

# WHAT DOES IT TAKE TO MAKE A FEDERAL SYSTEM? ON CONSTITUTIONAL ENTRENCHMENT, SEPARATE SPHERES, AND IDENTITY

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Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harvard U. Press 2010). Pp. 312. \$28.26.

Malcolm Feeley & Edward Rubin, *Federalism: Political Identity & Tragic Compromise* (U. Mich. Press 2008). Pp. 238. \$34.12.

Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (U. Chi. Press 2009). Pp. 256. \$35.96.

When I took the introductory Constitutional Law course in the spring of 1992, federalism was the subject of three or four days at most, most of them spent on the dormant Commerce Clause. My classmates and I were told that the Supreme Court had abandoned any effort to limit national power under the Constitution after 1937, and - not surprisingly - legal scholars had largely abandoned the subject as well. In the intervening two decades since my 2L year, however, federalism returned to the Supreme Court's docket in landmark cases like *United States v. Lopez*,<sup>1</sup> *Seminole Tribe v. Florida*,<sup>2</sup> and *Printz v. United States*.<sup>3</sup> Likewise, the end of reliable Democratic dominance in Congress and the presidency of George W. Bush shook liberals' instinctive preference for national power, at the same time that a host of new issues emerged - gay marriage, global warming - on which at least some states seemed more progressive than the national government. It is hardly surprising that federalism has made it back onto the legal academy's teaching and research agenda.

We have thus experienced not one "Federalist Revival," but three: judicial, political, and intellectual. The three books that form the subject of this review provide ample evidence of this third revival. Alison LaCroix's *The Ideological Origins of American Federalism*<sup>4</sup> challenges the conventional wisdom that our federalism dates

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1. 514 U.S. 549 (1995) (striking down a federal statute, the Gun Free School Zones Act, as exceeding Congress's commerce power for the first time since 1937).

2. 517 U.S. 44 (1996) (holding that Congress may not use its Article I powers to abrogate the states' sovereign immunity from suit by private individuals).

3. 521 U.S. 898 (1997) (striking down portions of the federal Brady Handgun Act that required state and local officials to participate in conducting federally mandated background checks for handgun purchasers).

4. Alison L. LaCroix, *The Ideological Origins of American Federalism* (Harvard U. Press 2010).

from the early Federalists' republican conception of popular sovereignty. Malcolm Feeley and Edward Rubin's *Federalism: Political Identity & Tragic Compromise*<sup>5</sup> develops a general theoretical account of federalism and advances the bracing claim that federalism does not, in fact, exist in contemporary America. And Robert Schapiro's *Polyphonic Federalism*<sup>6</sup> rejects traditional notions of dual federalism in favor of a synergistic relation between national and state institutions.

Each of these excellent books challenges settled notions about American federalism. And yet each, in some ways, remains thoroughly conventional in its approach and assumptions. All three see the American constitutional tradition as predicated upon a "dual federalism" model in which state and federal institutions govern largely separate spheres defined by regulatory subject matters, although Professor Schapiro seeks to move beyond this model. Both the Feeley/Rubin and Schapiro books see this traditional model as intimately tied to citizens' political identities - and therefore worthless in a world in which citizens identify primarily with the Nation. And none of these authors has a kind word to say about the contemporary Supreme Court's efforts to protect federalism by limiting national power; like most of the Academy, they see the Constitution as imposing little or no constraint upon contemporary national action.

This review takes a more sympathetic stance toward constitutional constraints on national power, although I find much to learn from and admire in each of these three contributions to the literature. Part I offers a brief overview of all three books. Part II turns to the relationship between federalism and constitutional entrenchment, while part III contrasts "separate spheres" and concurrent models of federalism. Part IV addresses the relationship between federalism and political identity.

### I. THREE TAKES ON FEDERALISM

Most histories of American federalism begin with the founding period. In these accounts, federalism is a product of the Founders' republican ideology and, in particular, the Federalists' decision to cast the People (always with a capital "P") as the traditional unitary sovereign, with the national and state governments each exercising sovereign powers delegated to them by the People in the Constitution.<sup>7</sup> As Justice Kennedy famously said,

Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.<sup>8</sup>

5. Malcolm M. Feeley & Edward Rubin, *Federalism: Political Identity & Tragic Compromise* (U. Mich. Press 2008).

6. Robert A. Schapiro, *Polyphonic Federalism: Toward the Protection of Fundamental Rights* (U. Chi. Press 2009).

7. See e.g. Forrest McDonald, *States' Rights and the Union: Imperium in Imperio 1776-1876*, at 1-5 (U. Press Kan. 2000); Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (U.N.C. Press 1998).

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

On this account, American federalism was both fundamentally new and a product of debates about political theory.

