

FEDERALISM AS A CONSTITUTIONAL CONCEPT

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INTRODUCTION

Debates about constitutional federalism—by which I roughly mean the division of powers and responsibilities between the national and state governments¹—abound.² Participants typically cast such debates as constitutional in character. Nearly invariably, however, policy concerns exert a dominating influence, either on the surface or just beneath it. More often than not, proponents offer federalism-based arguments on behalf of conclusions that they value for policy-based reasons. Reciprocally, champions of particular theories of constitutional federalism typically argue that their visions would yield better outcomes—as measured along some dimension—than would any other understanding of the Constitution’s structure.

In an effort to chart some dimensions of the relationship between federalism-based arguments and more overtly normative or policy-based arguments, I pursue three lines of inquiry in this Essay.

First, is there such a thing as a constitutional concept of federalism? On the one hand, the Constitution nowhere uses the term “federalism.” On the other hand, the Constitution includes a number of provisions bearing on the respective powers and prerogatives of the federal and state governments. Under these circumstances, my first concern is to clarify what it would mean to describe federalism as a constitutional concept such that we could plausibly ascribe a theory of federalism to the Constitution itself, rather than

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1. An additional, “horizontal” dimension of constitutional federalism involves states’ prerogatives and responsibilities relative to other states. *See, e.g.*, Allan Erbsen, *Horizontal Federalism*, 93 MINN. L. REV. 493, 494 (2008); Heather K. Gerken & Ari Holtzblatt, *The Political Safeguards of Horizontal Federalism*, 113 MICH. L. REV. 57, 59 (2014); Gillian E. Metzger, *Congress, Article IV, and Interstate Relations*, 120 HARV. L. REV. 1468, 1470–71 (2007).

2. For a lucid discussion of the values associated with federalism and of surrounding debates and controversies, see DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* (1995). On the historical origins of constitutional federalism, see ALISON L. LACROIX, *THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM* (2010).

merely expressing our own views about how federalism-related questions ought to be resolved.

Second, are the leading theories of federalism, as framed in judicial opinions and in the academic literature, plausible characterizations of the Constitution's theory of federalism, as distinguished from relatively free-floating normative theories about values that judges should promote by deciding particular cases in particular ways?

Third, if we assume for the moment that the Constitution reflects an immanent theory of federalism, should we expect that conception to yield direct conclusions about how the Supreme Court should decide particular, federalism-related cases?

I. FEDERALISM AS A CONSTITUTIONAL CONCEPT

People often speak of federalism or constitutional federalism as a concept. To make this characterization more helpful than question-begging, we need a distinction such as that which John Rawls drew between concepts and conceptions.³ In Rawlsian terms, a concept marks a contested terrain in normative discourse. Within that area, disputants advance arguments supporting conflicting conceptions—which might also be characterized as understandings or interpretations—of the concept. These differing conceptions offer preferred criteria or conditions for the concept's proper application. Rawls's paradigmatic example involved justice. In his view, disputes about justice and similar concepts are moral and political disputes.

In approaching constitutional federalism as a concept in Rawls's sense, we need to account for two differences between it and concepts such as justice. First, unlike justice, constitutional federalism is not a purely normative concept. Constitutional federalism has its roots in a text, the Constitution of the United States. Second, and relatedly, it may not be obvious what useful, action-guiding purpose a concept of constitutional federalism would serve. In the purely normative realm, we seek to specify our shared ideals as guideposts for action. In the constitutional realm, we already have a Constitution, which defines and structures state-federal relations, but does so through a variety of specific provisions, all of which could be interpreted and applied separately. As noted above, nowhere in the Constitution does the word "federalism" appear. With the Constitution making no express reference to federalism, it is worth pausing to explore why we should want to develop a concept of constitutional federalism—or whether we should want to do so at all.

3. See JOHN RAWLS, A THEORY OF JUSTICE 5 (1971).

A. Developing and Defending Conceptions of Constitutional Federalism

When we dispute the content of textually rooted concepts, Professor Ronald Dworkin insisted—correctly, I think—that our activity is “interpretive” and that it involves simultaneous appeals to the twin criteria of descriptive accuracy or “fit” and normative attractiveness:

[C]onstructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong. . . . If the raw data do not discriminate between . . . competing interpretations, each interpreter’s choice must reflect his view of which interpretation proposes the most value for the practice—which one shows it in the better light, all things considered.⁴

As Dworkin’s criterion of normative value brings out, a conception of constitutional federalism that aims to fit the text of the Constitution cannot be a mere list of the constitutional provisions that pertain to the distribution of powers to the state and national governments. Rather, a conception of constitutional federalism must explain how the items that appear on the list—the “raw data” to be interpreted—embody a normatively attractive vision.

Those data are so diverse that any descriptively plausible conception of constitutional federalism would likely have to be hugely complex. The many constitutional provisions that either obviously or implicitly deal with divisions of responsibility between the national and state governments include these:

- The clauses of Article I that confer federal powers, including the power to regulate commerce among the several states⁵ and the Necessary and Proper Clause;⁶
- The guarantee to each state of equal representation in the Senate;⁷

4. RONALD DWORKIN, *LAW’S EMPIRE* 52–53 (1986); *see also id.* at 254–58.

5. U.S. CONST. art. I, § 8, cl. 3.

6. *Id.* art. I, § 8, cl. 18.

7. *Id.* art. I, § 3.

- The specific limitations that the Constitution imposes on state power, including those in Article I, Section 10;⁸
- Various provisions of the judiciary Article, Article III, including those that confer federal diversity jurisdiction,⁹ federal court jurisdiction over cases arising under the Constitution and laws of the United States,¹⁰ and Supreme Court appellate jurisdiction;¹¹
- The provision of Article V that constitutional amendments require the agreement of three-fourths of the states;¹²
- The Supremacy Clause of Article VI, which provides that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding”;¹³
- The Tenth Amendment, which stipulates that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people”;¹⁴
- The Eleventh Amendment,¹⁵ which by all accounts was drafted and ratified to overrule a Supreme Court decision that had denied a state’s claim of sovereign immunity in a suit brought against it pursuant to federal diversity jurisdiction;¹⁶

8. *Id.* art. I, § 10:

[1] No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

[2] No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws

9. *Id.* art. III, § 2, cl. 1.

