The State of Our Federalism

Michael S. Greve

The Oldest Question of American Constitutional Law

Federalism has been called “the oldest question of American constitutional law.” And so it is. Federalism was the central question of our constitutional founding. It has been a constant theme of our politics ever since, and it has been a central, highly contentious question in every critical era in our history—the Civil War and Reconstruction; the Progressive Era; the New Deal; and the Civil Rights Era. We are now living through another critical period. The country is broke, and our political institutions seem incapable of finding solutions. And as always, federalism is playing a prominent role in a heated political debate.

You’ve heard the story line: an overbearing, out-of-touch, out-of-control government in Washington, D.C. has aggrandized itself and trampled state and local governments underfoot. To restore fiscal sanity and democratic government, we should restore federalism’s balance. We should respect the Tenth Amendment, return power to the states, and so bring government closer to the people. All of the Republican contenders for the presidency advocate this program, with varying degrees of enthusiasm.

I agree with their analysis and prescription—up to a point. Washington has indeed assumed far too much power over local affairs. In many policy areas, decentralization would improve our policies and our politics. I also agree that our problems have a potent constitutional dimension. And yet: I will try to persuade you that our federalism problem is a great deal more complicated. “Federalism” in the sense of decentralization and state authority is not just a solution. In many respects, it is also a problem and a cause of widely lamented institutional
dysfunctions. Put differently: we actually have not too little but far too much federalism of the wrong kind—a federalism that makes government bigger, more irresponsible, and less accountable. We need less of that federalism, and more federalism of the right kind—a federalism that disciplines government at all levels and makes it more accountable and transparent. We will over the coming years re-negotiate our federalism bargain. But the central question is not, how much federalism? It is, what kind of federalism?

My self-imposed task tonight is to explain why this question is urgent; why it’s important to get the answer right; and why we don’t have a lot of room for error. Let me start with with a brief assessment of our current discontents.

**Institutional Dysfunction**
Large majorities of Americans—larger than ever since the advent of modern opinion polling—think that the country is headed in the wrong direction. It’s hard to disagree. The 2008-2009 financial crisis brought the country, and the world, to the brink of a Great Depression. Then, the Obama administration’s health care initiative prompted widespread dismay over a fateful step toward a cradle-to-grave welfare state. This past summer, public attention shifted to the nation’s perilous financial condition, unsustainable entitlement programs, rapidly mounting debts at all levels of government, and Washington’s evident inability to reverse or even stem these alarming trends. All this has been playing out against a backdrop of stagnant wages, rising health care costs, and persistent levels of unemployment that are common in Europe but unknown, until recently, in the United States.

It is tempting to think that we have suffered an unusual confluence of external shocks and lousy policies, brought to us by feckless public officials. The shocks (one hopes) will subside
and the policies will be reversible, once we elect the right representatives and Washington gets its act together. But this sanguine view is very likely wrong. The sources of our political discontent and dysfunction are much deeper. They are institutional, and they are unlikely to be fixed by ordinary political, electoral and legislative means. Consider a few distressing facts:

First, the crises that agitate our politics have come in rapid succession—too rapid for the body politic to settle down, take its bearings, and confront the next crisis with the confidence that comes from having mastered the last one. Instead, the consequences of each act in the drama have lingered and compounded. The housing market still runs on fumes; government still controls or “guarantees” 99% of the mortgage market; FannieMae and FreddieMac still drain the fisc ($150 billion and counting); and the financial “reforms” of the Dodd-Frank Act have likely heightened the risks that produced the financial crisis in the first place. ObamaCare will destabilize and demoralize the health care and insurance markets for the foreseeable future, regardless of what happens in the courts or in Congress. And the government’s responses to the financial crisis and ObamaCare have exacerbated the nation’s dire financial predicament.

Second, each crisis has raised serious questions about our political institutions’ ability to conduct the nation’s business in an orderly fashion. The months-long, inconclusive haggling over the debt ceiling is still fresh in memory. But it was preceded by the panicked enactment of the grossly misnamed Troubled Asset Relief Program (TARP), by the midnight maneuvering and brutal cramdown of ObamaCare, and by the sad, sustained spectacle of budgeting by continuing resolution. Each experience has contributed to a growing sense that our political system has ceased to function.

Third, government’s principal mode of operation is lawlessness and inconstancy. The Bush administration’s response to the financial crisis was government by dealmaking: bail out
this firm; let that one go under; send $15 billion to the United Auto Workers; cram federal
dollars into banks that don’t want them. This may have been a necessary emergency response to
the financial chaos in 2008. However, TARP institutionalized the m.o., and Dodd-Frank has
made it permanent. That statute, moreover, as well as ObamaCare, marks a quantum leap in the
erosion of the rule of law. The statutes run hundreds of pages—and settle nothing. Instead, they
instruct that “the Secretary shall” or “the Commission may” do any one of a thousand things.
The agencies have undertaken their assigned tasks through “interim final rules,” regulatory
waivers for favored friends, threats and intimidation of non-favored firms and industries, and
other forms of extra-legal improvisation. The Environmental Protection Agency is creating a
global warming program by the same means, without any legislative mandate or authority.