Alison LaCroix's new treatment challenges both these elements of the conventional wisdom. Extending the historical frame backward past the Constitutional Convention, she takes in a number of episodes that many federalism scholars have neglected, including the North American colonists' seventeenth- and early eighteenth-century experiments with colonial union within the British Empire, the seventeenth-century assimilation of Ireland and Scotland into Great Britain, and - most important - the debates about imperial governance in the mid-eighteenth century that culminated in the American Revolution. "Beginning with the Stamp Act crisis," LaCroix writes,

some colonial observers . . . began to push toward a system that formally recognized two distinct levels of government within the empire, each with its proper sphere of legislative power. In this way, then, two central elements of American federal ideology were defined during the debates of the 1760s: first, structuring a government to include multiple levels of authority; and second, dividing that authority along subject-specific lines.<sup>9</sup>

LaCroix is not the only historian of federalism to tread this ground,<sup>10</sup> but her return to this material serves as a useful corrective to the contemporary tendency to treat federalism as if it sprang from the forehead of James Madison and James Wilson.

This earlier focus yields dividends even as LaCroix moves forward into more familiar debates surrounding the Convention and the early republic. LaCroix traces James Madison's proposal for a congressional "negative" on state laws, for example, to the English Privy Council's legislative review of colonial acts.<sup>11</sup> The defeat of Madison's negative marked a shift "toward a vision of federal authority that relied not on legislatures but on judges and courts to mediate among disparate sources of law."<sup>12</sup> This shift had implications for how national and state power would be divided. "The negative implied concurrence: every matter that the states could reach and regulate could also be reached and regulated by Congress by virtue of its power to negate state laws"; by contrast, "[t]he Supremacy Clause identified and created a body of supreme law of the land that was, according to Article I, circumscribed along subject-specific lines such that there was no concurrence with the substantive areas of state law."<sup>13</sup>

Moreover, because of the new emphasis on law and courts, battles over federalism increasingly took place on the terrain of federal judicial jurisdiction. LaCroix thus concludes her study by identifying contrasting visions of federalism embodied in the 1789 Judiciary Act and its abortive successor, the Federalists' expansive Judiciary Act of 1801.<sup>14</sup> From this overall experience, LaCroix derives several "key themes" of American

9. LaCroix, *supra* n. 4, at 35.

10. See e.g. Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* 139-214 (1993) (surveying the debates between imperial England and the American colonists).

11. See LaCroix, *supra* n. 4, at 145-158.

12. *Id.* at 164.

13. *Id.* at 171.

14. See *id.* at 175-213. The 1801 Act was, of course, repealed shortly after the Republicans took office

federalism: "multilayered authority as a conceptual matter; overlapping institutions (sometimes legislative, sometimes judicial) as a practical matter; and a belief that the division of authority among levels of government should be determined according to the subject matter at issue."<sup>15</sup>

In contrast to LaCroix's historical treatment, the Feeley and Rubin book bills itself as an "effort to remedy the surprising lack of theoretical writing about federalism."<sup>16</sup> With their customary courtesy toward those who disagree with them, Professor Feeley and Dean Rubin announce that "[d]espite the alleged tough-mindedness of political scientists, U.S. Supreme Court justices, and legal scholars, their treatment of the subject remains mired in sentimental attachment to the idea of federalism, replete with appeals to nostalgia-driven sentiments, the bromides of high school civics, and conceptual confusion."<sup>17</sup> Feeley and Rubin aim to shine a light in this darkness by providing a "general account" of federalism - that is, "an analytical framework that is connected to some overarching conceptual approach to modern government," and that "applies in any situation and at any time."<sup>18</sup>

This general account begins by describing federalism as "a means of governing a polity that grants partial autonomy to geographically defined subdivisions of the polity."<sup>19</sup> The interesting features of the account emerge as Feeley and Rubin distinguish "federalism" from other superficially similar forms of government - most importantly, from "decentralization" and "local democracy." Federalism differs from decentralization in that, under federalism, "there must be some types of decisions that are reserved to the subsidiary governmental units and that the central government may not displace or countermand"; that is, "the subsidiary units possess rights against the central government."<sup>20</sup> This is a point about *entrenchment*: under federalism, the central government may not alter decentralized decisions and institutional structures by ordinary legal means.<sup>21</sup>

Federalism differs from local democracy in that, under the former, "the subunits must exercise exclusive jurisdiction over some set of issues."<sup>22</sup> It is insufficient for a political system simply to guarantee the institutional structure of the subunits against central interference; rather, those subunits must have an exclusive say over particular areas of regulation defined by subject matter. "[W]ithout a substantive component," Feeley and Rubin assert, "federalism ceases to be a distinguishable mode of governmental organization."<sup>23</sup> In this way, Feeley and Rubin insist that only one of

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following the election of 1800.

15. *Id.* at 7.

16. Feeley & Rubin, *supra* n. 5, at 3.

17. *Id.* at 2.

18. *Id.* at 4, 5.

19. *Id.* at 12.

20. *Id.* at 16; *see also id.* at 20-21 ("Decentralization, in contrast, is a managerial strategy by which a centralized regime can achieve the results it desires in a more effective manner . . . the central government decides how decision-making authority will be divided between itself and the geographical subunits.").

