

Winter 2013

## The (Dys)Functions of American Federalism

Lisa L. Miller

Follow this and additional works at: <http://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Lisa L. Miller, *The (Dys)Functions of American Federalism*, 49 Tulsa L. Rev. 267 (2013).

Available at: <http://digitalcommons.law.utulsa.edu/tlr/vol49/iss2/4>

This Book Review is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in Tulsa Law Review by an authorized editor of TU Law Digital Commons. For more information, please contact [daniel-bell@utulsa.edu](mailto:daniel-bell@utulsa.edu).

## THE (DYS)FUNCTIONS OF AMERICAN FEDERALISM

Lisa L. Miller \*

SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* (2013). Pp. 256. Hardcover \$39.95.

DAVID BRIAN ROBERTSON, *FEDERALISM AND THE MAKING OF AMERICA* (2012). Pp. 248. Hardcover \$40.00.

ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* (2011). Pp. 432. Hardcover \$75.00.

Readers might reasonably ask what three more books on American federalism could possibly add to the already voluminous body of work on the topic. This thriving industry has recently produced encyclopedic compilations of major writings in the field,<sup>1</sup> works that laud the space federalism carves out for minority rule,<sup>2</sup> pieces that highlight the liberty-enhancing strengths of interactive, multi-level governance,<sup>3</sup> and even a full frontal assault on the very idea that American federalism serves any valuable democratic purpose whatsoever.<sup>4</sup> What could possibly be added to this vast literature?

Plenty, it turns out. The main reason is that so many of the extant works are trapped in legalistic norms that assume American federalism's alleged virtues with little empirical analysis of how federalism actually structures political activity on the ground, whether it produces the ends it is alleged to encourage, or even whether those ends are, in fact, essential to the advancement of democratic values.<sup>5</sup> What

---

\* Associate Professor of Political Science, Rutgers University.

1. *See generally* 1 *FEDERALISM* (John Kincaid ed., 2011) (compilation of various articles pertaining to specific debates and perspectives on federalism); *FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS* (G. Alan Tarr et al. eds., 2004) (compilation of various essays on comparative constitutionalism and case studies regarding constitutional arrangements and the protection of minority rights in order to understand the connection between federalism/subnational constitutionalism and minority rights).

2. *E.g.*, Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 *HARV. L. REV.* 4, 6 (2010).

3. *E.g.*, ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 122 (2009).

4. *See generally* MALCOLM FEELEY & EDWARD L. RUBIN, *FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE* (2008).

5. *E.g.*, Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 *STAN. L. REV.* 115, 118 (2010); Gerken, *supra* note 2, at 8; John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 *HARV. L. REV.* 2003, 2004 (2009); J. Mitchell Pickerill & Paul Chen, *Medical Marijuana Policy and the Virtues of Federalism*, 38 *PUBLIUS* 22, 24 (2007); Note, *Defending Federalism: Realizing Publius's Vision*, 122 *HARV. L. REV.* 745, 746-47 (2008); Symposium,

is most promising about these three volumes is that none of them begins with the premise that American federalism is *necessarily* a laudable arrangement. Rather, each seeks to explore the nature of this peculiar structure as it is, and assess its impact on multiple goals of democratic governance. Such analyses are well overdue and each of these books offers important challenges to conventional tropes about the value of our federal system.

In the spirit of these works, I begin with a candid statement of my own approach to understanding American federalism. For all the literature, it is surprising how few legal analyses have taken up the call, issued decades ago, to gain more conceptual clarity as to the specific values that inhere in American federalism and to generate more systematic assessments of whether it actually produces any of them.<sup>6</sup> Indeed, most approaches are deeply attached to the idea that federalism must have *some* virtues, and then set out to identify them.<sup>7</sup> Thus, my orientation towards the three volumes under review here is to consider what they contribute to our understanding of American federalism *de facto*, rather than their contributions to *de jure* preferences. In this view, new work on American federalism should recognize it as a political institution and seek to understand it better as such, rather than (or at least in conjunction with) articulating how we might like it to be. Contemporary analyses, in other words, are particularly beneficial when they move beyond the stale reifying of “our federalism” and towards an engagement with how federalism functions as a political institution that structures power relations.<sup>8</sup>

Happily, all of these books move the literature in that direction, albeit to greater or lesser degrees. Each is rich with detail, though space does not permit a comprehensive summary of all dimensions. Rather, I will offer brief reviews of the main arguments and then discuss them further through the thematic lens of distinguishing federalism’s normatively framed virtues from its reality. The brevity of the summaries should not be taken as encompassing the nuance and complexity provided in each volume.