Fourth, the statutes and policies I just mentioned became effectively irreversible with
their enactment. Talk show hosts, advocacy groups, and politicians may agitate for a “repeal” of
ObamaCare or Dodd-Frank. However, no one thinks that the pre-enactment state of American
health care, health insurance, banking, or financial regulation was any great shakes. Moreover,
the regulated industries, the states, and interest groups have by now made enormous investments
in steering policy in their desired direction, which they will be loath to surrender. “Repeal!” is a
slogan; it is not a plausible political program. Any serious reform agenda will require great
institutional capacity for deliberate, concerted political action. That, though, is precisely what we
lack.

I do not know what can be done about our institutional debilities; time will tell. I am
confident, however, that nothing can be done by way of a more disciplined, functional,
confidence-inspiring politics without a much better understanding of our Constitution—not just a
renewed respect for its individual clauses, but a deeper understanding of its principles and its
political economy. That need applies across the entire Constitution—the separation of powers, the Bill of Rights, and much else besides. (After all, institutional pathologies are all around us, from the proliferation of semi-official “czars” to the genteel corporatism of government-sponsored enterprises.) But there is no better illustration and no more urgent subject than our federalism.

**Federalism**

The conventional prescription, I said at the outset, is to “return power to the states.” As the leading Republican contender for the presidency has put it, we are “Fed Up” with Washington. Let’s make that wretched town “inconsequential” in our lives. Who could disagree? The national government regulates local storm drains, our children’s grade school curriculum, and conflicts between your plan to build a home on your property and a toad’s desire to procreate in the same location. (As a rule, the toad wins.) Domestic violence—spousal abuse, not armed insurrection—has become a care of the general jurisdiction, on account of its supposed connection to interstate commerce. Your parking spot at the mall, your office jokes, your children’s playground conduct—these and countless other matters close to home have become of national concern. This is a federalism problem.

It is, however, not our only federalism problem. Excessive centralization is a concern; but so is excessive de-centralization.

Put yourself in the shoes of someone who is trying to run a productive national enterprise—someone who wants to sell stuff on the Internet, or produce life-saving drugs, or provide flood insurance: you will find yourself beleaguered by legislatures, courts, attorneys
general, regulators, and trial lawyers from fifty fiefdoms—all with their own conflicting, cascading demands, but united in a desire to have a piece of you and your business. A few examples illustrate the point.

The failed state of California, among others, has contrived to regulate the internet, to tax corporations on profits earned in foreign jurisdictions, and to impose sales tax collection obligations on internet sellers domiciled elsewhere. States have vigorously asserted a right to conduct their own global warming policy, reaching far beyond the boundaries of the legislating states; some have signed greenhouse treaties with foreign nations. State attorneys general have reorganized entire industries through settle-or-else prosecutions and multistate settlements. Day in, day out, products and profits disappear in state hellhole jurisdictions. I could go on, but you get the point: federal regulatory overreach has gone hand-in-hand with state overreach.

Regulatory excess, moreover, is mirrored by countless fiscal programs that encourage states to “experiment” with federal dollars. The most prominent and menacing example is Medicaid, which now consumes almost a quarter of state budgets (much more in some states). For the most part, this is not a result of federal coercion or mandates. It is a result of the states’ voluntary decisions to expand Medicaid so as to attract federal matching funds (between fifty and eighty cents on the dollar, depending on the state). The states’ perverse incentives to expand their domestic welfare state on our collective nickel—trillions of nickels—is, again, a federalism problem.

In a sentence, then: our federalism presents a two-sided problem—excessive centralization in some respects; excessive decentralization (regulatory balkanization, fiscal profligacy and moral hazard) in other respects. Which of these problems is more serious? It’s
hard to say. Quite clearly, however, our federalism’s centrifugal tendencies are more than a slight detour in a relentless march toward centralization.

Consider: from the end of the Korean War to 2008, federal taxes in relation to GDP hovered between 18 and 20 percent. Over that same time frame, state and local taxes tripled, from about five to 15 percent. In fiscal terms, the entire growth of government in the United States is attributable to the growth of state and local government.

And consider: a few decades ago, no serious businessman or corporate lawyer worried about state law, state regulators, or trial lawyers. Now, companies operate amid a horde of regulatory trolls, any one of whom can unleash a regulatory firestorm any day of the week. There has never been a time in American history when states had more power over the commerce of the United States than they have now. The conventional story of a relentless march toward centralization—a “consolidated government,” as the Antifederalists called it—has a long history, and in a country with a healthy suspicion of government power, it has a certain charm. But as a matter of empirical fact, it’s mostly false.