21. *See e.g.* William H. Riker, *Federalism: Origin, Operation, Significance* 11 (Little, Brown & Co. 1964) (defining federalism as existing when the "autonomy of each government in its own sphere" is protected by a constitutional "guarantee").

22. Feeley & Rubin, *supra* n. 5, at 16.

23. *Id.* at 32.

many federalism models discussed in the wider literature - a "separate spheres" or "dual federalism" model - is consistent with their general account.

For Feeley and Rubin, federalism is meaningful only as a solution to the problem of multiple political identities existing within the same polity. "If people identify exclusively with the nation as a whole," they argue, "they have no consistent reason to desire or demand that geographic subdivisions of the polity possess autonomy rights."<sup>24</sup> Regional identity is thus crucial to federalism:

Only when [the people's] identity is divided between the nation and a geographic region or exclusively linked to such a region will they want the region to possess some level of autonomy, so that it can make choices that the center cannot countermand. In other words, regional autonomy will only be appealing to people if the region itself is meaningful to people, that is, if it relates to their sense of political identity.<sup>25</sup>

Federalism's connection to identity lends it a "tragic" character. Feeley and Rubin acknowledge that "a nation whose people disagree about the structure of the polity may remain intact and function through federalism, but it signals the nation's inability to develop a unified political identity."<sup>26</sup> They reject arguments that federalism protects diversity or liberty in any meaningful sense,<sup>27</sup> arguing that federalism can only be justified by the existence of intractable conflicts over political identity.<sup>28</sup> Happily, they report, no such tragic necessity exists in contemporary America: "the American people . . . have a unified political identity. Not only do they identify themselves primarily as Americans, but they insist on normative uniformity throughout the nation."<sup>29</sup> Feeley and Rubin argue that "federalism no longer serves any purpose in the United States,"<sup>30</sup> and they attribute the (supposed) incoherence of Supreme Court doctrine on the subject to this fact.<sup>31</sup> Their ultimate conclusion - which may come as a surprise to other scholars of American federalism - is that "federalism is no longer an operative principle in the United States."<sup>32</sup>

Robert Schapiro's book differs from Rubin and Feeley's in that it believes that there is such a thing as American federalism and that that principle even includes

24. *Id.* at 16.

25. *Id.*

26. *Id.* at 48.

27. Feeley & Rubin, *supra* n. 5, at 53-54, 55-57.

28. Feeley and Rubin go so far as to suggest that

the function of federalism in an ongoing regime can be plausibly analogized to abdominal surgery. It is an extremely valuable expedient, necessary, under certain circumstances, to the continued existence of the patient. It involves a certain amount of risk, however, and a great deal of discomfort . . . [N]o sane person or polity would resort to such expedients . . . unless they were necessary.

*Id.* at 60.

29. *Id.* at 115.

30. *Id.* at 122.

31. *See id.* at 126 ("Because federalism has ceased to be an operative principle in modern American government, decisions that strike down national legislation in its name are little more than either random firings of a nostalgia-driven dissatisfaction with modernity or political tropisms that reflect the judges' underlying views about substantive and otherwise non-justiciable matters of policy.")

32. Feeley & Rubin, *supra* n. 5, at ix.

something worth preserving. Schapiro agrees, however, that federalism in its traditional form makes little sense in a world where citizens no longer identify with their states. He acknowledges that “[t]o the extent that states do reflect integral communities of value, with moral and cultural views different from those of other states, then allocating certain kinds of power to the states make sense.”<sup>33</sup> But “[w]ithout division on key principles, federalism is not necessary.”<sup>34</sup> Schapiro thus rejects the traditional “dual federalism” model that allocated particular subject-matter competences to the national government and the states.<sup>35</sup> This rejection entails a critique of most contemporary federalism jurisprudence and profederalism scholarship, which Schapiro finds to be irretrievably dualist in character.<sup>36</sup>

In place of dualism, Schapiro advocates a “polyphonic” conception of federalism. In music, polyphony describes “the simultaneous and harmonious combination of a number of individual melodic lines” - as in Bach’s fugues or Pachelbel’s canon.<sup>37</sup> For Schapiro, “the key elements of polyphonic federalism are the protection of the institutional integrity of multiple sources of power and the promotion of the dynamic interaction of those centers of authority.”<sup>38</sup> This conception “remains federalist” in the sense that “the allocation of authority between the states and the national government has constitutional status,”<sup>39</sup> but this constitutional allocation does not protect exclusive domains of state authority.<sup>40</sup> Rather, what the Constitution protects is simply “the institutional integrity of states” and “[t]he continued functioning of each state’s political apparatus.”<sup>41</sup>

The primary doctrinal bite of Schapiro’s proposal, however, comes from his elimination of dualist doctrines that restrict both national and state power. On the national side, polyphonic federalism frees Congress from enumerated powers limits on its authority, as well as from other constitutional doctrines like state sovereign immunity.<sup>42</sup> On the state side, polyphony counsels a narrower approach to the preemptive impact of federal statutes on state law, a circumscribed dormant Commerce Clause, and a cutback on special doctrines restricting state participation in foreign affairs.<sup>43</sup> The latter chapters of the book focus on the judicial aspects of polyphony - that is, the benefits of “intersystemic adjudication,” or the concurrent enforcement of federal rights by state courts.<sup>44</sup> All of this, however, is meant to further a fundamental shift in federalism’s orientation: federalism should no longer be about drawing boundaries between state and federal power, but rather a means of harnessing the capacities of both

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33. Schapiro, *supra* n. 6, at 27.

