22, 1954.

discussion here will focus on the first part, as that is where the bulk of the Commission's critical and normative work was focused.

In his introduction, Kestnbaum outlines a number of themes that are developed throughout the balance of the report, three of which are of particular importance for present purposes. Together they constitute an understanding of the federal system consistent with the constitutional logic outlined above in Part I. First, he describes the underdeterminacy of the distribution of power, though without reference to constitutional design or the understanding of its architects. Here political experience and history are the guide: "Precise divisions of governmental activities need always to be considered in the light of varied and shifting circumstances; they need also to be viewed in the light of principles rooted in our history."[48] Second, Kestnbaum draws attention to the significance of public opinion and support in shaping the federal system, which in the discussion of the debate between Publius and the Anti-Federalists was elaborated under the heading of "attachment." And just as was the case in *The Federalist*, the argument about attachment is intertwined with considerations of state capacity. Kestnbaum writes,

> As with all governmental institutions in our society, the basic purpose of the division of powers is to provide a climate that favors growth of the individual's material and spiritual potential. Power will not long rest with any government that cannot or will not make proper use of it for that end. Our system of federal government can be in proper balance, therefore, only when each level is effective and responsible.[49]

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[48] *The Commission on Intergovernmental Relations: A Report to the President for Transmittal to the Congress* (June 1955) (hereinafter, *Report*), 5-6.

[49] *Ibid*, 4.

We encounter here a very Publian understanding of government: superior administration will attract popular confidence and support, and that will shape the division of powers.[50] Moreover, we are given a definition of the federal "balance" that is strikingly different from the definition frequently employed in federalism debates. More often than not, the "balance" imagery has been used to describe a putatively determinate constitutional division of powers between the national and state governments. Further, it is this "balance" that justifies judicial intervention; when the federal system becomes unbalanced, it is the job of the Court to step in and return it to equilibrium. Such an understanding is obviously in considerable tension with the constitutional logic of federalism described in Chapter One and, more importantly, in the CIR report. Eschewing legal definitions, the report defines the federal balance in terms of effectiveness and responsibility, considerations of administration and politics, respectively. This understanding of the standard against which the federal system should be measured is a defining feature of the Commission's report and is an integral part of its reconstruction of the federal system.

Finally, the introduction closes with a summary statement of how civic responsibilities should be divided. Here Kestnbaum offered the conclusion of the whole Commission:

> Leave to private initiative all the functions that citizens can perform privately; use the level of government closest to the community for all public functions it can handle; utilize cooperative intergovernmental arrangements where appropriate to attain economical performance and popular approval; reserve National action for residual participation where State and local governments are not fully adequate,

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[50] See, for example, *The Federalist* Nos. 17 and 27.

> and for the continuing responsibilities that only the National Government can undertake.

This is a definition of subsidiarity, which has a long history as an interpretation of American federalism.[51] It bears note, though, that there is an important difference between the two. Whereas federalism describes a division between governments in a polity, subsidiarity adds a normative decision rule to that institutional structure that is used to allocate powers.[52] Put differently, it is easy to conceive of a federal system not structured according to the principle of subsidiarity. Therefore, subsidiarity cannot be a necessary component of federalism. Furthermore, to the traditional definition of subsidiarity the Commission added a further step: intergovernmental relations. Instead of jumping straight from a lower to a higher level of government once the former can no longer "handle" a particular responsibility, an intervening level of participation between governments is inserted. Even as this step adds a further limit on (or qualification to) exclusive national power and authority, it also reaffirms the basic structure of cooperative governance that had become increasingly prominent since the New Deal. We see here once again the centrality of governmental capacity to the structure of the federal system. Once the decision is made to turn over a civic responsibility to government, the determination of which government—local, state, or national—will be responsible for

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[51] See "Part II: Constitutions, Federalism, and Subsidiarity," in *NOMOS LV: Federalism and Subsidiarity*, ed. James E. Fleming and Jacob T. Levy (NYU Press, 2014).