Erin Ryan’s, *Federalism and the Tug of War Within*, offers a comprehensive analysis of legal cases from cooperative federalism to New Federalism, illustrating

---

*Federalism, Political Accountability, and the Spending Clause*, 107 HARV. L. REV. 1419, 1420-21 (1994).

6. *E.g.*, WILLIAM H. RIKER, FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE 138 (1964); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 319 (1997); Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1486-87 (1994).

7. *E.g.*, Friedman, *supra* note 6, at 322 (though he calls into question the alleged virtues of federalism, he nonetheless begins from the premise that we should value federalism, suggesting that “legal scholars of federalism join together with those in other disciplines to enhance our knowledge of the values of federalism.”).

8. Although attributed to language in *Younger v. Harris*, 401 U.S. 37, 44 (1971), the term “our federalism” is frequently associated with the virtues outlined by Sandra Day O’Connor in *Gregory v. Ashcroft*. See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The *Gregory* Court noted:

[The] federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in the democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry. . . . Perhaps the principle benefit of the federalist system is a check on abuses of government power.

*Id.*

the contradictions and tensions inherent in trying to shoehorn all of federalism's virtues into legal opinions addressing very specific political problems.<sup>9</sup> Articulating the key political commodities that federalism purportedly offers—checks on sovereign authority to safeguard individuals, accountability and democratic participation, local autonomy (innovation, diversity, competition), subsidiarity, and state-federal problem-solving—Ryan nicely illustrates that, not only is it unclear whether Americans actually value all of these equally, but even if they do, they often run into conflict with one another.<sup>10</sup> As a result, Ryan argues, federal courts are by necessity engaged in balancing these goals, whether or not they acknowledge doing so, and Ryan's aim is to bring this balancing more to the fore of constitutional logics.<sup>11</sup> In place of the ad-hoc reasoning she sees in current state-federal conflict jurisprudence, Ryan offers "Balanced Federalism," a mechanism for assessing federal-state relations and for understanding the role of the Tenth Amendment in contemporary American jurisprudence.<sup>12</sup> In making this move, she explicitly confronts the question of who should decide, less from a normative or ideological position than from a practical, empirical one.<sup>13</sup>

The book's greatest strength, in my view, is that Ryan understands and takes seriously the way that much public policy and legal rules are actually made and implemented in American politics—that is, through untidy conflict and compromise that draw in many of the players in every venue, from national to state and even to local actors.<sup>14</sup> Drawing on rich examples from environmental policy, land use, public health, and counter-terrorism, Ryan highlights the real challenges facing twenty-first century governance and the limited capacity of existing federalism jurisprudential frameworks to contribute to their resolution.<sup>15</sup> Ryan suggests that the Balanced Federalism framework would be triggered when clear jurisdictional boundaries are not at stake, and thus what she refers to as "the interjurisdictional gray area" is in play.<sup>16</sup> In that case, she argues, courts should consider not just the classic, unidirectional problem of excessive federal encroachment on state power, but also the reverse flow—when state capacity is such that it does not provide sufficient

---

9. ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN* xi (2011).

10. *Id.*

11. *Id.*

12. *Id.* at xi-xii.

13. *Id.* at xii.

14. I have referred to this as the "federalization of law and policy." See Lisa L. Miller, *The Representational Biases of Federalism: Scope and Bias in the Political Process, Revisited*, 5 PERSPECTIVES ON POLITICS 305-21 (2007). See also LISA L. MILLER, *THE PERILS OF FEDERALISM: RACE, POVERTY, AND THE POLITICS OF CRIME CONTROL* 5 (2008). Federalization is a term that is likely to confuse legal scholars since, in the legal academy, it has primarily been used to describe increasing the scope of national authority in particular policy areas. See, e.g., Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization*, 54 AM. U. L. REV. 747, 766-70 (2005). However, focusing on increases or decreases in national or state authority over particular issue areas obscures the fact that jurisdictional authority is not a zero-sum game because many issues are active on the agendas of national, state, and even local political institutions simultaneously (for a related discussion, see Emily Zackin, *What's Happened to American Federalism?*, 43 POLITY 388, 389 (2011)). A more appropriate term for increasing national attention to, or control over, particular policy areas would be 'nationalization.' 'Federalization' thus implicitly recognizes increasing attention to policy across the varied landscape of American federalism as positive sum.