10. *Id.*

11. *Id.* art. III, § 2, cl. 2.

12. *Id.* art. V.

13. *Id.* art. VI, cl. 2.

14. *Id.* amend. X.

15. *Id.* amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”).

16. *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 479 (1793).

- Section 1 of the Fourteenth Amendment, which provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws”;¹⁷
- Section 5 of the Fourteenth Amendment, which authorizes Congress to enforce Section One;¹⁸
- The Fifteenth Amendment, which bars the states from discriminating on the basis of race in voting.¹⁹

Besides fitting the Constitution’s bare text, a conception of constitutional federalism needs to reckon with a variety of historical data. These include facts about the context in which various provisions were drafted and ratified. The historical record is messy, however. We know that some of the relevant provisions resulted from hard bargaining and compromise at the Constitutional Convention.²⁰ More particularly, some reflect the views or preferences of those who generally favored a strong federal government, while others reflect the views or preferences of those who were most concerned to preserve state powers and influence. We also know that the Civil War Amendments were designed to alter the preexisting balance of state and federal authorities but that the Fourteenth Amendment, in particular, reflected compromises.²¹ In important respects, vagueness and ambiguity appear to reflect the drafters’ design, rather than their oversights.²²

A familiar set of debates involves which historical facts determine the original meaning of particular provisions of the Constitution’s text.²³ But even if we could resolve those debates, and even if the relevant facts (most improbably) yielded determinate conclusions,²⁴ it would be a species of

17. U.S. CONST. amend. XIV, § 1.

18. *Id.* amend. XIV, § 5.

19. *Id.* amend. XV, § 1.

20. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS 57–58, 92–93 (1996); John F. Manning, *Federalism and the Generality Problem in Constitutional Interpretation*, 122 HARV. L. REV. 2003, 2040–57 (2009).

21. *See, e.g.*, ERIC FONER, RECONSTRUCTION 257–58 (1988).

22. *See id.*

23. For discussion of varieties of originalism, see, for example, Lawrence B. Solum, *What Is Originalism? The Evolution of Contemporary Originalist Theory*, in THE CHALLENGE OF ORIGINALISM: THEORIES OF CONSTITUTIONAL INTERPRETATION 12, 32–41 (Grant Huscroft & Bradley W. Miller eds., 2011).

24. *See generally* EDWARD PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY 17–37 (2007) (emphasizing the

confusion to think that the concept of federalism could have a historically fixed meaning in the same way as individual constitutional provisions might.²⁵ If we ask as a historical question what normative vision the Constitution's division of state and national powers reflects, history teaches that no shared vision existed.²⁶ In developing conceptions of constitutional federalism, we aspire to impose a coherence of aim that purely historical inquiry could never establish.

The point that I am making here is important, but it should not be controversial once we draw a crucial terminological distinction. At least in theory, purely historical inquiry might lead us to the conclusion that a particular constitutional provision—for example, the Commerce Clause—had a widely historically understood purpose and a widely historically understood contextual meaning, as defined by expected applications and non-applications.²⁷ Let us suppose this to be the case (even though I am doubtful that it actually is the case). Even if so, a claim about the original purpose and meaning of the Commerce Clause would not be a claim about the meaning of the constitutional concept of federalism in the sense in which I have defined that term. A claim about the meaning or purpose of the Commerce Clause would be just that—a claim about the Commerce Clause. If constitutional federalism is a useful concept, it operates at a higher level of abstraction and seeks to explain the purpose or meaning of the Commerce Clause (to extend the example) as an aspect, outgrowth, or reflection of a deeper, unifying vision of how the Constitution's various federalism-related provisions fit together and of the worthy purposes that the overall package of such provisions serves. If this is what we mean by a constitutional concept of federalism, all should agree that no such shared, architectonic vision ever existed in the minds of all of the Constitution's various designers and ratifiers, even if there was more agreement among relevant constituencies about the meaning or purposes of particular provisions, taken in relative isolation.

indeterminacy of constitutional provisions bearing on federalism and disagreement among the Founding generation).

25. See Manning, *supra* note 20, at 2008. For illuminating discussion of historical variation in prevailing understandings of federalism, see Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015).

26. See Manning, *supra* note 20, at 2069.

27. See Richard H. Fallon, Jr., *The Meaning of Legal "Meaning" and Its Implications for Theories of Legal Interpretation*, 82 U. CHI. L. REV. 1235, 1246–48 (2015) (discussing contextual meaning as thus defined).

*B. What Do We Need a Conception of Constitutional Federalism for—
or Do We Need One at All?*

So recognizing, we might wonder, as I have suggested already, whether, and if so why, anyone might even wish to develop an overall conception of constitutional federalism. Why should we not simply be concerned with identifying the meaning and purpose of the Commerce Clause when interpreting the Commerce Clause, the meaning and purpose of Article III when interpreting Article III, and the meaning and purpose of the Fourteenth Amendment when interpreting the Fourteenth Amendment, for example? The answer involves the importance of coherence, in both a minimal and a further-reaching sense. Minimally, we need an overarching understanding of federalism in light of which various constitutional provisions do not contradict one another. More ambitiously, we seek a linking, unifying vision of the Constitution's federalism-related provisions in order to guide us toward the "best" interpretation of each provision individually. By nearly all accounts, interpretation of particular provisions of a legal text depends on their historical and linguistic context, and the context of any one includes the Constitution as a whole.

Consider the case of the Commerce Clause. We might interpret it differently in light of other provisions of Article I, or the Tenth Amendment, than we would if it stood alone. For example, viewing the Constitution's package of federalism-related provisions as a whole, we might say that the Constitution seeks to limit federal power for the sake of preserving significant spheres of state and local autonomy and that the Commerce Clause should be interpreted in light of this goal, vision, or value. If we adopt this or similar positions, however, we should remember that we impute this vision as part of an exercise in what Professor Dworkin called "constructive interpretation."²⁸ Subject to the demands of "fit," we seek to portray the Constitution's federalism-related provisions in a way that makes their underlying values deserve continued admiration and adherence.