[52] Elazar makes a similar argument to the one offered here, though he perhaps goes too far in asserting an *opposition* of subsidiarity and federalism. See Daniel J. Elazar, "The United States and the European Union: Models for Their Epochs," in *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union*, ed. Nicolaidis Kalypso and Robert Howse (Oxford: Oxford University Press, 2001). See also Wayne J. Norman, "Towards a Philosophy of Federalism," in *Group Rights*, ed. Judith Baker (Toronto: University of Toronto Press, 1994).

that activity is determined by ability or capacity, by which government can "handle" that activity. *Ceteris paribus* there is a preference for the lowest competent level of government, but the administrative focus identifies which conditions will determine the assignments of responsibilities.

The statement on subsidiarity anticipates an argument that runs throughout the report: given the capacity of the modern state and the demands of governance that had developed especially in recent years, "federal forbearance" is required. Forbearance is the conscious decision not to act, a "prudent limitation of National responsibilities."[53] "Where the problem of our federal system once appeared to be one of creating sufficient strength and authority in the National Government," the report asserts, "today contrary concerns have aroused anxiety. The National Government now has within its reach authority well beyond what it requires for ordinary use; forbearance in the exercise of this authority is essential if the federal balance is to be maintained."[54] Put simply, federal forbearance is necessary because the possibility to do otherwise is no longer a theoretical question but one that pervades day-to-day politics. With expanded financial resources, enhanced regulatory powers, and newfound popular support, the federal government was at risk of overextending and overreaching. Time and again in the report, the reader is told that federal authority is discretionary—the use of national power is a function of national politics, and constitutional limitations provide little comfort for anyone seeking to restrain the federal government or protect the states:

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[53] *Report*, 35.

[54] *Ibid*, 34-35.

> It is important that National powers be adequate to all truly national needs; it is also important that they do not jeopardize the proper functioning of the States. *The former object is a matter of power and hence of constitutional law; the latter is primarily a matter of public policy*.[55]
>
> The organs of the National Government determine what the Constitution permits the National Government to do and what it does not, subject to the ultimate consent of the people…*In brief, the policymaking authorities of the National Government are for most purposes the arbiters of the federal system*.[56]
>
> The National Government has therefore a double duty: to protect and promote the national interest by adopting such substantive policies as are necessary and proper under the powers delegated to the National Government; and to protect and promote the national interest in the preservation of the federal system.[57]

Federal forbearance is the corollary of this argument. To be used well and effectively, discretionary power must be complemented by self-limitation. This, of course, was nothing new; at least on the understanding of the constitutional logic of federalism outlined here, federal power had always been discretionary. But while imprudent expansions and uses of power had always been possible, the capacity of the modern state made that threat considerably more potent, imperiling the vitality and, in time, continued existence of subnational governance.[58]

Here, then, is the crucial point in the Commission's argument. Because federal power is discretionary and the stakes of poor or improper use of its power are now of such great

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[55] *Ibid*, 32 (emphasis added).

[56] *Ibid*, 59 (emphasis added). Note the similarity between the understanding of federalism offered here and the "process" approach inaugurated by Herbert Wechsler, whose seminal article was published one year before the Commission's report. See Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," 54 *Columbia Law Review* 543 (1954).

[57] *Ibid*, 60.

[58] See, for example, *ibid*, 59 and 67.

magnitude, debates over the proper allocation of power—over the nature of American federalism—must be addressed in terms of policy. Federalism should be conceived of as a matter of governance, and not principally as a matter of law. This change of focus entails a corresponding shift in responsibility from courts to legislatures and administrative agencies, with important roles to be played by representatives at both levels of government. The Commission's statement in this connection bears quoting in full:

> Under our federal system, the division of responsibilities between the National Government and the States was once thought to be settled mainly in terms of power: either one level, or both, or neither, had the authority to move; and that was enough to settle their functions. Such a decision was usually one for the judiciary. Under current judicial doctrine, there are still limits on the coercive powers at both levels, but the National powers are broad and the possibilities by means of spending are still broader. *The crucial questions now are questions of policy: Which level ought to move? Or should both? Or neither? What are the prudent and proper divisions of labor and responsibility between them? These are questions mainly for legislative judgment, and the criteria are chiefly political, economic, and administrative, rather than legal.*[59]

This is, in one sense, a strikingly different view of federalism than what we might be used to. Federalism is often portrayed as a constitutional question and not a question of governance. On this understanding, the relevant concerns are quite different. Instead of asking what *should* be done, we ask what *must* be done in light of constitutional meaning. We don't think of constitutional *possibilities*, only constitutional *requirements*. And rather than seeking "prudent and proper divisions of labor," we seek clear limits on the powers of one government or both.