15. See generally RYAN, *supra* note 9.

16. *Id.* at 186.

means through which to solve the underlying policy problems.<sup>17</sup> In Balanced Federalism, courts would consider factors such as whether affected parties had (implicitly or explicitly) waived Tenth Amendment objections, the scope of the regulatory crossover (whether it is temporary, for example), the purpose and effects of the federal-state issues at stake, whether the crossover adversely affects vulnerable local actors and, particularly important for Ryan, the capacity of lower levels of governments to actually solve the problem at hand.<sup>18</sup>

In highlighting the complex web of policy decisions and implementation processes through specific examples such as Hurricane Katrina and radioactive waste disposal, Ryan rightly situates federalism conflicts in the context of real world policy-making. She thus avoids the tempting illusion that contemporary social problems could mystically recede into the background, if only states and the national government would reach whatever optimal jurisdictional boundary is preferred by various factions in the federalism wars. Ryan's willingness to engage with the realities of here and now is both refreshing and illuminating.

Though Ryan is critical of many Tenth Amendment claims for their inability to produce a logic that can confront twenty-first century problems, she nonetheless articulates a robust defense of its continued role in constitutional jurisprudence. In *The Fallacies of States' Rights*, Sotirios Barber gives no such quarter to the long-suffering Amendment. Going well beyond Ryan, Barber denies any constitutionally defensible *state* claim against national authority.<sup>19</sup> His argument pits states' rights claims against two forms of national federalism: process federalism and Marshallian federalism.<sup>20</sup> Process federalism asserts that so long as state concerns are protected in the democratic process—through equal representation in the Senate, fair elections in state legislatures and so on—the outcome of any national legislative process is justified.<sup>21</sup> Barber is unhappy with this approach because it assumes that simply aggregating individual preferences can produce the kind of robust, civic-minded republic that the Framers intended.<sup>22</sup> His alternative, Marshallian federalism, promotes a “secular public reasonableness,” which Barber argues is consistent with the history and intent of the founding of the nation:<sup>23</sup>

If the national government is trying to secure the nation from foreign attack, or trying to promote job growth, or trying to ensure equal treatment and opportunity for the nation's people—if the government is pursuing ends that a reasonable reading of the Constitution authorizes—then clashes with the states are constitutionally irrelevant.<sup>24</sup>

---

17. *Id.*

18. *Id.*

19. SOTIRIOS A. BARBER, *THE FALLACIES OF STATES' RIGHTS* 2 (2013).

20. *Id.* at 8.

21. *Id.*

22. *Id.* at 18-19.

23. *Id.* at 87.

24. *Id.* at 5.

In articulating Marshallian federalism, Barber continues his argument for a positive or ends-oriented constitutionalism.<sup>25</sup> Marshallian federalism would give courts one simple question to answer in federalism conflicts: Is the national government doing what it is supposed to do? Where the national government seeks to promote security, prosperity, rational deliberation, and public debate, Congress should enjoy unfettered authority. Only when it seeks alternative goals could the courts lawfully step in. Though Marshallian federalism includes a strict no-pretext rule that would bar Congress from engaging in lawmaking intended for some outcome *other than* promoting the nation's prosperity or security, this does not, Barber argues, stem from the right of states to object to congressional action but, rather from the limitations on Congress itself.<sup>26</sup>

Barber is persuasive in dismantling the states' rights doctrine, which, he argues, operates with a logical fallacy: the appeal to any republican principle that claims to provide the states with rights that they can assert against national power will necessarily implicate the sort of national agreement on what those rights are that is precluded by the very specific (and often parochial) claims made by states' rights advocates in the first place.<sup>27</sup> In trying to appeal to some value of state sovereignty against national power, Barber argues, states' rights advocates require an articulation of what that value is.<sup>28</sup> But in order to be persuasive, it must be of national value, thus undercutting the claim that states have rights *against* national authority.<sup>29</sup> Barber's compelling rebuttal to those who worry that the inability of states to make a legal claim against national authority would result in congressional power run amok is simple: just because Congress is *permitted* to act in a certain realm does not mean it necessarily *will* act.<sup>30</sup> Nor can states' righters explain why the mere possibility of more *national* regulation is a threat to liberty but more "*actual regulation*"—a consequence of multiple lawmaking in multiple state governments—is not.<sup>31</sup> These are crucial points and, like Ryan, they illustrate Barber's engagement with real-world political incentives that drive elected officials and government agencies.