My colleague John Manning has leveled searching criticisms at this way of thinking about constitutional federalism.²⁹ In his view, the Constitution's provisions bearing on federalism reflect a hotchpot of compromises; to see them as embodying a larger vision, rendered in the most attractive possible terms, not only distorts the historical record, but also invites judges to subvert the actual, authoritative decisions of the Constitution's authors and ratifiers. In my judgment, Manning's criticisms go too far. When we recognize that

28. See DWORKIN, *supra* note 4, at 52–53.

29. See Manning, *supra* note 20.

purely linguistic facts fail to determine the proper applications of many constitutional terms, we should—for reasons that I have explained elsewhere³⁰—see the need for courts to understand otherwise indeterminate language as reflecting intelligible values that then can guide application. Yet courts cannot sensibly interpret individual clauses without attention to how proposed interpretations would cohere or conflict with otherwise plausible interpretations of other constitutional provisions. As a result, there is no escaping the need to consider how different federalism-related provisions, and the values that underlie them, intersect with, reinforce, and sometimes limit one another—even if this approach to legal analysis may require the ascription of a unity of vision that never existed in anyone’s mind as a matter of historical fact.

That said, at least one further objection needs to be confronted. Even if there must be a degree of mid-level theorizing, conducted as needed to avoid conflicts among constitutional provisions in particular cases, we should consider whether an overall conception of constitutional federalism would operate at too high a level of abstraction to have practical utility. Perhaps most legal minds lack the capacity to theorize competently on this scale.³¹ Perhaps we should develop a bottom-up, quasi-casuistical approach to thinking about constitutional federalism. Pursuing this strategy, we could aspire to a degree of conceptual ascent, through the gradual working out of principles of mid-level generality, that would, for example, explain how the Tenth Amendment limits congressional power under the Commerce Clause (if it does). But we should not expect or even aspire to climb all the way to the high-level abstraction of a full theory of constitutional federalism.

With this possibility put on the table, I confess to agnosticism about whether we should err on the side of over- or under-theorization in addressing federalism-related constitutional issues. In principle, I think an overall, architectonic theory would be preferable to an untidy collection of mid-level mediating conceptions and abstractions that are developed on an ad hoc basis to construe individual constitutional clauses and to avoid contradictions among them. Given limits on human intellectual capacities and other impediments to coherent theorizing (including those that may be imposed by the doctrine of *stare decisis*, which I shall discuss in Part III), perhaps we

30. See Richard H. Fallon, Jr., *On Viewing the Courts as Junior Partners of Congress in Statutory Interpretation Cases: An Essay Celebrating the Scholarship of Daniel J. Meltzer*, 91 NOTRE DAME L. REV. 1743, 1749–56 (2016).

31. For explication and defense of this kind of approach to constitutional analysis, see CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 1–23, 244–58 (1999); Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1736–38, 1746–54, 1766 (1995).

should set our practical sights lower. If so, however, we should be clear about what we would be doing. We would have postponed the effort to develop, and thus denied ourselves the capacity to rely on, an overall theory or conception of constitutional federalism. We would be able to talk about principles of federalism, but not about an overall concept of federalism that determines those principles.

In going forward, I shall test leading conceptions of constitutional federalism against an ideal of completeness and integrated coherence. But I shall not assume that the absence of such completeness and integrated coherence is a necessarily disqualifying defect in a world of second-best.

First, however, I should summarize this Part's central conclusion: it is impossible to develop or assess a conception of constitutional federalism without making a partly normative judgment. Although a defensible conception of constitutional federalism must fit the Constitution's multiple federalism-related provisions and their history at least tolerably well, and will be disciplined and shaped by the need to do so, an architectonic conception of constitutional federalism necessarily imputes to the Constitution a unity of vision and purpose that never existed in anyone's mind as a matter of historical fact.

II. LEADING CONCEPTIONS OF CONSTITUTIONAL FEDERALISM AND THEIR LIMITATIONS

Given the need for normative judgment in developing a conception of constitutional federalism, we should not be surprised that many such conceptions exist. It would be possible to group these conceptions in a variety of ways. Perhaps the most familiar categorizations distinguish between theories that would sharply constrain national legislative power in order to preserve the significance of state authority and theories that would characterize national power in more expansive terms. Although a division of this kind will ultimately feature prominently in my analysis, this Part begins with a rough and ready distinction between transparently partial or incomplete theories of constitutional federalism—which identify federalism-related values that may pertain to some disputes but do not purport to link all of the Constitution's federalism-related provisions as reflections of a unified normative vision—and conceptions that aspire to relatively more comprehensiveness.

Among the conceptions of federalism that belong to the relatively partial category are what I call states' rights federalism, experimental federalism, and disruptive federalism. By contrast, two other conceptions aspire to, even if they do not always attain, comprehensiveness: libertarian federalism and

nationalist federalism. As will emerge, these more ambitious theories of constitutional federalism are not, and could not plausibly be, free-standing. Rather, they are deeply interconnected with and in some ways defined by interrelated conceptions of the rights that the Constitution (as properly interpreted) protects. To summarize this conclusion in a sentence: almost without exception, purported theories of constitutional federalism offer either less (in the case of partial theories) or more (in the case of theories that are bundled with theories of substantive constitutional rights) than meets the eye.

Before seeking to substantiate this claim, I should offer a word of methodological explanation. The rival conceptions of constitutional federalism that I sketch in this Part are not descriptions of actual theories but ideal types, designed to capture some of the central values and concerns that animate invocations of the concept of federalism in constitutional debates.³² In developing them, I shall therefore take the liberty of painting with a broad brush.³³

A. *Partial or Incomplete Conceptions of Federalism*

In talking about partial or incomplete conceptions of federalism, I need to distinguish, at the outset, between conceptions of federalism, on the one hand, and principles of federalism, on the other. As I use the term, a principle of federalism is a norm or precept framed to guide the decision of cases. Examples might be the interpretive norms or maxims that waivers of

32. Because my focus here is normative, I put to one side the interesting literature involving factors that either might or might not motivate political actors at the state level to behave consistently with a normative conception of constitutional federalism. *See, e.g.*, Jessica Bulman-Pozen, *Partisan Federalism*, 127 HARV. L. REV. 1077 (2014) (arguing that partisanship sometimes supplies the motivation for assertions of state prerogatives and limitations on federal power).