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[59] *Ibid*, 33 (emphasis added).

The shift from law to governance reorients all of these questions and, in so doing, returns to the constitutional logic of federalism. And in this sense, the Commission's conception of federalism is strikingly familiar. It is built on the twin foundations of popular attachment and government capacity, looking to the Constitution to structure the operation of the federal system but not to script it. It should not be surprising that, after an era that saw such growth in central state capacity and the emergence of greater popular support for the national government, the specific articulation or application of the federal system—the division of powers and the relationship between governments—would change. The discrepancy between the details of the Commission's suggestions, most notably their endorsement of cooperative relationships and continued grants-in-aid to the states, and earlier instantiations of the state-federal relationship is primarily a function of the difference between state capacity in the postwar period and in earlier periods of American history. Just as the federal system had influenced the New Deal legislation that decisively shaped the state that would emerge from the Second World War, so too did that political context shape the federal system. In taking stock of the tectonic shifts in popular support and government capacity that had occurred over the previous two decades, the Commission on Intergovernmental Relations aided in the reconstruction of American federalism, rationalizing the essential core of the New Deal state and articulating a vision of federal governance that was focused on exactly that—governance.

Conclusion

This dissertation is about the consequences of constitutional design. In one sense, it is about the particular consequences of specific design choices, namely those concerning the federal system established by the United States Constitution. But in another sense, it is about a feature of constitutional self-government in general, a phenomenon confronted by all polities that seek to put to paper a design for representative government. In *The Federalist* No. 37 Publius gave particularly poignant expression to this challenge, describing the obstacles that beset efforts to translate the objectives of constitutional governance into language with the crude instruments available to man:

> Experience has instructed us that no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive, and Judiciary; or even the privileges and powers of different Legislative branches…Besides the obscurity arising from the complexity of objects, and the imperfection of human faculties, the medium through which the conceptions of men are conveyed to each other, adds a fresh embarrassment…When the Almighty himself condescends to address mankind in their own language, his meaning, luminous as it must be, is rendered dim and doubtful, by the cloudy medium through which it is communicated.[1]

[1] *The Federalist*, 37:235-237 (Madison).

This observation is about the reality of constitutional underdeterminacy, and not about the American Constitution in any exclusive sense. As is the case for many of Publius's arguments in *The Federalist*, the subjects under consideration were those presented to all who sought to establish a constitution by "reflection and choice."[2] The reality, and thus the consequences, of constitutional underdeterminacy extend far beyond the provisions and history of the constitution examined here. But it is in the particularities of the American constitutional experience that one set of such consequences is clearly disclosed.

By way of reflection and conclusion, there are two closely related concepts that figure prominently in the foregoing analysis that merit further discussion: constitutional construction and constitutional logics. While the first of these is a fundamental component of my argument about the nature of American federalism, the second is an integral part of its development. On the account I have advanced, the underdeterminate structure of the federal system requires political actors to elaborate the state-federal relationship in the course of making public policy and pursuing the ends of constitutional governance. That is, it requires them to construct the state-federal relationship. Through these efforts, the meaning of American federalism is constructed, contested, and reconstructed—the recurring lifecycle of constitutional underdeterminacy. This constructive process, in turn, takes place in and through the institutions established by the Constitution. As a result, the developmental trajectories of the constitutional order bear the impress of the logics of the Constitution and its component institutions.

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[2] *Id*., 1:3 (Hamilton).