34. *Id.*

35. *Id.* at 56-85.

36. *See id.* at 57-73.

37. *Id.* at 94 (quoting Oxford English Dictionary Online (draft revision June 2007), <http://www.oed.com/>).

38. Schapiro, *supra* n. 6, at 96.

39. *Id.*

40. *See id.* at 96-97 (“Congress does not face limits on the subject matter of its regulatory authority.”).

41. *Id.* at 96.

42. *Id.* at 111-112.

43. Schapiro, *supra* n. 6, at 113-120.

44. *See id.* at 121-173.

state and federal governments to serve national ends.<sup>45</sup>

Each of these books raises a rich and diverse set of issues, and I cannot hope to analyze them all in the limited space permitted here. I want to focus instead on three persistent themes: the extent to which our federal system is (or must be) constitutionally entrenched; the contrast between dual and concurrent allocations of governmental competences in a federal system; and the relationship between federalism and political identity.

## II. FEDERALISM, DECENTRALIZATION, AND ENTRENCHMENT

For Feeley and Rubin, constitutional entrenchment defines the difference between federalism and decentralization: Federalism is a decentralized institutional arrangement that cannot be altered by the central authority, where the subunits have rights that function as “trumps” against central power.<sup>46</sup> Advantages of decentralized administration - such as state-by-state policy variance or experimentation - cannot be attributed to federalism unless they can be linked to the entrenchment of the decentralized arrangement. Feeley and Rubin originally made the entrenchment point in their famous article, *Federalism: Some Notes on a National Neurosis*.<sup>47</sup> Their distinction between federalism and unentrenched decentralization has been quite influential, but a number of scholars have responded by arguing that constitutional entrenchment may enhance the benefits of decentralization in various ways.<sup>48</sup> The new Feeley and Rubin book makes virtually no effort to engage these arguments - it is as if a decade and a half of critical commentary on their argument had never been written.

I want to make a different point about entrenchment, however, which is that constitutional federalism is not a binary matter of entrenched and unentrenched structures, but rather a continuum comprised of many different sorts of legal arrangements that are more or less difficult to alter. Consider the recent case of *Gonzales v. Oregon*,<sup>49</sup> which involved efforts at the national level to overturn Oregon’s decision to allow physician-assisted suicide. There was no doubt, in *Gonzales*, that Congress had the constitutional power to regulate the drugs used in physician-assisted suicide and that therefore Congress could preempt the Oregon law through ordinary legislation. In this sense, physician-assisted suicide did not fall into any constitutionally entrenched area of state sovereignty. On the other hand, Congress had *not* so acted, and instead the Bush administration had sought to preempt the Oregon law through an administrative regulation issued by the Attorney General. The question before the Court was thus

45. *See id.* at 176.

46. For other definitions of federalism that emphasize constitutional entrenchment, see Riker, *supra* n. 21; Thomas R. Dye, *American Federalism: Competition Among Governments* 5 (Lexington Bks. 1990) (arguing that federalism requires that “the autonomy of the subnational governments must be given exceptional legal protection, such as a written constitution that cannot be amended without the consent of both national and subnational populations”).

47. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. Rev. 903 (1994).

48. *See e.g.* Lynn A. Baker, *Federalism: The Argument from Article V*, 13 Ga. St. U. L. Rev. 923 (1997); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 Harv. L. Rev. 2180, 2216-2228 (1998); Ernest A. Young, *The Conservative Case for Federalism*, 74 Geo. Wash. L. Rev. 874, 883 (2006).

49. 546 U.S. 243 (2006).

whether the Attorney General's regulation was authorized by the underlying statute, the Controlled Substance Act ("CSA").<sup>50</sup>

The important point for present purposes is that the Supreme Court's finding that the CSA did *not* authorize the regulation gave the State of Oregon, or anyone relying on the Oregon statute, an enforceable right against the national government. Just as the Constitution trumps a federal statute, so too does a federal statute (or the limitations in that statute) trump a federal regulation. Entrenchment is thus a relative concept. Even a constitutional provision, like the Commerce Clause, is not entrenched categorically - it may be overturned by a constitutional amendment. Amendments are extremely difficult in our system, but Feeley and Rubin are presumably willing to call "federal" even systems, like Canada or Australia, with constitutions that are considerably easier to amend.<sup>51</sup> In any event, *Gonzales* illustrates the fact that lesser degrees of entrenchment - for example, the need to amend the underlying CSA in order to overturn Oregon's assisted suicide law - may confer enforceable rights on states, with important practical consequences.<sup>52</sup>