33. For alternative efforts to map the relevant terrain, see, for example, Randy E. Barnett, *Three Federalisms*, 39 LOY. U. CHI. L.J. 285, 285–86 (2008); Erwin Chemerinsky, *The Assumptions of Federalism*, 58 STAN. L. REV. 1763, 1766–69 (2006); Frank B. Cross & Emerson H. Tiller, *The Three Faces of Federalism: An Empirical Assessment of Supreme Court Federalism Jurisprudence*, 73 S. CAL. L. REV. 741, 744 (2000); Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549 (2012); Byron Dailey, Note, *The Five Faces of Federalism: A State-Power Quintet Without a Theory*, 62 OHIO ST. L.J. 1243, 1244–46 (2001). As Professor Gerken wisely notes, “it is possible for many forms of federalism to coexist” both descriptively and normatively. Gerken, *supra*, at 1564; *see also* Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534 (2011) (identifying multiple forms or images of federalism in the Patient Protection and Affordable Care Act).

sovereign immunity need to be express,³⁴ that courts should presume that Congress does not intend to preempt state law,³⁵ and that Congress has no power under the Commerce Clause to single out states and require them to perform distinctively governmental functions.³⁶ In contrast with these relatively self-contained principles, partial conceptions of constitutional federalism seek to explain multiple (though not all) of the Constitution's federalism-related provisions as manifestations of or means for promoting one or more normative values.

1. States' Rights Federalism

Examples of states' rights or state-sovereignty-based conceptions of federalism have surfaced recurrently throughout American history.³⁷ Partisans in constitutional debates have most frequently wielded such conceptions to support claims that states should be free to resolve a disputed issue for themselves, without national legislative or judicial intervention.³⁸ Defenses of states' rights-based theories of federalism have frequently rested on historical and conceptual notions, such as the premise that the states enjoyed sovereignty at the time of the Constitution's ratification and that the powers of the national government are therefore stringently limited to the grants that the states effected.³⁹ When states are identified as sovereigns on

34. See, e.g., *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675–81 (1999).

35. See, e.g., *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 516–18 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

36. See *Printz v. United States*, 521 U.S. 898, 933–35 (1997); *New York v. United States*, 505 U.S. 144, 174–77 (1992).

37. See, e.g., FONER, *supra* note 21, at 455–56, 533; MICHAEL J. KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS 398* (2004) (recounting Southern politicians' denunciations of federally enforced desegregation as a “blow at the sovereignty of the states”). The origins trace at least to the Nullification Crisis of the 1820s and 1830s. See BARRY FRIEDMAN, *THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 95–104* (2009).

38. E.g., KLARMAN, *supra* note 37, at 23, 367 (describing state sovereignty-based opposition to judicially enforced integration); cf. Ernest A. Young, *Federalism as a Constitutional Principle*, 83 U. CIN. L. REV. 1057, 1077 (2015) (“The conventional wisdom among many lawyers is that no one cares either about federalism *per se* or about particular states. . . . The same conventional wisdom suggests that when people do invoke federalism as a reason to do or not do something, it's simply an opportunistic move motivated by preferences about the underlying substantive issue.” (citation omitted)).

39. See, e.g., *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 846, 848 (1995) (Thomas, J., dissenting) (“The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole. . . . The Federal Government and the States thus face different default rules: Where the

historical and conceptual grounds, proponents sometimes personify the states by citing the harms to sovereign dignity that would occur if the federal government or the federal judiciary intruded on state prerogatives. Other defenses have appealed to a related conception of popular sovereignty, with the states depicted as the original and foundational locus for the exercise of democracy. On this view, the Constitution is the creation of the states, whose right to rule and to confer powers on the national government arises from the will of the people.

Nearly without exception, states' rights conceptions of federalism have been sketchily theorized. Much of the explanation derives from the characteristically forensic motivations of those who have relied on such conceptions, typically to resist a particular, substantively disliked, assertion of federal power.⁴⁰ An example comes from those who argue that the Commerce Clause gives Congress no power to enact many kinds of economic regulatory legislation—but then rely on the Commerce Clause to justify federal statutes restricting abortion. But the reason for the partiality of states' rights conceptions of federalism may run deeper. As Part I emphasized, the Constitution includes multifarious provisions bearing on states-federal relations, a number of which specifically limit states' rights or subject them, their officials, or their affairs to federal power. The Supremacy Clause is particularly noteworthy in this respect. Accordingly, a complete states' rights theory of constitutional federalism would be nearly a contradiction in terms. It would need to explain the rights that the states do not have, as well as those that they do, and would need to be highly complex.

So recognizing, we should see the states' rights conceptions that have emerged historically as making claims that it is fair or desirable, for normative reasons, to read constitutional powers that confer national powers and restrict state powers as narrowly as is reasonably possible at least in some cases and possibly in all. If Congress exhibits any significant political disposition to assert national regulatory power, this conception would require an aggressive judicial role in drawing and enforcing limits, but one that the states' rights conception leaves largely undefined.

Constitution is silent about the exercise of a particular power—that is, where the Constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.”).

40. See Frank B. Cross, *Realism About Federalism*, 74 N.Y.U. L. REV. 1304, 1307 (1999) (“[F]ederalism is consistently (and I contend inherently) employed only derivatively, as a tool to achieve some other ideological end . . .”).

2. Experimentalist Federalism

In perhaps the most famous single invocation of federalism principles in American constitutional law, Justice Louis Brandeis paid tribute to the role of the states as laboratories of experiment.⁴¹ From the beginning, Brandeis's metaphor has had rhetorical resonance. Significantly, however, Brandeis never attempted to work out a full theory of constitutional federalism. No one thinks states should be able to experiment with slavery, and almost no one maintains that states should be able to experiment with the suppression of free speech. Hard questions can also arise when experiments in one state have adverse spillover effects in other states.⁴² As these examples illustrate, the most famous experimentalist conception of federalism is clearly only partial: it does not seek to fit all of the provisions of the Constitution that bear on federalism even reasonably well. Rather, it emphasizes values that would apply, and that proponents think ought to control, in some but not all cases in which questions about how to construe particular constitutional provisions arise.

3. Disruptive or Uncooperative Federalism

The idea of disruptive or uncooperative federalism, and in particular its characterization as potentially attractive or beneficial, has emerged in recent, imaginative writing by Heather Gerken and others.⁴³ In the view of defenders of this conception, federalism-based elements of the Constitution's design not only limit federal power; they also create a feedback loop in which states and state officials can resist or temper otherwise lawful assertions of federal authority in potentially creative, informative, and productive ways.