The concept of constitutional construction has its roots in the distinction between constitutional interpretation and constitutional construction.[3] In the traditional formulation, the interpretation-construction distinction is clarified by reference to cases of vagueness (the presence of borderline cases) and ambiguity (the existence of multiple senses or meanings). While interpretation resolves instances of ambiguity, construction resolves cases of vagueness. Thus, in the context of this dissertation, "interpretation is the activity that aims at discovery of the linguistic meaning of the various articles and amendments that form the United States Constitution."[4] The goal of constitutional interpretation is the determination of the Constitution's semantic content. Constitutional construction, in contrast, "gives legal effect to the semantic content of a legal text."[5] This distinction has been recently reinvigorated, and somewhat reoriented, by the work of Keith Whittington, whose two book-length studies focus on both the phenomenon of constitutional construction and instances of construction in and between the legislative, executive, and judicial branches.[6] For Whittington, constitutional construction is "the

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[3] Lawrence B. Solum has offered perhaps the most perceptive and persuasive treatments of this distinction. See especially "The Interpretation-Construction Distinction," *Constitutional Commentary* 27:95-118. For more of an applied treatment, see Solum's coauthored piece with Tun-Jen Chiang "The Interpretation-Construction Distinction in Patent Law," 123 *Yale Law Journal* 530 (2013), esp. 543-562.

[4] Solum, "The Interpretation-Construction Distinction," 100.

[5] *Id*., 103.

[6] See Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (University of Kansas Press, 1999) and *Constitutional Construction: Divided Powers and Constitutional Meaning* (Harvard University Press, 1999). For a further application of the framework developed in *Constitutional Construction*, see "Dismantling the Modern State? The Changing Structural Foundations of Federalism," *Hastings Constitutional Law Quarterly* 25:483-528 (1998).

method of elaborating constitutional meaning in [the] political realm."[7] This definition was offered, at least in part, as a corrective to the overly narrow focus on traditional "modalities" of constitutional interpretation.[8] Whittington's argument invited observers to see how constitutional constructions "elucidate the text in the interstices of discoverable, interpretive meaning, where the text is so broad or so underdeterminate as to be incapable of faithful but exhaustive reduction to legal rules."[9] This was a salutary development, as it pushed back against the court- and judge-centered focus that dominated much of the literature in constitutional theory, law, and history, providing a fuller and more accurate account of constitutional operation and meaning-making.

In the years since Whittington's intervention, however, the lesson he urged seems not to have been learned. Much of the scholarship that picked up on his attempt to clarify the difference between interpretation and construction instead transposed the distinction (back) into the domain of the judiciary, disregarding or simply not addressing the roles played by non-judicial actors in the discovery and elaboration of constitutional meaning.[10] A leading voice in this movement is Randy Barnett, for whom the interpretation-construction distinction presented a metric for evaluating the propriety of

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[7] Whittington, *Constitutional Construction*, 1.

[8] The seminal articulation of these modalities—textual, historical, structural, prudential, doctrinal, and ethical—is Philip Bobbitt's *Constitutional Fate: Theory of the Constitution* (Oxford University Press, 1984).

[9] Whittington, *Constitutional Construction*, 5.

[10] This neglect was often benign, a function more of subfield preoccupations than overt dismissal. The conjunction of two passages from Lawrence Solum's treatment is instructive: "Because my own work on the interpretation-construction distinction occurs mostly in constitutional theory, I will use the text of the United States Constitution as an illustrative example…Although political construction and private construction are important, I want to focus on judicial construction of the Constitution for illustrative purposes." Solum, "The Interpretation-Construction Distinction," 101 and 104.

judicial behavior.[11] While the domain of interpretation requires judicial resolution, interpretation yields where semantic content runs out, and construction thus signals a different kind of judicial behavior, one that may justify greater scrutiny. The affirmation of construction as a legitimate judicial endeavor caused Barnett, among others, to go as far as to claim that the distinction is more fiction than fact. Reacting to the efforts of some to argue for a larger "zone of construction" in which judicial judgment must occur, Barnett has argued that "the labels are not important" and that interpretation and construction could actually be conceived of as two species of interpretation, which he calls "semantic interpretation" and "applicative interpretation."[12] There is much more to these arguments than what has been said here, but the description of these developments is sufficient to demonstrate the frequent dismissal of the broader focus on which Whittington insisted.

