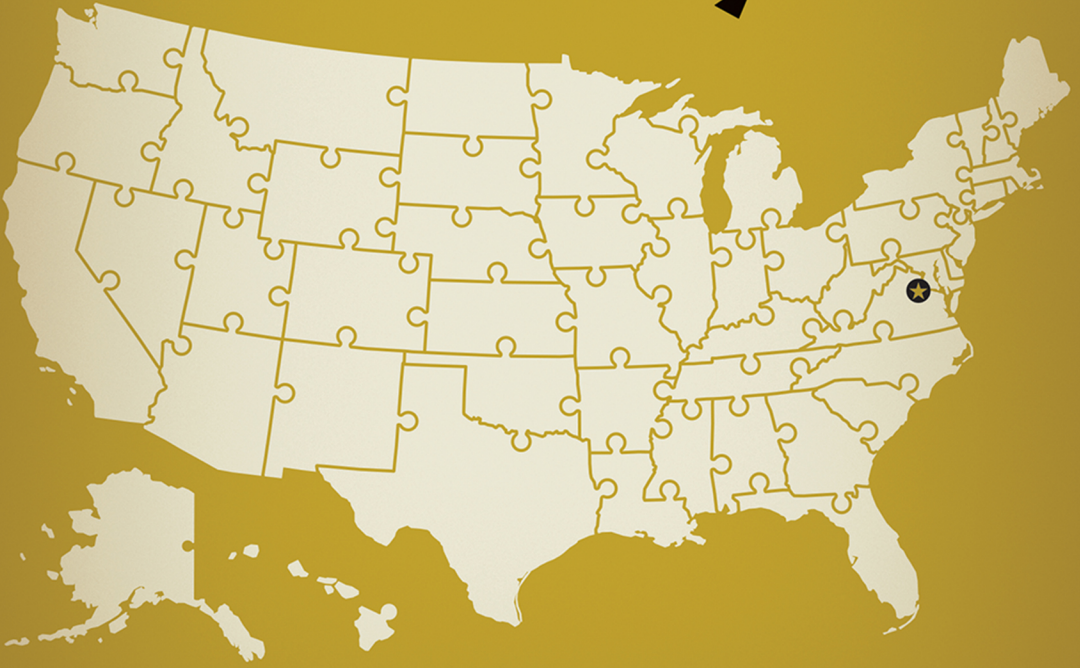


Perspectives on Political and Economic Governance

American Federalism Today



EDITED BY

MICHAEL J. BOSKIN

Federalism Principles and Perspectives

Discussants: Thad Kousser and Daniel L. Rubinfeld

THAD KOUSSER: Thank you so much for the invitation and the chance to learn from these great papers. I'm going to talk about the David Kennedy and the [Alice] Wang and [Morris] Fiorina papers. On David Kennedy's paper, I'm thrilled to see that he takes on this traditional narrative of the course of federalism in American history. The textbook story of federalism is that it's been a monotonic increase in greater and greater national power and greater and greater national spending over the history of time, but it's been more complicated than that. In Jonathan Rodden's paper, we will trace some of that at the financial level, but in the realm of state power, I think David is absolutely right to focus on cycles, to talk about this aggregate trend that has over time generally increased the realm of national authority and national spending.

But there have been these periods where states have challenged the federal government. They've challenged it with policies, challenged it in the courts, and of course challenged it on the battlefield. You see it in the Supreme Court, where you see a landmark case on federalism just about every session, right? So it's always being renegotiated; this question of what falls under a state's autonomy and what's a national power is America's great unresolved argument. We started this fight in Philadelphia, and we haven't ended it. And thinking through David's paper, there's one point I want to make and then one question I want to raise.

The point is that he terms this history as this story of "stubbornly persistent confusion and argument." And I want to make the point that this is much more argument than confusion. Woodrow Wilson, he's quoted as saying that this is the great unfinished, unanswered question.

An unanswered question is something that you can resolve with logic and with better or worse argument. But instead, this is really a battle. It's a battle that's been fought through political, legal, and sometimes even military power.

So he quotes James Madison talking about this federal and state combined power, and Kennedy characterizes him as this uncharacteristically obtuse version of Madison trying to spell out where the division is. And I think the reason he can't spell it out is that it's not an answerable intellectual question. It's something that has to be argued and negotiated and renegotiated over time consistently. And the people who are talking about it in that state and federal realm aren't speaking of it in obtuse or uncertain terms. They're always making clarion calls.

So for instance, one of the practitioners who we're going to hear from later today, Governor Jerry Brown: five years ago, Attorney General Jeff Sessions came to Sacramento in part of this federalism war. Sessions was there to castigate the state for passing a sanctuary state law that said essentially that state and local law enforcement could not cooperate with federal immigration authorities when it came to people convicted of misdemeanors. And Jerry Brown said that Sessions was initiating a "reign of terror" and that this is basically going to "war" against the state of California. Sessions ramped it up, called the state radical extremists. And was this overheated? Well, this is a really, truly important issue for the people who were part of it, but I think what this shows is that [it's] an argument fought in really strident terms continuously and still today between the state and national government.