Like the states' rights and experimentalist conceptions, a conception of disruptive or uncooperative federalism could not purport to capture the full

41. See *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."); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 430–31 (1998).

42. See Samuel Issacharoff & Catherine M. Sharkey, *Backdoor Federalization*, 53 UCLA L. REV. 1353, 1385–89 (2006).

43. See, e.g., Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1284–93 (2009); see also Bulman-Pozen, *supra* note 32, at 1105–08 (discussing how recent examples of uncooperative federalism are important to federalism's vitality); Ernest A. Young, *A Research Agenda for Uncooperative Federalists*, 48 TULSA L. REV. 427, 429–37 (2013) (discussing questions arising from the work of Professors Gerken and Bulman-Pozen on uncooperative federalism).

complexity of the concept of constitutional federalism. It could only plausibly aspire to guide constitutional or statutory interpretation in some range of contested cases—and to do so without specifying in detail how the values that it serves relate to, cohere with, or in some instances possibly trump other constitutional values. Leading proponents of uncooperative federalism so acknowledge. For example, Dean Gerken and Professor Bulman-Pozen write that they do not “offer a single, authoritative account of federalism,” that they “do not mean to suggest that contestation will always be desirable,” and that they “merely argue that the benefits of uncooperative federalism have not been fully appreciated in the literature.”⁴⁴

4. Summary Observations

As noted above, to characterize a purported theory of constitutional federalism as partial or incomplete is by no means categorically damning. Such theories may contain vital, if local, insights. They may pick out values that some constitutional provisions might usefully advance and offer those values as sources of interpretive guidance. Partial theories do so, however, without explaining how the preferred values and other values that a full theory of constitutional federalism would need to accommodate relate to one another.

B. Relatively Complete Conceptions of Constitutional Federalism

As I read the literature, there are two prominent conceptions of constitutional federalism—libertarian and nationalist federalism—that aspire to relative completeness and that purport to express the Constitution’s vision of federalism in a comprehensive sense. Unsurprisingly, the defenses of both need to depend heavily on claims concerning their normative attractiveness. Perhaps more surprisingly, the attractiveness of the two most ambitious conceptions of constitutional federalism depends on their interconnections with theories of constitutional rights. In other words, libertarian and nationalist federalism are not freestanding theories of constitutional structure but—for better or for worse—composite visions that connect structure to substantive values that transcend mere divisions of power between the state and federal governments.

44. Bulman-Pozen & Gerken, *supra* note 43, at 1259–60.

1. Libertarian Federalism

In the views of Randy Barnett⁴⁵ and Richard Epstein,⁴⁶ the Constitution should be understood as dividing power between state and federal governments, and especially as limiting the power of the national government, as a strategy for safeguarding liberty. Partly because of the intellectual sophistication of its proponents, this view has achieved broad currency in some circles. It is highly ambitious. It claims to fit most or all of the Constitution's federalism-related provisions. It also embodies a robust normative vision.

If we begin appraisal by inquiring how well libertarian federalism fits the Constitution's language and history, it is striking on the surface that a number of theorists appear to link libertarianism and originalism. But matters are more complex than they seem. Although some theorists of libertarian federalism also purport to be originalists,⁴⁷ the fusion of federalism with libertarianism seems fraught with conflict. To see why, we need only ask how the two defining concepts of libertarian federalism—namely, libertarianism and federalism—relate to one another. For those who train their gazes narrowly on issues of constitutional federalism, the answer may prove surprising. As I have emphasized, the Constitution's myriad provisions bearing on constitutional federalism are not the products of a single mind or vision. But it would be dramatically implausible to claim that all had determinate historical meanings that would have pleased libertarians. And in cases of conflict between original meaning and libertarian norms, most libertarian federalists' more fundamental commitment involves liberty, not federalism.⁴⁸ Although libertarian conceptions are often presented as theories of constitutional federalism, the connection between libertarianism and

45. RANDY E. BARNETT, *OUR REPUBLICAN CONSTITUTION: SECURING THE LIBERTY AND SOVEREIGNTY OF WE THE PEOPLE* 167–202 (2016).

46. RICHARD A. EPSTEIN, *THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT* 147–53 (2014). According to Epstein, “the Constitution is not a libertarian document” but instead a “classical liberal” one because it “allows for both taxation and eminent domain.” *Id.* at 193. Although this is not a trivial difference for some purposes, I put it aside in light of my aspiration to sketch the theoretical landscape in broad strokes.

47. *See, e.g., id.* at 45 (advocating the reading of the Constitution “through the lens of the same classical liberal theory that animated the drafting of the original text—a position that incorporates but goes beyond in critical ways the most common form of original meaning as explicated by Justice Antonin Scalia”).

48. *See, e.g.,* Randy E. Barnett, *Afterword: The Libertarian Middle Way*, 16 *CHAP. L. REV.* 349, 363 (2013) (noting that libertarians “evaluate the legitimacy of any constitution, including the Constitution of the United States, by this criterion: how well does it protect the private rights of all persons in the jurisdiction in which it governs?” (footnote omitted)).

federalism is contingent and instrumental. For example, libertarian federalists favor a narrow construal of congressional power under the Commerce Clause, but they embrace broad federal constitutional rights against the states. They also welcome assertions of federal judicial authority to enforce federal constitutional rights to liberty.⁴⁹

We should detect no inconsistency here: if libertarianism provides the normative vision that best explains the Constitution's federalism-based provisions, that vision will call for whatever allocations of federal and state power best serves the cause of liberty. At the same time, we should see the federalist commitments of libertarian federalism as being substantially instrumental and potentially opportunistic: in a crunch, the claims of state as much as federal authority will almost always yield to the paramount value of individual liberty. Moreover, the federal courts will emerge as liberty's preeminent guarantors.

2. Nationalist Federalism

As emphasized above, the Constitution includes a number of provisions that confer as well as limit national power. Some read the Necessary and Proper Clause especially expansively, as Chief Justice John Marshall did in *McCulloch v. Maryland*.⁵⁰ The Constitution also includes a number of limitations on state power. And Article VI affirms with great explicitness that in cases of collision, national authority takes precedence. Undoubtedly in reflection of a normative vision, some have developed or implicitly invoked what we might think of as nationalist conceptions of American constitutional federalism.⁵¹ Although nationalist conceptions necessarily recognize some distinctive roles for states, they do not read the constitutional provisions that define or preserve state prerogatives as generative of any larger, robust

49. See, e.g., BARNETT, *supra* note 45, at 160–63; EPSTEIN, *supra* note 46, at 70–100, 570–73; John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 91 (2004).