While Ryan and Barber stake out normative terrain, albeit with a clear eye on the realities of twenty-first century governance, in *Federalism and the Making of America*, David Brian Robertson continues his analytic work on the origins of the American Constitution that places interests, bargaining, and politics at its core.<sup>32</sup> A scholar of American political development, Robertson persuasively illustrates how American federalism has been a "principal battlefield of political conflict" and has

---

25. SOTIRIOS A. BARBER & JAMES E. FLEMING, CONSTITUTIONAL INTERPRETATION: THE BASIC QUESTIONS 16 (2007).

26. BARBER, *supra* note 19, at 205.

27. *Id.* at 9-11.

28. *Id.* at 9.

29. *Id.*

30. *Id.* at 62.

31. *Id.* at 9-10.

32. *See generally* DAVID BRIAN ROBERTSON, FEDERALISM AND THE MAKING OF AMERICA (2012).

played a role in virtually every major conflict in American politics.<sup>33</sup> Rather than critique or laud this fact, Robertson's aim is simply to illustrate how, and with what consequences, this has occurred. After spelling out the purported virtues of federalism, Robertson proceeds to take the reader through a history of the institution, which reveals just how disconnected such values are from practical realities. "No one at the Constitutional Convention of 1787," he writes, "fully anticipated or welcomed the federal framework they placed in the U.S. Constitution. The specific rules of American federalism in that document resulted from the delegates' conflicts over the direction of American political development."<sup>34</sup>

Indeed, the second chapter clearly demonstrates that the federal structure that the Constitutional Convention wrought was not an idealized balance of power aimed at abstract goals, such as liberty or checks and balances or citizen participation, but simply *the best the Framers could do, given the conflicts and interests of their time*.<sup>35</sup> Robertson deftly illustrates the path dependence of how the federal structure emerged. For example, when proportional representation in the Senate slipped away, southern state support for broad national powers waned.<sup>36</sup> "Because a series of ingenious and expedient compromises produced American federalism, it is futile to try to find a single, logical blueprint for federalism in the Convention debates or the Constitution."<sup>37</sup>

Of course, Robertson is not the first to understand the Framers as political actors with political interests, a fact historians have long well-understood.<sup>38</sup> What he adds, however, is detailed analysis of how these arrangements have necessarily shaped the development of political institutions, the tactics of those seeking to influence political outcomes, as well as the outcomes themselves. The book's subsequent chapters illustrate how the *hardware* of governing—political parties, interest groups, social movement, government capacity and bureaucratic regulation—has all been shaped by the federal compromise forged in the Constitution, as has virtually every major policy issue, including racial inequality, economic development, labor-business relations and social welfare policy.<sup>39</sup> For example, Robertson argues that federal arrangements have probably both helped and hindered the influence of business interests over public policy.<sup>40</sup> They have helped in that the fragmented nature of power in the U.S. federal system allowed those opposed to government regulation to "dig in behind states' rights," but they also generated a larger number of venues where various social movements could press for inflexible rules to be im-

---

33. *Id.* at 1.

34. *Id.* at 19.

35. *Id.* at 34-35.

36. *Id.* at 26-27.

37. *Id.* at 31.

38. See generally RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* (2009); PAUL FINKELMAN, *SLAVERY AND THE FOUNDERS: RACE AND LIBERTY IN THE AGE OF JEFFERSON* (2d ed. 2001); GEORGE WILLIAM VAN CLEVE, *A SLAVEHOLDERS' UNION: SLAVERY, POLITICS, AND THE CONSTITUTION IN THE EARLY AMERICAN REPUBLIC* (2010).