Seen from this perspective, any bright-line definitional contrast between federalism and decentralization becomes much more complex. This has important consequences for Feeley and Rubin's argument. Drawing a sharp line between federalism and decentralization allows them to discount most of the benefits commonly attributed to federalism, such as policy competition and experimentation or popular participation in government, as attainable through decentralization alone. That leaves Feeley and Rubin free to assert that protection of distinctive political identities is the only benefit accruing to federalism *per se*, and that this benefit is obsolete in contemporary America. This argument crumbles if entrenchment is always relative, and the actual structure of decentralized government in America combines aspects of enforceable federalism in a wide variety of institutional contexts. By defining federalism so narrowly as to exclude virtually all aspects of American governance, Feeley and Rubin have scored some debaters' points but rendered their argument irrelevant to meaningful conversations about American law.

The Schapiro and LaCroix books both illustrate the failings of Feeley and Rubin's abstract approach. Schapiro likewise views entrenchment as important to federalism,<sup>53</sup> but the aspects of polyphony that seem most practically significant - his approach to preemption, the dormant Commerce Clause, and intersystemic adjudication - all involve rules that are subject to congressional alteration without a constitutional amendment. Both judges and scholars (including this one) have written that statutory preemption cases are the most important battleground of contemporary federalism,<sup>54</sup> and Schapiro

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50. *Id.* at 243-244.

51. See *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, § 38; *Australia Constitution Act, 1900*, (U.K.), Chapt. VIII.

52. See generally Ernest A. Young, *The Constitution Outside the Constitution*, 117 *Yale L.J.* 408, 429-433 (2007) (discussing *Gonzales v. Oregon*).

53. Schapiro, *supra* n. 6, at 96.

54. See e.g. *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting); Thomas O. McGarity, *The Preemption War: When Federal Bureaucracies Trump Local Juries* (Yale U. Press 2008); Ernest A. Young, *Federal Preemption and State Autonomy*, in *Federal Preemption: States' Powers, National Interests* ch. 9 (Richard A. Epstein & Michael S. Greve eds., AEI Press 2007).



rightly recognizes what Feeley and Rubin ignore - that is, that the ways courts interpret federal statutes have profound implications for the federal balance.<sup>55</sup>

LaCroix's work also recognizes, at least implicitly, the importance of federal structures that are not constitutionally entrenched. Certainly the antecedents of American federalism in the law of the British Empire would not have been entrenched in the American sense, given the English doctrine of parliamentary sovereignty.<sup>56</sup> The notion of federalism as law that a court may rely upon to invalidate an act of Congress - which LaCroix sees as the paradigm that emerged from the defeat of Madison's negative - does entail an important degree of constitutional entrenchment. But the critical aspect of this development is the enforcement of federal structures by courts, and that enforcement occurs not only when a court strikes down an act of Congress under the Commerce Clause, say, but also when it invalidates a federal regulation as inconsistent with the intent of Congress or interprets a federal statute narrowly to avoid preempting state law. Indeed, the latter forms of judicial enforcement are far more common in our system.

Rubin and Feeley may be correct that real federalism requires at least some core of decentralized authority that the central authority, as a practical matter, cannot alter.<sup>57</sup> Where they go wrong is in assuming that all less-entrenched institutional structures are irrelevant to federalism. Moreover, the *shape* of the essential core need not necessarily take the traditional form of a fixed allocation of authority ordered by subject matter. I take up that point in the next section.

55. For example, Feeley and Rubin discount the Court's leading case on federalism-protective clear statement canons of statutory construction, *Gregory v. Ashcroft*, 501 U. S. 452 (1991), as "not a constitutional decision." Feeley & Rubin, *supra* n. 5, at 138. But scholars have recognized for decades the importance of clear statement rules as part of how constitutional values are enforced. See e.g. Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000); William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 Vand. L. Rev. 593 (1992). For an account of *Gregory* as representing a new paradigm for judicial enforcement of federalism, see Ernest A. Young, *The Story of Gregory v. Ashcroft: Clear Statement Rules and the Statutory Constitution of American Federalism*, in *Statutory Interpretation Stories* (William N. Eskridge, Jr., Philip P. Frickey & Elizabeth Garrett eds., West 2010).

56. See A.V. Dicey, *An Introduction to the Study of the Law of the Constitution* 3 (8th ed., London: Macmillan 1915) ("The principle of Parliamentary sovereignty means . . . that Parliament . . . has . . . the right to make or unmake any law whatever; and, further, that no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament."); Beer, *supra* n. 10, at 146-153 (arguing that English notions of parliamentary sovereignty made the American vision of federalism impossible).