50. 17 U.S. (4 Wheat.) 316, 406–09 (1819).

51. For discussion of a nationalist model of judicial federalism, see Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1158–64 (1988). For more generally nationalist conceptions of constitutional federalism, see Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1897–901 (2014); Heather K. Gerken, *The Supreme Court, 2009 Term—Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 44–73 (2010) [hereinafter Gerken, *Supreme Court*]; Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2089–93 (2014).

principle that the national government should need to respect in promoting national goals and seeking to protect federal rights.⁵²

In principle, a nationalist conception of federalism could leave many large federalism-related issues for resolution by Congress, without commitment to any particular set of constitutional rights.⁵³ Some *Lochner*-era progressives sought little more from the judiciary than “restraint” or non-interference with state and congressional lawmaking. But in the absence of a rights-based vision, the question can always arise why nationalism is good or whether federalism is working.⁵⁴ Accordingly, most of those whose stated views about federal and state power most closely approximate the nationalist ideal type have also championed a broad set of typically “liberal” (rather than libertarian) individual rights, enforceable against both Congress and the states. Among the Justices of the Supreme Court, the leading nationalists have included such famous liberals as William Brennan, Thurgood Marshall,⁵⁵ and, more recently, Ruth Bader Ginsburg. As in the case of libertarian federalism, the coupling of structural commitments with substantive normative premises possesses a powerful normative and conceptual logic. Given the importance of normative attractiveness in assessing rival conceptions of federalism, nationalists sensibly develop the details of their views about structural questions with individual rights in mind.

3. Concluding Observations

In outlining libertarian and nationalist conceptions of constitutional federalism, I have repeated the conclusion—which emerged initially in Part I—that developing and defending a theory of constitutional federalism requires an exercise in normative judgment. In addition, however, I have emphasized that both libertarian and nationalist conceptions stake their claims to normative attractiveness on their linkage of theories of allocations of state and federal power with theories of individual rights. In doing so,

52. Cf. Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1956 (2014) (“[T]oday state and federal governance and interests are more integrated than separate. Instead of focusing on the life or death of American states as autonomous, independent actors, we should think more seriously about federalism’s afterlife as a form of nationalism.”).

53. See, e.g., Heather K. Gerken, *The Loyal Opposition*, 123 YALE L.J. 1958, 1991–94 (2014); Gerken, *Supreme Court*, *supra* note 51, at 72.

54. See Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1067–72 (1980) (suggesting that process-based theories depend for their attractiveness on unarticulated substantive values or limits).

55. See Fallon, *supra* note 51, at 1163.

moreover, they assume the burden of furnishing a normative defense of rights-based as well as structural premises.

In my view, the acknowledgment of a linkage between a theory of constitutional structure and a theory of constitutional rights is a source of strength, not weakness, in the libertarian and nationalist conceptions of federalism. Obviously, however, that acknowledgment highlights the pervasive normativity of overarching theories or conceptions of constitutional federalism.

III. BLENDING A CONCEPTION OF CONSTITUTIONAL FEDERALISM WITH A THEORY OF THE JUDICIAL ROLE: THE CHALLENGE OF JUDICIAL FEDERALISM

With issues involving the relationship between conceptions of constitutional federalism and theories of the judicial role under the Constitution now in view, we come to the third question that I framed at the outset: would the best theory of constitutional federalism yield direct conclusions about how the Supreme Court should decide federalism-related constitutional cases? To that question, I believe that the answer is frequently no.

After having recognized that a reasonably complete theory of federalism needs a complementary theory of individual rights, we may be tempted to conclude that a theory of constitutional federalism also requires, or is necessarily connected with, a theory of the judicial role. But that further claim would go too far. The judiciary aside, we might think a theory of constitutional federalism valuable as a guide to action by the President or Congress. Perhaps more pertinently, a conception of constitutional federalism might establish an ideal for courts to seek to realize as fully as they reasonably could, consistent with a defensible conception of the judicial function. If so, a theory of the judicial role would operate as a constraint on the realization, rather than as a component, of a theory of constitutional federalism.

Elsewhere I have written extensively about issues involving constitutional interpretation,⁵⁶ constitutional implementation,⁵⁷ judicial legitimacy,⁵⁸ and the judicial role more generally.⁵⁹ To rehearse my prior arguments here would

56. See, e.g., Fallon, *supra* note 27.

57. See, e.g., RICHARD H. FALLON, JR., *IMPLEMENTING THE CONSTITUTION* (2001).

58. See, e.g., Richard H. Fallon, Jr., *Legitimacy and the Constitution*, 118 HARV. L. REV. 1787 (2005).

59. See, e.g., Richard H. Fallon, Jr., *Constitutional Precedent Viewed Through the Lens of Hartian Positivist Jurisprudence*, 86 N.C. L. REV. 1107 (2008).

serve no good purpose. Instead, I shall seek to illustrate the point that one could not move directly from a theory of constitutional federalism to conclusions about how courts should decide particular federalism-related cases by tracing the implications of two concepts that would need to figure prominently in any normatively defensible conception of the judicial role—those of *stare decisis* and judicially manageable standards.

A. *Stare Decisis*

As historically understood, the doctrine of *stare decisis* establishes that courts should sometimes adhere to initially mistaken interpretations of constitutional language, perhaps most importantly because surrounding doctrines and practices have developed and reliance interests have accrued.⁶⁰ On almost any plausible account, *stare decisis* poses a significant obstacle to judicial enforcement of any robust conception of constitutional federalism, including all of those discussed above. The doctrinal landscape is far too complex to fit any single normative vision even reasonably well. Trusting that the point is relatively obvious, I shall offer only one illustration each for libertarian and nationalist federalism.

For libertarian federalism, *stare decisis* poses notoriously large problems in cases involving Congress's regulatory powers under the Commerce Clause. Looking disapprovingly at the scope of federal power under current constitutional doctrine, libertarians sometimes refer to, and claim that they would wish to restore, "the Constitution-in-exile."⁶¹ But even if libertarian federalists' normative arguments were otherwise persuasive, their undiluted theoretical demands would ask courts to do more than courts ought to do in light of the doctrine of *stare decisis* and the rationales that undergird it.