39. ROBERTSON, *supra* note 32, at 1.

40. *Id.* at 50-51.

posed on what they saw as deeply hostile adversaries.<sup>41</sup>

Perhaps Robertson's most important contribution is his exploration of federalism as a "double battleground," which gives "political adversaries the incentive and the opportunity to use the Constitution as a shield and a sword."<sup>42</sup> The first battleground is the one on which all democratic systems turn—should the government act and, if so, by what means? But the second battleground is which *level of government* should have the power to act, and it is this second alternative, Robertson argues, that has had far-reaching implications for policy. "American political opponents," he observes, "routinely choose to fight on the second of these battlefields, over the role of the states versus the national government, *because they are likely to get better results at one level of government than the other.*"<sup>43</sup> The most insidious use of the double-battleground has been on racial inequality, which slowed racial progress immeasurably. But other illustrations abound. Liberals pushed hard for national control over environmental regulation during the period of government expansion and Democratic control in the 1960s and 1970s, but later, as Republican presidents cut funding and altered national policy, environmentalists sought to strengthen state power in this area.<sup>44</sup> Similarly, conservative opponents of same-sex marriage and abortion decried federal meddling when it protected these outcomes, but eagerly sought national laws that would restrict them (Defense of Marriage Act; Partial-Birth Abortion Ban Act).<sup>45</sup> Meanwhile, advocates of medical marijuana sued to declare federal drug laws beyond the scope of congressional power when states began to legalize its use.<sup>46</sup>

Each of these books substantially moves the needle of federalism debates in three ways. First, in making explicit their goals and values, the authors expose the difficulty (if not impossibility) of articulating federalism's virtues without tethering them to political aims. Those aims need not be strictly partisan—the problem-solving strategy proposed by Ryan, for example, does not presuppose liberal or conservative policy solutions—but general appeals to the traditional virtues of 'our federalism' are not clearly self-justifying. Second, each work takes seriously the realities of how American federalism functions as a structure of power relations by: revealing how federalism claims have been used by different groups for different ends throughout American history (Robertson),<sup>47</sup> illustrating the many-layered, multiple and complex dynamics of real world policy-making (Ryan),<sup>48</sup> and by highlighting the political aims of states' rights claims against national power (Barber).<sup>49</sup>

---

41. *Id.* at 77.

42. *Id.* at 34-35.

43. *Id.* at 39 (emphasis added).

44. See BARBER, *supra* note 19, at 22 (offering another example, arguing that the contemporary revival of states' rights arguments has little to do with the states and instead, is primarily interested in subverting both state and national regulation to the market).

45. Partial Birth Abortion Ban Act, 18 U.S.C.A § 1531 (2003); Defense of Marriage Act, H.R. 3396, 104th Cong. (1996). DOMA was partially declared unconstitutional by the Supreme Court in *U.S. v. Windsor*, 570 U.S. \_\_\_ (2013).

46. See *Gonzalez v. Raich*, 545 U.S. 1, 1 (2005).

47. See generally ROBERTSON, *supra* note 32.

48. See generally RYAN, *supra* note 9.

49. See generally BARBER, *supra* note 19.



Finally, in general, these books focus less on abstract and ambiguous concepts like 'liberty' and 'checks and balances,' and more on the need for democratic governments to solve real problems. "No sane actor," Barber notes, "would make a government, a machine, or anything else for the sole or the chief purpose of restraining its operation or use."<sup>50</sup>

Some will quarrel with this reality-based approach, arguing that the very purpose and value of American federalism is precisely to keep the central government from trying to solve every problem and that the overlapping, messy jurisdictional terrain whose origins are described by Robertson, illustrated by Ryan and implicitly decried by Barber are a consequence of the very congressional overreach they wish to restrain. In this view, it is the encroachment on state power that has generated the policy messes we are in.<sup>51</sup> But even if one wishes for a leaner regulatory role for the national government, we still need accounts of how to get there from here. The complex overlap in policy-making and implementation is a ship that has long since sailed and no one can credibly advocate more restrictive jurisdictional boundaries without explicit engagement with this overlap.<sup>52</sup>