57. When developing some contemporary implications of her book in subsequent blog posts, LaCroix has suggested that the historical meaning of federalism "has centered on a commitment to governmental multiplicity itself more than a vision of a particular distribution of governmental authority." Alison LaCroix, *Balkanization, Commandeering Federalism*, <http://balkin.blogspot.com/2010/04/commandeering-federalism.html> (Apr. 7, 2010). It is not clear that LaCroix's somewhat different take on the relevant history justifies her accusation that "the Supreme Court's recent 'federalism revolution' has [not] been . . . about federalism in any historically informed sense." *Id.*; after all, the Court's cases discuss the history at length, and LaCroix has not addressed, much less refuted, the bulk of the relevant arguments. In any event, the fact that the Framers may not have had a fixed allocation of power in mind hardly proves that any possible allocation would be constitutional. The limits of LaCroix's position become clear if we substitute, say, "due process" for federalism. The Constitution plainly does not specify the content of "due process of law" - much less "liberty" - with any particularity either (beyond the more specific guarantees of the Bill of Rights, which are themselves "specific" only in comparison to concepts like "due process" or "equal protection"). Does anyone think that this means the State may alter the balance between governmental authority and personal liberty as it pleases? Our constitutional tradition has instead understood due process as protecting an irreducible core of personal liberty against government intrusion, notwithstanding the ambiguity of the constitutional definition of that core. So too with federalism.

### III. OF SEPARATE SPHERES AND CONCURRENT JURISDICTION

All three books start with a “separate spheres” model of federalism - that is, a model in which the Constitution allocates exclusive authority over particular subject matters, such as education or foreign affairs, to either the nation or the states. Historically, this model has been described as “dual federalism”; as Alpheus Mason wrote, it contemplates “two mutually exclusive, reciprocally limiting fields of power - that of the national government and of the States. The two authorities confront each other as equals across a precise constitutional line, defining their respective jurisdictions.”<sup>58</sup> LaCroix argues that division of regulatory jurisdiction according to subject matter was integral to the historical conception of federalism in the eighteenth century.<sup>59</sup> Feeley and Rubin contend that such a division is necessary to distinguish federalism from local democracy, and that geographical subunits cannot reflect distinctive political identities unless they have exclusive jurisdiction over certain subjects.<sup>60</sup> And Schapiro insists that current doctrine and scholarship about federalism remains firmly in the dual federalism mold, although he argues that American federalism must move beyond that model.<sup>61</sup>

Schapiro is surely right that concurrency is the key to a successful federalism in contemporary America. As I have argued elsewhere,<sup>62</sup> courts have found it prohibitively difficult to draw jurisdictional lines that can be enforced in a principled way, and they have largely given up trying. Schapiro’s book is frustratingly unwilling to acknowledge that much current doctrine and legal scholarship already adopts a concurrent model. Most of the Supreme Court’s decisions limiting national power have either prohibited Congress from requiring the states to enforce federal law or restricted the remedies available when states violate federal statutes.<sup>63</sup> Even the Rehnquist Court’s famous Commerce Clause decisions were so narrow that they can hardly be said to be carving out substantive areas of exclusive state authority.<sup>64</sup> Similarly, most legal scholars writing about federalism today appear to adopt some version of, or at least to be heavily influenced by, “process federalism” theories that emphasize the political protection of the states in the national governmental process<sup>65</sup> and/or the procedural protection

58. Alpheus Thomas Mason, *The Role of the Court*, in *Federalism: Infinite Variety in Theory and Practice* 8, 24-25 (Valerie A. Earle ed., F.E. Peacock Publishers, Inc. 1968).

59. See LaCroix, *supra* n. 4, at 35.

60. See Feeley & Rubin, *supra* n. 5, at 16, 31-32.

61. See Schapiro, *supra* n. 6, at 55.

62. See generally Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 Tex. L. Rev. 1 (2004) [hereinafter Young, *Two Federalisms*].

63. See e.g. *Printz v. U.S.*, 521 U.S. 898 (1997); *Seminole Tribe of Fla. v. Fla.*, 517 U.S. 44 (1996). Similarly, the Court’s decisions limiting state power under the dormant Commerce Clause have long since given up the effort to exclude the states from regulating interstate commerce per se. See generally Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. Chi. L. Rev. 483 (1997). Rather, those cases generally only prohibit state regulation that discriminates against out-of-staters. See e.g. *Fulton Corp. v. Faulkner*, 516 U.S. 325 (1996). The only major area in which the Court has continued to try to police an exclusive domain of federal authority is foreign relations law. See generally Ernest A. Young, *Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception*, 69 Geo. Wash. L. Rev. 139 (2001) [hereinafter Young, *Dual Federalism*].

64. See Young, *Dual Federalism*, *supra* n. 63, at 157-163 (discussing *U.S. v. Lopez*, 514 U.S. 549 (1995), and *U.S. v. Morrison*, 529 U.S. 598 (2000)). Moreover, the Court seems to have largely given up on limiting the Commerce Clause. See *U.S. v. Comstock*, 130 S. Ct. 1949 (2010); *Gonzales v. Raich*, 545 U.S. 1 (2006).