Tellingly, moreover, nearly all Supreme Court Justices—including those with partial libertarian sympathies—have so recognized.⁶² The Court's pro-federalist majority rejected claims of congressional regulatory power under the Commerce Clause three times between 1995 and 2012—in *United States v. Lopez*,⁶³ *United States v. Morrison*,⁶⁴ and *National Federation of*

60. The literature is too enormous to summarize. See, e.g., *id.*; Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723 (1988).

61. Douglas H. Ginsburg, *Delegation Running Riot*, 18 REGULATION 83, 83–84 (1995) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993)).

62. See RICHARD H. FALLON, JR., *THE DYNAMIC CONSTITUTION: AN INTRODUCTION TO AMERICAN CONSTITUTIONAL LAW AND PRACTICE* 240–42 (2d ed. 2013).

63. 514 U.S. 549 (1995).

64. 529 U.S. 598 (2000).

Independent Businesses v. Sebelius.⁶⁵ But in none of those cases did the Court majorities question, much less reject, the furthest reaching claims to regulatory power under the Commerce Clause that the Court upheld in the years between 1937 and 1995. Rather, the Court apparently set out to draw lines beyond which it would allow no further expansions. Stare decisis, and accompanying settled expectations and reliance interests, rather clearly explain the Court's reluctance to overrule iconic prior decisions, including those upholding national minimum wage legislation and the 1964 Civil Rights Act.⁶⁶

In my view, stare decisis should also stop courts from adopting a number of positions that nationalist conceptions of federalism would commend. An example may come from state sovereign immunity jurisprudence. In a series of closely divided cases decided during the 1990s, centrally including *Seminole Tribe of Florida v. Florida*⁶⁷ and *Alden v. Maine*,⁶⁸ the Supreme Court interpreted the Eleventh and Tenth Amendments as giving robust protection to states against suits by their citizens to enforce federal law.⁶⁹ From a nationalist perspective, these decisions were deeply mistaken. As dissenting opinions emphasized, the literal language of the Eleventh Amendment does not reach actions brought by citizens against their own

65. 567 U.S. 519 (2012).

66. Without overturning iconic cases, the Court has sometimes achieved a limited federalism-protective effect by applying a "federalism canon" of statutory interpretation that disfavors broad interpretations of federal regulatory statutes. *See, e.g.,* *Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172–74 (2001); *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991).

Richard Epstein chastises those who invoke stare decisis and related reliance interests to sustain exercises of the commerce power that are "antithetical to the basic presuppositions of classical liberal theory." EPSTEIN, *supra* note 46, at 569. According to him, American constitutional practice has descended into disarray, and courts should take the lead in renovating it. Even if I agreed with the diagnosis of disarray, I would hold with those who insist that courts have no mandate to engage in the quasi-revolutionary dismantling of central pillars of national economic life, including the 1964 Civil Rights Act, that have stood in some cases for up to eighty years. It is a separate question whether courts should attempt to draw lines beyond which Congress, in particular, should not be allowed to pass going forward. *See* BARNETT, *supra* note 45, at 200–01 (describing such an approach).

67. 517 U.S. 44 (1996).

68. 527 U.S. 706 (1999).

69. Although earlier cases had treated issues involving state sovereign immunity as arising under the Eleventh Amendment and Article III, *Alden* treated the question whether states may claim immunity from suit in their own courts as having a Tenth Amendment dimension. *See id.* at 713–14, 739.

states to enforce federal law against the states.⁷⁰ A nationalist conception of constitutional federalism would also indicate that the decisions wrongly insulated states from important levers for assuring the practical supremacy of federal law in collisions with claims of state prerogative.⁷¹

Although I agree with nationalists who condemn *Seminole Tribe* and *Alden* as wrongly decided, it is a separate question whether the Supreme Court now ought to reverse them. My colleague David Shapiro has persuaded me that the Court should not, largely for reasons involving stare decisis and issues of judicial role.⁷² Sovereign immunity doctrine bites most sharply in cases in which plaintiffs seek damages relief from state treasuries for past violations of federal law and federal rights. As long as a plaintiff seeks relief against a state official, rather than the state itself, injunctions are normally available to remedy ongoing violations of federal rights.⁷³ Although well short of ideal from my perspective, this doctrinal compromise is at least functionally tolerable. Current sovereign immunity law does not turn federal rights into functional nullities. Injunctions, among other remedies that escape the sovereign immunity bar, give bite to federal guarantees against the states and their officials, even if some wrongs go uncompensated. Under these circumstances, the doctrine of stare decisis should foreclose the application of a nationalist conception of constitutional federalism, even if nationalists are correct about how relevant constitutional provisions ought to have been interpreted initially.⁷⁴

70. See *id.* at 761 (Souter, J., dissenting) (criticizing the majority's "contorted reliance on the Eleventh Amendment"); *Seminole Tribe*, 517 U.S. at 82 (Stevens, J., dissenting) ("[T]he plain text of the Amendment cannot be read to apply to federal-question cases.").

71. The dissenters thus maintained that principles of sound government well-recognized by the Founding generation called for the availability of federal jurisdiction to enforce the states' obligations under federal law. *Seminole Tribe*, 517 U.S. at 155 (Souter, J., dissenting) ("Given the Framers' general concern with curbing abuses by state governments, it would be amazing if the scheme of delegated powers embodied in the Constitution had left the National Government powerless to render the States judicially accountable for violations of federal rights.").

72. See David L. Shapiro, *The Role of Precedent in Constitutional Adjudication: An Introspection*, 86 TEX. L. REV. 929 (2008). For a rejection of Professor Shapiro's position and an argument that *Seminole Tribe* and *Alden* ought to be overruled, see Thomas D. Rowe, Jr., *Exhuming the "Diversity Explanation" of the Eleventh Amendment*, 65 ALA. L. REV. 457, 471–72 (2013).

73. The leading case is *Ex parte Young*, 209 U.S. 123 (1908). For discussion of the scope of the *Young* doctrine and the extent to which it and related "exceptions" to state sovereign immunity allow the effective enforcement of federal law against the states, see RICHARD H. FALLON, JR., JOHN F. MANNING, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 920–22, 927–35, 979–81 (Robert C. Clark et al. eds., 7th ed. 2015).