The following comments link up with the 'federalism as it is' aspect of these works and are primarily aimed at moving the dialogue yet further down that path, as well as highlighting some of the ways that these works, highly valuable though they are, may still include some obstacles to doing so. For example, though engaging with the real politics of having to govern, Ryan and Barber remain mired in case law as justification for a particular version of federalism.<sup>53</sup> In doing so, they leave themselves open to opposing arguments for which, by their own assessments, there are few, if any, legal resolutions. To be clear, both authors are explicit in their goals, with Ryan aiming at providing a workable jurisprudential framework for resolving federal-state conflicts, and Barber making the case for a national federalism that is capable of providing the government with the capacity to secure the public good.<sup>54</sup> Even those who disagree with Ryan and Barber's arguments must acknowledge that these are reasonable goals of democratic governance. Nonetheless, by relying heavily on legal cases and constitutional logics, neither volume can get out of the normative framework on which opposing arguments also rely.

For example, though Ryan rightfully calls into question the purpose and value of federalism's claimed virtues, she nonetheless reifies them by regularly deploying, but not defining or defending, abstract claims of "checks and balances"<sup>55</sup> and "protecting individual rights against government overreach."<sup>56</sup> While she does acknowledge the partisan nature of such claims, subsequent arguments fall back to purely legal assessments.<sup>57</sup> At one point she suggests that:

---

50. *Id.* at 177.

51. *See generally* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2004); RICHARD A. EPSTEIN, HOW PROGRESSIVES REWROTE THE CONSTITUTION (2006).

52. *See generally* MICHAEL S. GREVE, THE UPSIDE-DOWN CONSTITUTION (2012).

53. *See generally* BARBER, *supra* note 19; RYAN, *supra* note 9.

54. *See generally* BARBER, *supra* note 19; RYAN, *supra* note 9.

55. RYAN, *supra* note 9, at 39, 41, 61.

56. *Id.* at 39.

57. *Id.* at 38.

If infallible lines of governmental accountability were the most important feature of good governance, then a unitary or even a confederate system might be preferable. . . . And yet we tolerate dual sovereignty's assault on this particular strain of governmental accountability because the unitary and confederate alternatives would undermine (inter alia) the check-and-balance advantages discussed above and the problem-solving advantages discussed below.<sup>58</sup>

But Ryan never explains what precise checks-and-balances our federal system provides that are missing in, say, unitary systems such as the United Kingdom or the Netherlands, nor does she make the case for why federalism rather than simply decentralization is required to solve the problems she describes.<sup>59</sup> Most strikingly, her claim that Americans accept dual sovereignty in order to preserve checks and balances belies Robertson's clear historical evidence that American federalism is simply the constitutional structure *we have*.

Similarly, while Barber generously lays out competing arguments to his own, allowing the reader to make up his or her own mind, Barber himself acknowledges that the line between process federalism and Marshallian federalism is difficult to draw.<sup>60</sup> His argument obligates him to defend Marshall against Marshall,<sup>61</sup> furthering the reliance on judicial opinions to validate the argument for Marshallian federalism.

To some degree then, both Ryan and Barber elide the core question they wish to resolve: the very problem of just how the national and state balance of power should be determined. Both see problem-solving at the core,<sup>62</sup> but Robertson powerfully illustrates that *the meaning of problem-solving itself* is at the heart of democratic contestation.<sup>63</sup> American federalism affords political actors the opportunity not only to decide *whether* to see issues as problems government should solve (e.g., racial or economic inequality) or even as problems in the first place (e.g., lack of affordable health care), but also to then obfuscate the debate by replacing 'whether to problem-solve' with arguments of *where* to do so. By providing the opportunity for this seemingly procedural claim, federalism offers a bait-and-switch political commodity that has allowed opponents of one particular policy or another to shift the argument away from the nature of the problem and what the government should do about it, to whether the issue should be resolved by this or that level of government.

Indeed, Robertson's analysis makes it clear that, precisely because federalism

---

58. *Id.* at 48.

59. See generally FEELEY & RUBIN, *supra* note 4.

60. See BARBER, *supra* note 19, at 172-211.

61. See *Gibbons v. Ogden*, 22 U.S. 1 (1824).

62. Barber's understanding of constitutional principles places "secular public reasonableness" at its core. BARBER, *supra* note 19, at 87. Similarly, Ryan notes that "good government should address those market failures, negative externalities, and other collective action problems that individuals are ill-equipped to resolve on their own." RYAN, *supra* note 9, at 5.