The debate about interpretation and construction, and the distinction between vagueness and ambiguity on which it traditionally rests, does not map neatly onto the account of the American federal system that I have developed over the course of this dissertation. But the arguments advanced here about constitutional underdeterminacy and the construction it anticipates can help buttress the interpretation-construction distinction and again emphasize the need to look not only to the judiciary but to the broader constitutional order in which it is embedded. Underdeterminacy is distinct from properties like ambiguity and vagueness and, accordingly, has a different relationship to

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[11] For example, see Laura A. Cisneros, "The Constitutional Interpretation/Construction Distinction: A Useful Fiction," *Constitutional Commentary* 27:71-93 (2010).

[12] Barnett, "Interpretation and Construction," 34 *Harvard Journal of Law and Public Policy* 65 (2011), 65.

the interpretation-construction distinction. Indeed, at various points in this dissertation I have defined underdeterminacy *in opposition to* vagueness and ambiguity.[13] Risking the confusion that often results from doubling down on academic jargon, it could be said that the federal system is unambiguously underdeterminate. Concluding that the Constitution does not fully specify the contours of the state-federal relationship, and as such defers further specification to the processes and actors established thereby, does not depend on contestable decisions between multiple senses of constitutional language. Nor is it quite accurate to say that underdeterminacy is the result of underlying linguistic vagueness, as the question of the proper or permissible state-federal relationship cannot be conclusively answered by reference to a point on a spectrum of constitutional meaning for stipulated provisions or terms.

Though a function of constitutional language, underdeterminacy is not principally linguistic but rather textual and institutional; it concerns the specification of offices, powers, and relationships that the Constitution leaves for subsequent determination and elaboration. It is, in a word, *constitutional*, in that it captures constitutionalism's defining purpose of structuring the definition, location, and exercise of political power. While this dissertation has explored the phenomenon almost exclusively in the context of federalism, it sought also to show the relevance of underdeterminacy to the separation of powers. By contrasting the underdeterminacy of these two hallmarks of American constitutionalism, defining characteristics of the federal system came more clearly into view. Thus the responsive and power sharing relationships between branches of the

[13] See Introduction, p. 6 note 11, and Chapter One, p. 44 note 13.

national government stand in stark relief to the completeness and independence of state and national governments. The former can give rise to positive benefits of deliberation and compromise, and through this process imbue government actions with the concerns of institutions structured to express the basic values of constitutionalism. The latter, on the other hand, produces claims of exclusive authority and political sovereignty, which in turn require the assertion of either national sovereignty or state prerogatives to resolve. This difference accounts for the need for a constitutional mechanism to resolve competing claims of sovereignty, claims that are themselves encouraged by the structure of the constitutional order.

My insistence on constitutional underdeterminacy and the construction it entails should not be understood as a categorical rebuke to the operation and claims of courts, though that impression may be forgiven.[14] While the analysis I present partakes of a broader tradition of qualifying the interpretive claims of the Supreme Court, my central goal has been to demonstrate that, wittingly or otherwise, all branches of the national government engage in constitutional construction. In the case of the judiciary, this means that attempts to interpret the Constitution give rise to new understandings of the federal system, understandings that because of the underdeterminacy of the Constitution's

[14] My emphasis on the political elaboration of the state-federal relationship could appear, at a very superficial level, similar to the political safeguards or process federalism arguments initially posed by Herbert Wechsler and further developed by, among others, Jesse Choper and Larry Kramer. In lieu of a comprehensive response to this characterization, it should be noted that those arguments were developed as efforts to identify and qualify the proper role of judges, principally the Supreme Court. My focus, and the focus of this dissertation, is not on the appropriate scope of judicial review but on the broader relationship between constitutional design and development. Though there are certainly consequences for judicial review, those have not been the subject of inquiry here. For a provisional exploration of these consequences, see Ewing, "Structure and Relationship in American Federalism," 712-728.

definition of the state-federal relationship are distinct from constitutional interpretation. Whereas Chapter Four addressed an episode of legislative and executive construction, Chapter Three revealed that such constructions can also result from iterated episodes of interpretation by the judiciary. By repeatedly seeking to provide determinacy to the underdeterminate state-federal relationship, the Supreme Court produced a logic of federalism that departed from the constitutional logic of federalism. While the latter is predicated on an openness to revision and change—to constitutional possibilities—the former entailed categorical distinctions between state and national power that served to minimize or eradicate underdeterminacy. This connection—between the determination of constitutional meaning and the operation of constitutional institutions—brings us to the second central concept of this dissertation: constitutional logics.

