

DEPOLITICIZING FEDERALISM

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In his great biography of President Andrew Jackson,¹ Arthur Schlesinger, Jr. celebrated Jackson's defense of the rights of states and opposition to federal power. Yet as a mid-twentieth-century liberal, Schlesinger was a strong supporter of the federal government and an opponent of states' rights.² Was Schlesinger's position inconsistent? He did not think so,³ and neither do I. In Jackson's time, an entrenched economic elite controlled the federal government and used federal power to dominate the lower classes.⁴ State governments served as a focal point for opposition to this domination. By mid-twentieth century, the federal government was an engine for redistribution and racial justice.⁵ States' rights rhetoric served the interests of segregationists and reactionaries.⁶

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1. ARTHUR M. SCHLESINGER, JR., *THE AGE OF JACKSON* (1945).

2. See Douglas Martin, *Arthur Schlesinger, Historian of Power, Dies at 89*, N.Y. TIMES, Mar. 1, 2007, at A1 (calling Schlesinger an "unabashedly liberal partisan . . .").

3. Schlesinger put the point this way:

It is always a question of whose ox is gored. . . . The crucial question is not, Is there 'too much' government? but, Does the government promote 'too much' the interests of a single group? In liberal capitalist society this question has ordinarily become in practice, Is the government serving the interests of the business community to the detriment of the nation as a whole?

SCHLESINGER, *supra* note 1, at 514.

4. Cf. Mark Fenster, *Seeing the State: Transparency as a Metaphor*, 62 ADMIN. L. REV. 617, 632 (2010).

5. See, e.g., Wagner Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-169 (2006)); Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2006)); Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. ch. 21 (2006)).

6. See, e.g., MARTIN GARBUS, *COURTING DISASTER: THE SUPREME COURT AND THE UNMAKING OF AMERICAN LAW* 124 (2002); PATRICK M. GARRY, *AN ENTRENCHED*

Schlesinger's example poses an important challenge for those who want to generalize and depoliticize the argument about federal versus state power. The argument about federalism is, or at least should be, deeply contextual, and it is political to the core. In different times and places, federalism has differing relationships with substantive justice,⁷ and, in all times and all places, people disagree about what counts as substantive justice. What we should be doing, therefore, is talking about our disagreements about substantive justice—about the appropriate role of markets and government, about redistribution and property rights, and about our obligations to the poor and individual freedom—instead of changing the subject to talk about federalism.

There are several ways in which legal scholars have attempted to depoliticize federalism. One way is to treat it as a question of constitutional law. On this view, instead of debating what policies our government should adopt, we should argue about what James Madison and his contemporaries thought or about what the words he and others wrote two centuries ago meant.⁸

LEGACY: HOW THE NEW DEAL CONSTITUTIONAL REVOLUTION CONTINUES TO SHAPE THE ROLE OF THE SUPREME COURT 94 (2008). Almost half a century after publication of *The Age of Jackson*, Schlesinger was ready to concede that some of his conclusions about Jackson were, themselves, grounded in the political context in which he had worked. Yet he continued to argue that Jackson's own stance on federal power appropriately depended on political context. See Arthur Schlesinger Jr., *The Ages of Jackson*, N.Y. REV. OF BOOKS, Dec. 7, 1989, <http://www.nybooks.com/articles/archives/1989/dec/07/the-ages-of-jackson/> ("In practice, the answer to the question of the proper role of the state depended for the Jacksonians on the answer to the question who controlled the state; and this is what the fight in the age of Jackson was all about.").

7. See, e.g., ROBERT M. COVER, JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS 161 (1975) (federalism and protection of fugitive slaves); MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 391 (2004) (discussing federalism and desegregation); Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 998–1007 (2002) (discussing federalism and gender equality).

8. For examples of this approach, see *United States v. Lopez*, 514 U.S. 549, 585–93 (1995) (Thomas, J., concurring); *New York v. United States*, 505 U.S. 144, 163–167 (1992). It must be noted, however, that even the Court's leading originalists have strayed from this approach and adopted something like a "living constitution" analysis when it suited their purposes. For example, in his opinion for the Court in *Printz v. United States*, 521 U.S. 898 (1997) Justice Scalia acknowledged that there was nothing in the constitutional text prohibiting the putative infringement on state power before the Court. *Id.* at 905 ("[T]here is no constitutional text speaking to this precise question . . ."). One would have thought that

This approach to federalism has played an important role in the history—not to say the name—of the Federalist Society,⁹ but I am glad to see that the organizers and participants in this event seem to be moving away from it. The effort to think through the political economy of federalism—the subject matter of this panel—amounts to an implicit acknowledgment that the appropriate division of authority between the federal government and the States cannot, and should not, be read off a constitutional text written by deeply flawed authors during a deeply flawed process designed to deal with a country unrecognizably different from the one we live in today. The decision to talk about federalism in terms of political economy must be grounded in a concession that the Constitution does not resolve the issue.