The question I want to raise is that in this argument, is anyone ever making a principled argument? Certainly in Philadelphia there were principled arguments, and Michael [McConnell] laid them out beautifully. And there's kind of an evolution of those arguments. So I think today, a political theorist who believes in state power would say that philosophical commitment to decentralization is all about innovation in a Brandeis manner, and also having greater responsiveness, a greater match to local preferences and power. So if you're a Californian during the Trump era, you get the policies that you want, at least at the state level. You get the sanctuary state. If you're a Floridian during the Biden era, you get Ron DeSantis's version of how to address COVID and that better fits. And so that's the state argument.

And there's a principled argument on the other side, which is that this patchwork of policies is not internally cohesive, creates externalities that spill over, and one state's problem rubs off on another. And also, that there are certain important rights that need to be guaranteed federally. I think Madison won that debate that you were talking about, between whether local or national government is the better protector of fundamental rights. But I don't

think anyone who's engaged in these debates is actually following these principles, right? If you look, no one's consistent. There is no party that is the consistent party of state power. If you look at what Democrats have supported, liberals have wanted national power when it comes to healthcare programs, right? The ACA [Affordable Care Act] with both the individual mandate and the Medicaid expansion, those were big pushes for national power.

On the environment, Obama had the Clean Power Plan that was held up by a deadlocked Supreme Court. That would've required every state to have a plan to decarbonize its energy grid. That would've been a huge expansion of national power. The preservation of voting rights, H.R. 1 that Congress was focused on last year, that would've had a national way to run an election. Guarantees of LGBTQ rights, preserving federal gun controls, keeping immigration a federal issue, and striking down things like California's Prop 187—Democrats have wanted all that. But Democrats have also wanted state rights when it comes to sanctuary state laws, when it comes to the environment. California always pushes for Clean Air Act amendments that exempt California.

And exactly as Michael was talking about with this Pork Producers Act, California legislators now are very intentionally trying to use California's market power to affect the way that other states govern themselves. So no party has been consistent; the parties have shifted on the question of which level should govern abortion. People who were saying abortion should be a state issue now want to pass a federal ban on abortion. So no party is consistent philosophically on federalism. And so I think, that doesn't mean that we as academics don't have to bring principled arguments. And I think David brings at the end of this a very forceful argument, that it's futile, that Stephen Douglas's argument for popular sovereignty is futile. It's just a way to kick the can down the road for the weighty issues of the day. So other academics—Jake Grumbach has a recent book called *Laboratories against Democracy*, Jamila Michener's *Framgmented Democracy*—they've criticized federal power, and I think that's where we need to have the argument.

So in two minutes, I'll talk about the very helpful Wang and Fiorina paper that brings comprehensive data on mass attitudes across time to this question. And I read it through the lens of this question that David Kennedy raises, which is: Does the public have a principled view of federalism, or is the public just as unprincipled as our politicians? So you very helpfully break things down by parties. And you look at people's views on the role of the federal government. And what you see is that when Democrats are in power

in Washington, DC, Democrats in the mass public want federal power. When Donald Trump wins, they back away from that. And you see this perfect fluctuation depending on who's in power in Washington, DC.

So people are basically having the same views on trust in government, on the role of the federal government. And I bet if you looked at presidential approval, it would just essentially track that, right? But then if that's the case, then it raises this question of, "Is there a substance behind that public opinion?" There's a question that [Douglas] Rivers, [David] Brady, and [Jacob] Jaffe, their paper is also going to bring up. And so I think that's where, as you revise this, you take this wealth of data to use, the question that David [Kennedy] was asking, like, do people who are local winners, who have copartisans in the governor's office, do they favor state powers? Is there a way to look at particular issues—abortion, gun control—to see where people want power exercised? And really, at the end of the day, is there any substance to this issue? Or are we all just reasoning from our views on policies and projecting that into arguments on federalism? Thanks.

DANIEL L. RUBINFELD: So I'm going to work my way back to Michael McConnell's paper, which I thought was wonderful. What's interesting to me is that the McConnell paper offers views that are in near agreement with my recent book with Robert Inman [*Democratic Federalism*]. However, while McConnell offers a wonderful development, I disagree with him with respect to several of the policy issues. Interestingly, the source of our likely areas of disagreement comes out of the work Bob Inman and I began at the Center for Advanced Study only thirty years ago. It eventually led to our book, which came out in paperback in 2022.