Constitutional logics figure prominently in the works of a small group of scholars for whom questions about constitutional meaning and development require conceptualizing and evaluating the constitutional system as a complex whole, as a constitutional *order* and *enterprise*.[15] Jeffrey Tulis has provided the most detailed definition, identifying three features of a constitutional logic: "(1) the fundamental commitments, or constitutive dimensions, of political life, (2) the philosophic presuppositions of those commitments, and (3) the cultural, institutional, and policy implications of those commitments."[16] At a

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[15] See principally Jeffrey K. Tulis, *The Rhetorical Presidency* (Princeton University Press, 1987), 8 n. 9; and "On the State of Constitutional Theory," *Law & Social Inquiry* 16(4):711-716 (Autumn, 1991); Jeffrey K. Tulis and Nicole Mellow, "The Anti-Federal Appropriation," *American Political Thought* 3(1):157-166*;* William F. Harris II, "Bonding Word and Polity: The Logic of American Constitutionalism," *American Political Science Review* 76(1):34-45 (1982); and Sotirios Barber, *On What the Constitution Means* (Johns Hopkins University Press, 1984), 156-159.

[16] Tulis, "On the State of Constitutional Theory," 716.

more general level, constitutional logics can be thought of as the basic set of constitutional principles, along with the relevant theoretical assumptions and practical consequences of those principles. The focus of this dissertation has been the constitutional logic of federalism: (1) the *principle* of the Constitution's underdeterminate division of power between levels of government, (2) the *assumption* that this underdeterminacy reflects a commitment to popular sovereignty as the ultimate foundation of political legitimacy, and (3) the *practical consequence* of contestation over the proper meaning of the state-federal relationship and, as a result, over the meaning of sovereignty in the constitutional order.

In the course of working out the development of this constitutional logic, it was necessary to identify the institutions through which this logic is promulgated. Hence, this dissertation has also emphasized institutional logics, which should be understood as particular, and often partial, manifestations (or applications) of constitutional logics. Once the premise about constitutional underdeterminacy is acknowledged, judicial claims about interpretation may appear to be more pretense than observation—an assertion of institutional prerogative rather than an argument about constitutional meaning. While there is a strong case to be made that this is at times true, it also risks stating the matter too strongly. As I've argued, the judiciary, like other governing institutions, has a distinctive perspective on questions of constitutional meaning. Moreover, the perspectives of the three branches of the national government are functions of the constitutional ends each is designed to vindicate. These ends I've summarized as the fundamental ends of liberal constitutionalism: popular will, general welfare, the rule of

law, individual rights, and national security. Because each of the three branches of the national government is structured to advance and give unique expression to a different end (while still being mindful of the others), inquiries into the elaboration of constitutional meaning must take account of the ways in which these institutional logics inflect the branches' elaboration of constitutional meaning.

Taken together, constitutional construction and constitutional logics offer the tools fit for the analysis of our Constitution. As argued in Chapters One and Two, and as illustrated in Chapters Three and Four, the underdeterminacy of the federal system anticipates constitutional development. This development, in turn, is inflected by the institutional logics of the branches as they encounter questions of constitutional meaning and gives rise to constructions of the state-federal relationship. Such a posture towards American constitutional development requires first identifying the constitutional logics that define the polity's fundamental commitments and then attending to the institutional logics that give life to those commitments. Only then can the distance traveled by "We the People" towards "a more perfect Union" be accurately charted.