This acknowledgement, belated as it is, should nonetheless be welcomed. Perhaps, in the fullness of time, it will lead to the acknowledgement of another obvious fact: All sides regularly use the rhetoric of federalism to advance contestable political positions.¹⁰ I have made a standing offer to several of my colleagues to take them out to lunch if they can point to a single person living in the United States who favors the Patient Protection and Affordable Care Act¹¹ as a matter of policy but nonetheless regretfully concludes that it is unconstitutional. There are over 300 million women, men, and children from whom to choose,¹² but, as this Article goes to press, my col-

for an originalist this would be the end of the matter. Undaunted, Justice Scalia went on to invalidate the challenged federal statute because it violated “historical understanding, and practice, the structure of the Constitution, and the jurisprudence of this Court.” *Id.*; see also *Brown v. Plata*, 131 S. Ct. 1910, 1950 (2011) (Scalia, J., dissenting) (“There comes before us, now and then, a case whose proper outcome is so clearly indicated by tradition and common sense, that its decision ought to shape the law, rather than vice versa.”); Robert Post & Reva Siegel, *Originalism as a Political Practice: The Right’s Living Constitution*, 75 *FORDHAM L. REV.* 545, 559 (2006) (discussing an originalist’s argument that the Fourteenth Amendment does not protect against sex discrimination).

9. For a discussion of originalism’s influence on the Federalist Society, see generally *ORIGINALISM: A QUARTER-CENTURY OF DEBATE* (Steven G. Calabresi ed., 2007). The first Federalist Society event was a symposium on federalism held at the Yale Law School in April 1982. See STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 138 (2008).

10. For those requiring proof of obvious facts, see, for example, Post & Siegel, *supra* note 8, at 562; Peter J. Smith, *Federalism, Instrumentalism, and the Legacy of the Rehnquist Court*, 74 *GEO. WASH. L. REV.* 906, 906–07 (2006).

11. Pub. L. No. 111-148, 124 Stat. 119 (2010).

12. U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* 9 (2011), available at <http://www.census.gov/prod/2011pubs/11statab/pop.pdf>.

leagues have yet to identify one who meets these criteria. I am happy to extend the offer to the first reader of this *Journal* who comes up with such a person.¹³

The retreat to constitutional law is not the only way to depoliticize federalism, however. Unfortunately, the choice of subject matter for this panel effectively endorses another method. The assumption underlying that choice seems to be that the “science” of political economy provides an uncontroversial, apolitical, technocratic solution to questions about centralization of power. Once one understands some basic truths about things like exit options, prisoner’s dilemmas, and races to the top or the bottom, then all people of good will—in all times and places, whatever their differences concerning substantive justice—can agree on the appropriate level of government to resolve various disputes.

This effort, too, is bound to fail. To see why, we might focus on two highly simplified sets of narratives about the interrelationship between freedom and federalism. Friends of federalism adopt the narrative of decentralized diversity. For them, the story goes as follows: Decentralization promotes freedom because it satisfies a greater variety of preferences. Instead of being trapped in large units of government, individuals can choose between different, smaller units that offer a menu of regulatory options. Therefore, federalism promotes freedom.¹⁴ This narrative often is supplemented with the closely related narrative of experimentation, complete with the mandatory citation to Justice Brandeis’s celebration of states as “laboratories.”¹⁵

These arguments, sometimes presented with great sophistication and careful elaboration, have provided powerful support for federalism.¹⁶ Unfortunately, however, they are countered by an equally powerful set of narratives. The primary story here is

13. I will choose the location, date, and time. I assume here with a high degree of confidence that a lunch with me is not sufficiently attractive to motivate people to make claims in bad faith.

14. See, e.g., Charles M. Tiebout, *A Pure Theory of Local Expenditure*, 64 J. POL. ECON. 416, 416–19 (1956); Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1493 (1987) (book review).

15. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).

16. See, e.g., McConnell, *supra* note 14.

the prisoner's dilemma.¹⁷ On this version of the way things are, the citizens of individual states want to develop a particular regulatory regime, but competition between states prevents them from doing so. For example, imagine that the citizens of both Virginia and Maryland want to adopt a minimum wage. Each state knows that if it does so by itself, however, all the employers will move to the other state. The freedom of these citizens is therefore diminished rather than enhanced by the exit threat. The freedom of both states can be maximized if both commit to acting in concert—something that they can do through the mechanism of federal legislation.¹⁸

17. For a concise explanation of prisoner's dilemma games as well as an argument that scholars often mistake coordination problems for prisoner's dilemma problems, see generally Richard H. McAdams, *Beyond Prisoners' Dilemma: Coordination, Game Theory, and Law*, 82 S. CAL. L. REV. 209 (2009).