63. See generally RYAN, *supra* note 9.

so deeply shaped the institutional hardware of American politics, a great deal of political interests, motivations and goals are obfuscated when we retreat to legal language to discuss its merits. Neither Ryan nor Barber's arguments can get us out of this double-battleground. In fact, Ryan reinforces it by claiming that there are 'clear' cases of federal or state authority and then a large, inter-jurisdictional gray area. But, as noted above, some will simply respond to this gray area as evidence of the very unconstitutional congressional encroachment that Balanced Federalism cannot resolve. Nor is there likely to be much agreement on which areas fall into or out of the gray. Where do we go from there? Even Barber, who makes a powerful case for why states—qua states—should not be able to block national authority, argues for federal courts stepping in to restrain Congress when it acts on pre-textual grounds, thus reifying the use of double-battlegrounds for political ends (surely we will disagree as to what counts as pretext).

A related problem in Ryan's analysis is the tendency to see the outcomes of federalism as the reasons we require federalism. Here again, Robertson is instructive because his historic approach illustrates how, from the founding itself, the very nature of our federal system generated fragmentation, de-centralization and weak collective action across a wide range of institutions and actors. Thus, when discussing radioactive waste, Ryan notes that "the accumulation of these contaminants on the surface of private and state lands is generally beyond the scope of federal regulatory jurisdiction," and thus, requires multiple, overlapping levels of government to resolve.<sup>64</sup> But this claim overlooks the fact that land use policy itself, including the creation of rivers, watersheds and wetlands, has long been a function of political struggles between different interests using federalism's double-battleground to advance their preferences.<sup>65</sup> Thus, it is unclear why the radioactive waste disposal story that Ryan draws upon is anything more than a coordination problem that has actually been created by the very fragmented federal arrangements that she suggests are required to solve it. Drawing on overlapping national-state authority to solve problems created by pitched battles over national-state authority may be inevitable, but it hardly seems fair to laud federalism as the solution if federalism created the problem in the first place.

To be fair, the target audiences for Ryan and Barber are legal scholars and they can hardly make their case without venturing into constitutional case law terrain. However, remaining so firmly planted there limits the power of their arguments.

The second observation applies to all three works, but is really more of a broader issue in the legal literature on federalism generally, which is that few works leverage comparative political accounts to any substantial degree.<sup>66</sup> Admittedly, this is even less fair than the previous comment, since none of the works suggests it is anything other than analyses of the American system and makes no

---

64. RYAN, *supra* note 9, at 152.

65. See generally KAREN M. O'NEILL, RIVERS BY DESIGN: STATE POWER AND THE ORIGINS OF U.S. FLOOD CONTROL (2006); ROBERTSON, *supra* note 32, at 77.

66. See generally BARBER, *supra* note 19; ROBERTSON, *supra* note 32; RYAN, *supra* note 9.

broader claims about the value of federalism generally. However, to the degree that these works seek to offer important insights about how American federalism functions and should function, they would each benefit from a comparative framework.

For starters, each draws on the nature of the American federal system to define federalism, thus largely mistaking the American case for the form.<sup>67</sup> By using terms like ‘divided’ and ‘relationship,’ they obscure the very power struggles that shape jurisdictional terrain in the first place (though Robertson’s book clearly demonstrates these struggles). The more analytic definition used by comparative politics scholars refers to “an architecture of government with dual structures, driven by a process of *bargaining* between a number of constituent units and a center.”<sup>68</sup> Using this definition re-orientes legal analysis by placing the very political battles over who does what (bargaining) at the heart of the definition. At its core, federalism, in whatever form, *is a political institution that structures power relations*.

The American federalism literature would benefit enormously from greater engagement with such comparative work.<sup>69</sup> Contrary to oft-repeated claims in legal literature, for example, comparative federalism research finds that federalism can actually *decrease* political accountability and public responsiveness, particularly where jurisdictional boundaries lack clarity, and that federal systems likely produce *fewer* public goods than unitary systems.<sup>70</sup> This is reinforced by work in American politics that finds that state capacity for innovation is vastly overstated; and that national policymaking may better satisfy public preferences than sub-national policymaking.<sup>71</sup> There is in fact little evidence that federalism generally promotes accountability, innovation, participation, or limits government abuse, and even less evidence that the peculiar American-style of federalism specifically does so.