Appendix A[1]

Fig. A1: State and Local Government Receipts, 1929-2015

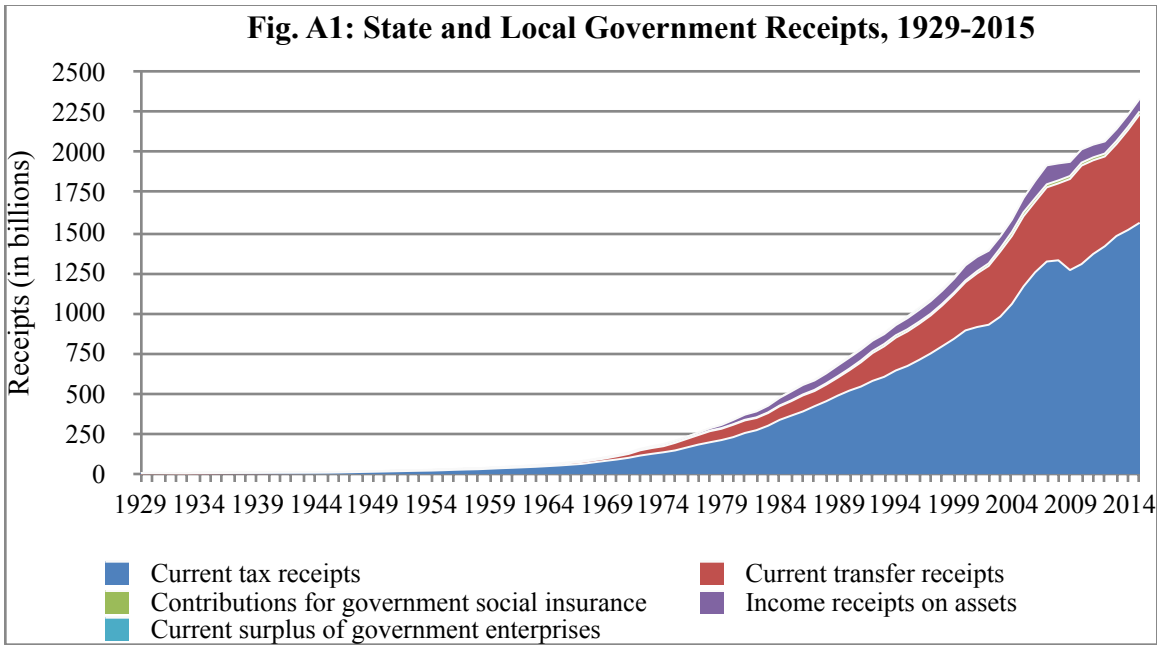
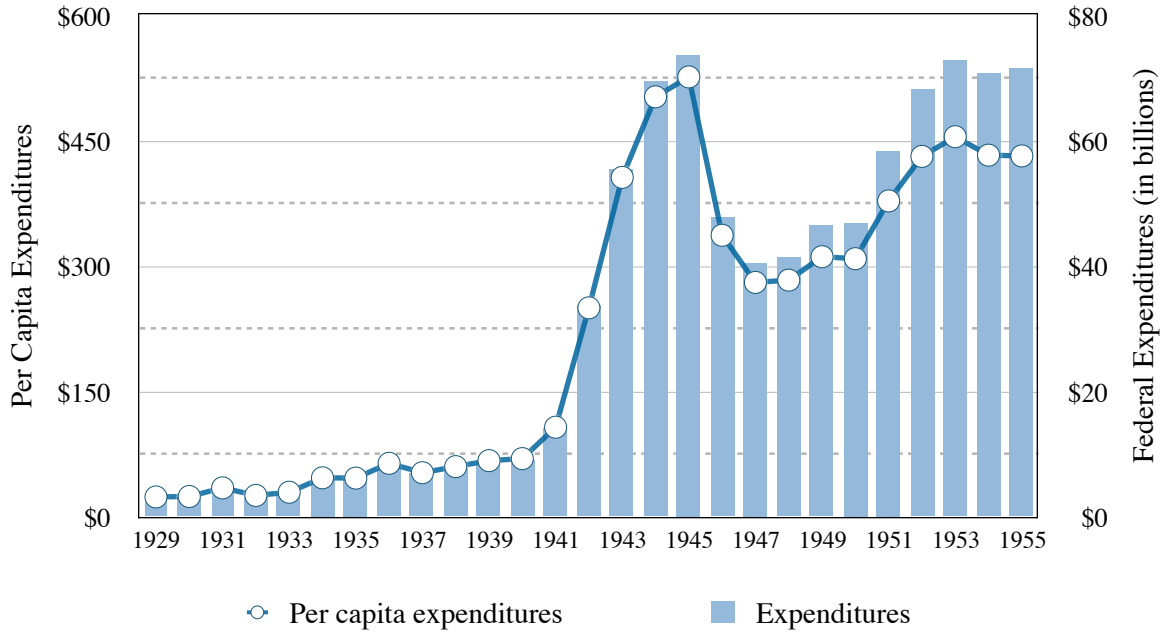