65. See e.g. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256 (2009); Larry Kramer, *Understanding Federalism*, 47 Vand. L. Rev. 1485 (1994); Herbert Wechsler, *The*

afforded for state autonomy by the sheer difficulty of making federal law.<sup>66</sup> The persistent dualist model that Schapiro attacks is thus something of a straw man.

It is, of course, no fun to be an academic unless one can portray oneself as swimming against the tide. The more significant problem with Schapiro's particular version of concurrency is that it lacks meaningful state-protective content. To be sure, Schapiro is barking up the right tree when he suggests that, given the concurrency of state and federal powers, the courts should read federal statutes narrowly to avoid preempting state law.<sup>67</sup> But beyond this, the notion of "polyphony" remains troublingly vague. Schapiro's theory of polyphony seems to have few resources for identifying situations in which the fugue-like complementarity of national and state authority becomes a discordant drowning-out of state autonomy.

As I have already suggested, the contemporary federalism literature already offers other concurrent authority models. For half a century, judges and scholars have accorded a virtually unlimited substantive scope to Congress's powers while looking for ways to enforce, and sometimes enhance, the political and procedural safeguards that protect state autonomy in a concurrent world.<sup>68</sup> Notwithstanding Feeley and Rubin's condescending dismissal of process federalism as "conceptual mush,"<sup>69</sup> a concurrent federalism model that emphasizes clear lines of political accountability and enforcement of the procedural barriers to federal lawmaking does offer concrete bases for limiting federal action in important contexts. More broadly, Schapiro's general idea of shifting from an adversarial federalism to a polyphonic cooperation to advance national values may unwisely jettison federalism's integral role as part of a system of constitutional checks and balances. As James Madison noted in *Federalist 51*, federalism - along with separation of powers at the national level - is part of the "double security" that guarantees individual liberty in our system.<sup>70</sup> Any theory of federalism that is directed "toward the protection of fundamental rights"<sup>71</sup> would do well to remember that principle.

#### IV. FEDERALISM AND IDENTITY

Schapiro, Feeley, and Rubin all stress the decline of distinctive and compelling state political identities as the basic reason either to redirect our notions of federalism or to discard them altogether. Because we are all Americans now - not Texans or Californians or Vermonters - there is no point in protecting some exclusive domain of

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*Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543 (1954).

66. See e.g. Bradford R. Clark, *Separation of Powers As a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001); Ernest A. Young, *Preemption and Federal Common Law*, 83 Notre Dame L. Rev. 1639 (2008).

67. See Schapiro, *supra* n. 6, at 113-118.

68. See generally Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, *Hart and Wechsler's The Federal Courts and the Federal System* 459 (6th ed., West 2009) (developing a view of federal law as "generally interstitial in its nature") (quoting the 1st ed. published in 1953); Clark, *supra* n. 66; Young, *Two Federalisms*, *supra* n. 61.

69. Feeley & Rubin, *supra* n. 5, at 76. It must be said that this same degree of contempt for anyone who disagrees with them pervades the Feeley/Rubin book. This attitude is disappointing in the work of these eminent scholars, if hardly new.

70. James Madison, *The Federalist No. 51* 351 (Jacob E. Cooke ed., Meridian Bks. 1961).

71. See Schapiro, *supra* n. 6.

state authority in which states might express a distinctive vision of the good life. In this last part, I want to probe both the empirical foundations of that argument and its implications.

The death of state political identity is an empirical claim. But neither the Schapiro nor the Feeley and Rubin book provides any empirical evidence to support that claim. To be sure, it would be a devilishly difficult claim to verify empirically. How does one measure political identity? When Sandy Levinson and I taught a seminar at the University of Texas School of Law, we began by asking our students "What are you?" To our very great surprise, the overwhelming majority said "Texans," not "Americans" or "Democrats" or "Cowboys fans."<sup>72</sup> But I am unaware of any social scientist who has tried to ask this question to large numbers of people in a systematic way. One can find surveys measuring arguably related variables, such as the relative confidence that people express in the various levels of government (they consistently favor state and local),<sup>73</sup> or the degree to which people move from state to state over the course of their lives.<sup>74</sup> The important point is that neither Feeley and Rubin nor Schapiro has undertaken any of this work.

One might instead seek to measure the extent to which the states are politically or culturally distinctive from one another. Here there is more data: there is an extensive debate among social scientists concerning whether "red" and "blue" states are really that different from one another, for example, and this literature includes evidence on the extent to which attitudes about, say, abortion differ from state to state.<sup>75</sup> Both the Feeley/Rubin and Schapiro books mention this literature in passing, although they tend to take the "no polarization" view as clearly correct when in fact there is continuing debate. Moreover, it is unclear whether distinctiveness is even the right question. After all, inhabitants of Canada, Great Britain, and France may have remarkably similar views on most political questions and yet still identify strongly with their respective nations.