Seen in this light, Ryan’s claim, for example, that federal preemption in counter-terrorism would foreclose local expertise presumes aspects of that relationship that are themselves open for bargaining.<sup>72</sup> Why does federal preemption necessari-

---

67. See BARBER, *supra* note 19, at 3 (explaining that federalism is “a relationship between layers of government”); ROBERTSON, *supra* note 32, at 1 (explaining that federalism means “the division of government authority between the national government and the states.”); RYAN, *supra* note 9, at 7 (defining federalism as “a system of government in which power is divided between a central authority and regional political subunits, each with authority to directly regulate its citizens.”).

68. Pablo Beramendi, *Federalism*, in THE OXFORD HANDBOOK OF COMPARATIVE POLITICS 752, 754 (Carles Boix & Susan C. Stokes ed., 2009) (emphasis added).

69. See generally Carol S. Weissert, *Beyond Marble Cakes and Picket Fences: What U.S. Federalism Scholars Can Learn from Comparative Work*, 73 J. POL. 965, 974 (2011).

70. See generally CLEM BROOKS & JEFF MANZA, WHY WELFARE STATES PERSIST: THE IMPORTANCE OF PUBLIC OPINION IN DEMOCRACIES (2007); Cameron D. Anderson, *Economic Voting and Multilevel Governance: A Comparative Individual-Level Analysis*, 50 AM. J. POL. SCI. 449, 459 (2006); Sandra León, *Who is Responsible for What? Clarity of Responsibilities in Multilevel States: The Case of Spain*, 50 EUR. J. POL. RES. 80, 101 (2010); Christopher Wlezien & Stuart Soroka, *Federalism and Public Responsiveness to Policy*, 41 PUBLIUS 31, 44 (2010).

71. See Sara Chatfield & Philip Rocco, *Is Federalism a Political Safety Valve? Evidence from Congressional Decision Making, 1960-2005*, 44 PUBLIUS 1, 1 (2014); Virginia Gray, David Lowery, James Monogan & Erik K. Godwin, *Incrementing Toward Nowhere: Universal Health Care Coverage in the States*, 40 PUBLIUS 1, 82 (2010); David Lowery, Virginia Gray & Frank R. Baumgartner, *Policy Attention in State and Nation: Is Anyone Listening to the Laboratories of Democracy?*, 41 PUBLIUS 2, 286-88 (2011); Ryan T. Moore & Christopher T. Giovinazzo, *The Distortion Gap: Policymaking under Federalism and Interest Group Capture*, 42 PUBLIUS 2, 189 (2012).

72. See RYAN, *supra* note 9, at 159.

ly preclude the use of local experts? This blurs the conceptual boundary between the development of public policy and its execution, conflating the necessity of local attention to policy *implementation* with the necessity of local control over policy *creation*. Though Ryan acknowledges Rubin and Feeley's observations that much of what we think we need federalism for can be accomplished through decentralization, she nonetheless assumes that problems in policy creation require federalism to resolve.<sup>73</sup> However, centralized political systems often decentralize policy implementation, and other forms of federalism (those of Germany and Canada, for example) have a fair amount of centralized policy that is implemented at the local level.

Even Robertson modestly falls prey to causal claims of American federalism's virtuous effects. After adding up his own evidence that federalism has not really made good on its promises of protecting rights and liberties, responding to citizens, or encouraging innovation and efficiency, Robertson cannot resist adding that "federalism has had benefits for the United States, especially for democracy and prosperity."<sup>74</sup> He goes on to note that "these benefits must be weighed against many costs," but given his analysis, one wonders what precise democratic advantages flow from American federalism.<sup>75</sup>

These books each make a crucial contribution to a literature that is in need of a fresh lens. They challenge legal claims that continue to insist that preferences for state or federal jurisdiction in policymaking are about principles, not politics, by engaging with the fact that governments at all levels are pressured to solve real world social problems. Illuminating as these works are as descriptions of the current realities of American federalism, however, they do little to recommend it, at least in its current form. Given the lauding of American federalism in the wider legal and public discourses, that is perhaps their greatest strength.

---

73. See *id.* at 36-38; see also Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

74. ROBERTSON, *supra* note 32, at 176.

75. *Id.*