18. This theory played a crucial role in the Supreme Court's decision upholding the federal unemployment compensation system in *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937). Writing for the Court, Justice Cardozo claimed that opponents of the system attacked it as an effort "to drive the state legislatures under the whip of economic pressure into the enactment of unemployment compensation laws at the bidding of the central government." *Id.* at 587. But Cardozo saw matters differently:

Before Congress acted, unemployment compensation insurance was still, for the most part, a project and no more. . . . But if states had been holding back before the passage of the federal law, inaction was not owing, for the most part, to the lack of sympathetic interest. Many held back through alarm lest, in laying such a toll upon their industries, they would place themselves in a position of economic disadvantage as compared with neighbors and competitors. . . . [T]he freedom of a state to contribute its fair share to the solution of a national problem was paralyzed by fear.

Id. at 587–88.

For a scholarly elaboration of the point in the context of environmental law, see Richard B. Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy*, 86 YALE L.J. 1196, 1197 (1977). Some scholars have argued that competition among states actually produces a race to the top. See DAVID VOGEL, *TRADING UP: CONSUMER AND ENVIRONMENTAL REGULATION IN A GLOBAL ECONOMY* (1995). Others have claimed that interstate competition might reduce the level of regulation but produce the optimal amount of it. See generally Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992). Of course, if one equates optimality with the outcome of competition, this claim is tautological. But much of our politics is dominated by disagreement over just that equation. For an exploration of market defects that might lead to suboptimal outcomes in competitions between states, see Peter P. Swire, *The Race to Laxity and the Race to Undesirability: Explaining Failures in Competition Among Jurisdictions in Environmental Law*, 14 YALE L. & POL'Y REV. 67, 68 (1996).

Just as the narrative of experimentation supplements the decentralized diversity narrative, so too the narrative of externalized costs supplements the prisoner's dilemma narrative. This narrative is most intuitively accessible when states facially discriminate against nonresidents.¹⁹ Nonresidents then disproportionately bear the costs of government action without getting the benefits. But the externalities idea is not so easily cabined.²⁰ Suppose, for example, that the citizens of Alaska decide to turn the entire Alaska wilderness into a parking lot. Even if that decision accurately reflects their own preferences, it imposes costs on those of us who do not vote in Alaska elections. When Mississippi decided to serve as a laboratory for an "experiment" in a pervasive system of racial subjugation, the harms it inflicted were not just on its own African American citizens, but also on all the rest of us who did not want to live in a country where this sort of injustice occurred.

Both of these sets of narratives are, in some sense, true, and both are available to people who favor action on the federal or state level. The important point for present purposes, however, is that the choice between narratives strongly correlates with the choice between different conceptions of freedom. For people who conceptualize freedom primarily as private choice in a private sphere, the first set of narratives will be attractive. The inability of states to coordinate and prevent exit restrains the government regulation that they fear. For people who conceptualize freedom as collective choice that controls oppressive, private power, the second set of narratives is more appealing. The greater ability of the federal government to coordinate promotes the government regulation that they favor.

This is not to say that the correlation is perfect. Suppose that both Virginia and Maryland want to deregulate the use of narcotics. Here, the prisoner's dilemma narrative might be advanced to serve libertarian ends. Perhaps states are constrained by the fear that if either acts on its own, it will be inundated by

19. See, e.g., *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184 n.2 (1938) ("State regulations affecting interstate commerce, whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within, have been thought to impinge upon the [Commerce Clause] even though Congress has not acted.").

20. For the classic elaboration of this point, see Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387, 398–401 (1981).

drug users. Deregulation on the federal level might avoid this difficulty. Conversely, suppose that a strong majority of Californians wants to regulate greenhouse emissions, but a national majority rejects regulation. Here, the narrative of decentralized diversity might promote regulation. Indeed, Justice Brandeis's original example of states acting as laboratories involved state regulation of matters left unregulated on the federal level.²¹

It is precisely because the correlation is not perfect that sometimes political actors appear to be behaving in an unprincipled fashion by favoring federal or state power on a result-oriented basis. When the correlation fails, actors who consistently favor a particular conception of freedom will necessarily have an inconsistent position about federalism. Often, these people are called "unprincipled."²² If my thesis is correct, however, they are not unprincipled at all. Instead, they are motivated by the principles that should matter the most to us—by their deeply and sincerely held beliefs about the nature of human flourishing and the primary threats to that flourishing.

Many may find it unsettling that we disagree so starkly and fundamentally about these basic questions. Like members of a dysfunctional family desperate to stay together but forever teetering on the edge of uncontrolled anger and irreparable rupture, we want to change the subject. But fearful secrets and forbidden topics must be confronted sooner or later. Conflict cannot be wished away by ignoring it, and we cannot forever fool our opponents into thinking that some uncontroversial premise forces them to do things our way. The sooner we start talking to each other honestly about what really matters, the better it will be for all of us.

21. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 263 (1932).

22. E.g., Christopher A. Bracey, *Louis Brandeis and the Race Question*, 52 ALA. L. REV. 859, 907 (2001).