In any event, neither Feeley and Rubin nor Schapiro makes any effort to explore these questions. That is a serious problem, given how central the death of state identity is to the claims in these two books. Their assertion may well match the intuitions of other legal academics, who often seem to see themselves as members of a national community, but that hardly tells us much about the vast majority of Americans. We ought to demand more in the way of empirical support before accepting claims that the states no longer represent meaningful political communities.

If these authors *are* correct that state political identity has largely eroded in this country, the question remains whether we should celebrate that fact as a reason to dispense with federalism altogether (Feeley and Rubin) or adopt a vision of federalism dedicated to the advancement of common national goals (Schapiro) - or instead view that

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72. For the record, both Sandy and I said "Americans."

73. See e.g. Richard L. Cole & John Kincaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending, and Trust - An ACIR Update*, 30 *Publius* 189 (2000).

74. Pew Research Ctr., *Social and Demographic Trends*, <http://pewsocialtrends.org/maps/migration/> (last accessed Sept. 10, 2010).

75. See e.g. Barbara Norrander & Clyde Wilcox, *State Residency, State Laws, and Public Opinion*, in *Public Opinion in State Politics* 38 (Jeffrey E. Cohen ed., Stanford U. Press 2006); Robert S. Erikson, John P. McIver & Gerald C. Wright, Jr., *State Political Culture and Public Opinion*, 81 *Am. Poli. Sci. Rev.* 797 (1987).

erosion with concern. The case for concern arises from the probability that federalism serves other important purposes unrelated to accommodating clashes of identity. For example, LaCroix's account of the origins of American federal ideology stresses the checking function - originally, the North American colonists' desire to check the authority of the British Crown - rather than the need to accommodate distinctive, preexisting political identities in each of the individual colonies.<sup>76</sup> Feeley and Rubin discount the importance of the checking function,<sup>77</sup> but they ignore much recent literature demonstrating the varied ways in which state autonomy promotes fruitful dissent and limits national power in ways beneficial to liberty.<sup>78</sup>

It may well be the case that although federalism serves functions other than accommodating state political identities, some level of popular identification with or loyalty to a state is necessary to make that state an effective participant in our federal system.<sup>79</sup> State identity, on this view, would be a *means* rather than an *end*. State governments may be more effective in checking the power of the central authority, for example, if their constituents strongly identify with state institutions and policies. James Madison's original account of the "political safeguards of federalism," after all, framed that dynamic as a competition for popular loyalty between the national and state governments.<sup>80</sup>

If that is the case, then the pressing task for federalism scholars will be to understand whether state political identity can be revived. Such a revival might not rely on distinctive cultural, ethnic, or religious patterns, but rather upon critical political commitments such as social inclusion (gay marriage in Massachusetts), environmental protection (California's policy on warming), or retributive justice (capital punishment in Texas). States might thus seek to develop their own forms of "democratic patriotism" analogous to the identity that some European scholars and politicians have sought to build around commonly held notions of human rights.<sup>81</sup> In any event, the present books highlight the importance of state political identity to understanding federalism, but they hardly represent the last word.

## V. CONCLUSION

Hegel said that "[t]he Owl of Minerva takes its flight as the shades of night are gathering,"<sup>82</sup> meaning that intellectual justification of institutions often comes as those institutions are beginning to crumble. The current wave of intellectual interest in federalism may well be too late - the Supreme Court, after all, has backed away from its landmark federalism cases of the 1990s,<sup>83</sup> and the Democrats' return to power in

76. LaCroix, *supra* n. 4, at 3-4.

77. Feeley & Rubin, *supra* n. 5, at 43-46, 96-110.

78. See e.g. Heather K. Gerken, *Dissenting by Deciding*, 57 *Stan. L. Rev.* 1745 (2005).

79. See generally Ernest A. Young, *The Volk of New Jersey? Sovereignty and Political Community in Europe and the United States* (manuscript on file with author).

80. See *The Federalist Nos. 45 & 46* 308-323 (Jacob E. Cooke ed., Meridian Bks. 1961).

81. See e.g. Jan-Werner Müller, *Constitutional Patriotism* (Princeton U. Press 2007).

82. George Wilhelm Friedrich Hegel, *Philosophy of Right* 13 (T.M. Knox trans., Oxford U. Press 1952).

83. See e.g. *Comstock*, 130 S. Ct. 1949 (construing the Necessary and Proper Clause broadly to cover civil commitment of sex offenders); *Raich*, 545 U.S. 1 (rejecting a Commerce Clause challenge to federal regulation of medicinal marijuana use); *C. Va. Community College v. Katz*, 546 U.S. 356 (2006) (retreating from the

Washington has renewed progressive enthusiasm for bold social and regulatory initiatives at the national level. Certainly Feeley and Rubin will welcome these developments, and it seems unlikely that either LaCroix or Schapiro would find them overly concerning. For those of us who believe that federalism is both an integral principle of our Constitution and a critical element of our political community, however, these books provide a valuable stimulus to further thought about how to revitalize our federal institutions.