Inman and I were trying to develop a coherent, primarily normative, theory of federalism. And the only natural place to start was with small governments, which, for a lot of reasons, the founders discussed extensively. The benefits of small governments included, one, fostering political participation; two, protecting individual rights and liberties; and three, matching citizen preferences to service levels.

It's very powerful from a normative perspective to think about the nature of the ability to have competition among local governments and to have liberty as well as participation benefits. And that goes way beyond the underlying pure economics. The hard question for me, with which the McConnell discussion is really helpful, is to understand the normative role for states.

The early economics literature flipped between local activities and the center and said nothing about the appropriate role for intermediaries—the states. Yet there’s a natural role for states, which goes beyond economic federalism to cooperative federalism. Here you start thinking about the treatment of various externalities that are best treated at the local level if possible. If not purely local, there is a role for the states. States are able to manage the inefficiencies that result from local provision while protecting against tyranny by the center and promoting and protecting a stable democracy.

And once you start to think about the role of states, you can read, I think, a fair amount of this into the founders’ debate, which McConnell discusses. That debate included a discussion of the benefits—and costs—of a system of constitutional federalism in which there is direct representation in the center. Our empirical analysis suggests that this system is preferable to a system of de facto federalism in which politically independent lower-tier governments operate without direct representation at the center. To complete the federalism story, I note that what is missing from Michael’s essay, which would just complement it further, is the fact that many externalities have been handled by the creation of special districts. Today, there are over fifty thousand special districts in the US that handle all kinds of externalities that wouldn’t otherwise make sense at the state level, let alone the federal level. The founders didn’t talk about special districts, but it’s a natural consequence of growth or economy. In my view, there are powerful arguments for the efficiencies that flow from some form of decentralization. US economist Caroline Hoxby’s papers are very supportive in that regard. If you go back to the work I did back about thirty years ago, there are clearly efficiencies with respect to the provision of K–12 public education, bearing in mind, of course, the compelling show by Rick [Eric] Hanushek that dollars spent on education are not necessarily productive.

So Inman and I went back and looked empirically at what we would describe as federal states in the world, of which the US is, I’d say, the prominent, most successful example. But there are many less-prominent forms of government. And when you look at the data over about a thirty- or forty-year period and look at various measures of success, the federal design we have in the US has been successful. If you look at measures of success, including basic measures like output per worker, the US framework does well. The more interesting political question is why other systems did not do as well. To illustrate, Inman and I have a chapter on the European federal

state, which is an example of what I think some of the founders of the US Constitution had in mind for an ideal federal state. But the EU has failed significantly on many dimensions, and in our chapter we highlight some of those. Those failures have to do with the ineffectual nature of the European Parliament and with macro issues, where the monetary system there does not function very well. To sum up, all of these other federal systems do reasonably well compared to more traditional centralized systems, but none do as well as the US.

Now my disagreement, if there is one, with McConnell comes when we start to look at some of the practical debates about what makes sense at the center and what doesn't. And there, Inman and I have, I think, an interesting discussion of the work we did in South Africa, where a World Bank–led team helped South Africa to design a decentralized system.

With respect to issues of decentralization, there is an important, extensive legal and economic literature surrounding the so-called state action exemption doctrine. The question at issue is when the federal government should trump the activities of state and local governments. And the raisin producers cartel example in *Parker v. Brown* is noteworthy. That case is all about the California raisin cartel that controlled a market where it produced almost all the raisins, while Californians consumed almost none. *Parker v. Brown*, from my point of view, was a wrongly decided case, and the reason is a failure to account for this significant externality when the benefits and costs are not appropriately aligned at a local-state level.

Unfortunately, that is still true today. If you look at the case law relating to state action, the emphasis is on the ability of states or localities to promulgate their own regulations and to enforce them but not to account for the significant externalities they had created. Our suggestion is to create a federalism impact statement, which would basically be a system that would require a formal federalism analysis before regulatory activities are put in place.

If Alice Rivlin [former director of the US Office of Management and Budget] were still with us, I would ask her to take charge of an analysis by the Congressional Budget Office or some other appropriate organization that would seriously trade off the pros and cons of what should be centralized and what should not be centralized. So even if we take *Dobbs* [*Dobbs v. Jackson Women's Health Organization*], which was mentioned earlier by McConnell, the subject, about which there are very strong views, could be evaluated within our federalism impact framework.

Finally, a few comments on David Kennedy's paper. Kennedy offers an insightful commentary on how the framers viewed the concept of a federal system of government. The key, he points out, is an appropriate sharing of powers between the states and the center. Kennedy properly emphasizes the importance of the Commerce Clause—it offers a grant of congressional authority and a restriction on the regulatory authority of the states. I did find the reference to Madison's discussion in *The Federalist*, No. 39 to be of interest—where, if I recall, Madison describes the proposed constitution as neither a national nor a federal constitution.