74. Among the arguments for denying strong stare decisis effect to *Seminole Tribe* and *Alden*, the strongest, in my view, is that current doctrine may be too internally conflicted to be

B. Judicially Manageable Standards

The courts cannot enforce the Constitution in the absence of judicially manageable standards.⁷⁵ Judicial manageability is a complex and disputed concept in its own right. I do not suggest that it has an agreed and determinate meaning. Nevertheless, within reasonably clearly settled understandings of the judicial role, courts could not enforce any robust, normative, abstract conception of federalism unless they can develop judicially manageable standards to guide their efforts in doing so.

An example of how the need for judicially manageable standards could impede the courts from directly implementing a libertarian conception of constitutional federalism may come from *National League of Cities v. Usery*⁷⁶ and the cases that followed in its wake. *National League of Cities* articulated the principle, congenial to libertarian federalists, that Congress's regulatory powers under Article I do not encompass the authority "to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions."⁷⁷ But that abstraction—standing alone, and without further specification—was judicially unmanageable: it sowed uncertainty and confusion in the lower courts that the Supreme Court proved incapable of resolving through the provision of a more determinate general test.⁷⁸ The problem of judicially unmanageable standards is not always intractable. The language of many constitutional provisions is too vague for practical implementation until courts develop implementing formulas or constructions, including those reflected in the myriad "tests" that dot the landscape of constitutional law.⁷⁹ But in this case, perhaps as a result of disagreement among the Justices, efforts at "precisification" failed.

In *Garcia v. San Antonio Metropolitan Transit Authority*,⁸⁰ the Court abandoned any general effort to enforce the judicially unmanageable standard

deemed settled, partly as a result of *Central Virginia Community College v. Katz*, 546 U.S. 356, 377–78 (2006), which held that the Court's determination in *Seminole Tribe* that Congress lacked Article I power to subject the states to unconsented suit did not apply to the Bankruptcy Clause. As Justice Thomas argued in dissent, *Katz* is difficult if not impossible to reconcile persuasively with *Seminole Tribe*. *Id.* at 381–82 (Thomas, J., dissenting); see FALLON, MANNING, MELTZER & SHAPIRO, *supra* note 73, at 965. Although current doctrine exhibits undoubted tensions, the lines that it draws are intelligible and thus potentially stable.

75. See Richard H. Fallon, Jr., *Judicially Manageable Standards and Constitutional Meaning*, 119 HARV. L. REV. 1275, 1277 (2006).

76. 426 U.S. 833, 852 (1976).

77. *Id.*

78. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530 (1985).

79. See Fallon, *supra* note 75, at 1297–1312.

80. 469 U.S. 528 (1985).

that it had articulated in *National League of Cities*. One might suspect that some or even most of the Justices in the *Garcia* majority never accepted the abstract principle that the Court propounded in *National League of Cities* to begin with. I thus want to be careful in asserting claims about what the majority decision in *Garcia* demonstrates. Within little more than a decade, however, a clear majority of the Justices had embraced an agenda of revitalizing constitutional federalism.⁸¹ Even so, the Court left *Garcia*'s disavowal of the *National League of Cities* formula almost wholly undisturbed—largely, one might speculate, due to a continuing collective inability to converge on judicially manageable standards for enforcing the abstract principle of constitutional federalism that *National League of Cities* had articulated. The restraint of the Court's pro-federalist majority in this respect reflected a wise acknowledgment of the potential gap between a conception of federalism that posits the existence of constraints on federal power and a defensible conception of the judicial role, which will sometimes deny the capacity of courts to implement a theoretical conception of federalism.

Nationalist federalism can pose similar difficulties of judicial implementation. For example, many if not most adherents of a nationalist conception would probably endorse Professor Dworkin's characterization of the concept that the Equal Protection Clause embodies as requiring state officials to treat all citizens with "equal concern and respect."⁸² But that formulation is too amorphous to permit direct judicial application. Implicitly so acknowledging, even Justices whose views generally align with nationalist conceptions of constitutional federalism have gone along with Supreme Court efforts to craft more determinate, and also much more limited, tests for gauging the permissibility of state official action in equal protection cases.⁸³ In Professor Lawrence Sager's apt term, liberal, nationalist Justices have concluded that the Constitution's equal protection guarantee should be a "judicially underenforced constitutional norm" in at least some instances.⁸⁴

81. See Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 460 (2002).

82. RONALD M. DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977); see also JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 82 (1980) (approvingly quoting Dworkin's formulation).

83. See Fallon, *supra* note 75, at 1297–98 (partially cataloguing judicially developed and manageable standards for implementing the Equal Protection Clause).

84. Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978) ("The equal protection clause is . . . a prominent example of a constitutional norm which is underenforced to a significant degree by the federal judiciary.").

IV. CONCLUSION

In exploring what it would mean to treat federalism as a constitutional concept, and how rival conceptions of constitutional federalism ought to be assessed, I have drawn three main conclusions, each of which emerged as an answer to one of the three questions that I posed at the outset.

First, although we can speak meaningfully of the Constitution's embodying a concept of federalism, the content of that concept cannot be discovered as a matter of linguistic or historical fact. Insofar as federalism is concerned, the Constitution is a hotchpot of compromises. Developing a conception of constitutional federalism requires normative judgment as well as attention to matters of "fit" in regard to the Constitution's myriad federalism-related provisions.

Second, some leading conceptions of constitutional federalism aspire to explain more of the Constitution's text than others. Significantly, however, any relatively ambitious theory of constitutional federalism needs to be closely interconnected with a normatively charged theory of constitutional rights. There can be no free-standing theory of constitutional federalism that does not imply stances toward other constitutional issues.

Third, a theory of constitutional federalism is one thing, a theory of the judicial role, another. Although plausible theories of federalism will be bound up with theories of constitutional rights, extra-textual constraints on the judicial role will almost inescapably leave gaps between theories of federalism and conclusions about how courts should adjudicate federalism-related cases.

To repeat a phrase that I used earlier, there is nearly always either more or less to leading theories of constitutional federalism than meets the eye. And in the case of the libertarian and nationalist conceptions, which are the most robust and ambitious currently on offer in the literature, there is both more and less. There is more insofar as these conceptions come packaged with theories of individual rights. There is less insofar as they fail to generate direct prescriptions concerning how courts should decide disputed, federalism-related cases.