Fig. A2: Per Capita Federal Government Expenditures, 1929-1955



[1] The data for the Appendix figures as follows: Figure A1 is drawn from the Bureau of Economic Analysis, State and Local Government Current Receipts and Expenditures (Table 3.3) (rev. March 25, 2016); Figure A2 is a composite of the Bureau of Economic Analysis, Federal Government Current Receipts and Expenditures (Table 3.2) (rev. March 25, 2016) and U.S. Census Bureau reports.

Table A1: Federal Grants to States and Localities, Selected Years 1930-1960

	1930	1940	1950	1960
Total Number	**15**	**31**	**68**	**132**
Categorical grant	15	31	68	132
Block grant	0	0	0	0
General revenue sharing	0	0	0	0
Total Outlays (in millions)	**$100**	**$967**	**$2,212**	**$7,019**
Health	0	22	123	214
Income security	1	271	1,123	2,635
Ed., train., employ., & soc. serv.	22	238	484	525
Transportation	76	165	429	2,999
Community & regional devel.	0	0	0	109
Other	1	271	53	537

Source: Congressional Research Service, Report 7-5700 (R40638), "Federal Grants to State and Local Governments: A Historical Perspective on Contemporary Issues," 5-6 and 10-11 (Mar. 5, 2015).

Appendix B

Members of the Commission on Intergovernmental Relations

Chairmen

Clarence E. Manion (until Feb. 1954)	Dean, Notre Dame Law School
Meyer Kestnbaum (from Feb. 1954) *	President, Hart, Schaffner & Marx

Presidential Appointees

William Anderson	Professor, University of Minnesota
Lawrence A. Appley	President, American Management Assoc.
John Battle	Governor (D-VA)
John E. Burton	Vice President, Cornell University
Marion Bayard Folsom	Undersecretary, Department of Treasury
Charles P. Henderson	Mayor, Youngstown (R-OH)
Oveta Culp Hobby	Secretary, Dept. of Health, Education, and Welfare
Clark Kerr	Chancellor, University of California
Sam Jones	Governor (R-NE)
Alice K. Leopold	Director, Women's Bureau
Val Peterson	Governor (R-NE)
Allan Shivers	Governor (D-TX)
Dan Thornton	Governor (R-CO)

Senate Appointees

Sen. Guy Cordon †	Texas (R)
Sen. Robert Hendrickson †	New Jersey (R)
Sen. Clyde R. Hoey †	South Carolina (D)
Sen. Hubert H. Humphrey	Minnesota (D)
Sen. Andrew F. Schoeppel	Kansas (R)

House Appointees

Rep. John D. Dingell	Michigan (D)
Rep. James I. Dolliver	Iowa (R)
Rep. Brooks Hays	Arkansas (D)
Rep. Harold Ostertag	New York (R)
Rep. Noah M. Mason *	Illinois (R)

Replacements

Sen. Alan Bible	Nevada (D)
Sen. John Marshall Butler	Maryland (R)
Rep. Angie Goodwin	Massachusetts (R)
Sen. Wayne L. Morse	Oregon (I)

*Notes: * Resigned from Commission. † Left office prior to conclusion of Commission's work.*

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