Perhaps (you might say or think) the Obama administration has changed the game and the trends. But that, too, is incorrect. The Bush administration bailed out the banks under TARP. The Obama administration bailed out states, to the tune of a half-trillion dollars, by means of the “Stimulus” bill (formally, the American Reconstruction and Recovery Act). (The difference is that the TARP money has come back; the Stimulus money is gone.) The EPA’s global warming programs, we owe to lawsuits and legislation instigated by states: the case that forced the program is called Massachusetts v. EPA. Nor do the administration’s signature accomplishments, ObamaCare and Dodd-Frank, herald a lurch into socialist centralization. Rather, they build on the most dysfunctional practices of our federalism, and double down.
ObamaCare increases the states’ Medicaid match from 50 to 80 cents to *one-hundred* cents on the dollar. Moreover, the law encourages states to dump their employees and retirees—whose health care costs currently fall on state and local governments—into federally subsized “exchanges.” (This is why the states were for ObamaCare before some of them were against it.) Similarly, Dodd-Frank gives state regulators and attorneys general a power they have lacked since *M’Culloch v. Maryland* in 1819 and the creation of the national banking system in 1864—the power to supervise and sue nationally chartered banks. Our official national policy since 2008 has been to restore the balance sheets of national banks. At the same time, Dodd-Frank has enabled state attorneys general to help themselves to a big chunk of that capital by suing the same banks over their foreclosure practices—an alleged fraud without a single identified victim.

Before I try to sort out our two-sided federalism problem, allow me to add yet another of its pathologies. Federal overreach and state overreach do not somehow cancel each other out; they compound and create further problems. One problem is the pervasive mismatch of the natural scale of a given policy issue and the level of government that is handling it. And again, the problem runs both ways. On one side, in a vast, diverse country, local matters are rarely managed very well from a single center. (The national government has no comparative advantage in providing education. Why, after a half-century of appalling results, is it still trying?) On the other side, California can do nothing useful about global warming. If it wants to ruin itself over this fetish, that is its privilege. But why is it allowed to dictate national policy and to impose costs on the rest of us, just to make it feel good about itself?

A second problem of bilateral overreach: its usual form is not the substitution of a federal monopoly for local control, or vice versa. Rather, bilateral overreach produces joint, concurrent government powers over private affairs. In the regulatory domain, private conduct becomes
subject to multiple, often conflicting impositions: the states and the feds “compete” by heaping regulatory burdens on the commerce of the United States. There is no stopping point, and the toughest regulator sets the rules of the game. Likewise, in the fiscal arena, the joint exercise of federal and state powers under spending programs—“cooperative federalism,” as it is called—drives the growth of government. Federal subsidies systematically induce state and governments to overspend, both because they do not want to “lose” federal dollars and because they expect that the federal government will bail them out of trouble (as it has done repeatedly, through Stimuli and other means). The system produces a level of spending that neither the federal government nor even the most profligate state would adopt if individual governments had to match their spending with taxes.

The common theme behind these dysfunctions is the erosion of political accountability and transparency. Under a federalism of bilateral overreach, everything government puts on offer is a joint product. The projects will consistently fail—even if all the institutions and their occupants are competent and well-intentioned. Failure, in turn, consistently produces an orgy of bureaucratic blame-shifting: state officials complain about “unfunded mandates”; the feds, over state irresponsibility and incompetence. The rest of us are left confused and impotent.

Our federalism did not create Hurricane Katrina. However, it created the infrastructure that rendered New Orleans defenseless; spectacularly botched the response; and spent upwards of $140 billion on a “rebuilding” effort, most of it wasted. The only upside was the storm itself: physical annihilation gave New Orleans an opportunity, unique among urban districts, to create schools that actually work—until the intergovernmental monster that produced the pre-Katrina school system recreates itself.
There is nothing at the end of this federalism road but ruin. We are not going to fix the problem by yelping about federal usurpation or the Tenth Amendment; we will have to reform our institutions. And to that end, we first have to re-think and re-appreciate our constitutional structure.

**What Federalism? Competition and Cartel.**

Against the depressing backdrop I have just sketched, it may seem tempting to give up on federalism altogether. But that is not my point. First, it isn’t an option. James Madison was keenly aware of federalism’s pathologies, and he urged the Philadelphia Convention to abolish the states. For good or ill, though, he lost the debate, and so we are stuck with the states. Second, the right *kind* of federalism would actually do considerable good. What is needed is a clear-eyed recognition that federalism is a “they,” not an “it.” Depending on its form, it can be a blessing or a curse. The question, therefore, is not whether we want “more” or “less” federalism. The question is what *kind* of federalism we should aspire to and, as a constitutional matter, are supposed to have.

Let’s call the good kind “competitive” federalism. Its central virtue is *competition among states*. This federalism relies on exit and mobility—of capital, and of labor—as a means of disciplining government. Very roughly, competitive federalism is the federalism we had from the Founding to the pre-New Deal period. Its general theory and contours are straightforward. Matters that are genuinely national should be committed entirely to the federal government. National defense, the regulation of network industries (such as airlines or the internet), and perhaps large-scale redistribution (such as Social Security) are the classic examples. The assignment should be *exclusive*, so as to avoid the regulatory duplication, gamesmanship, and
intergovernmental collusion that characterize our federalism. On the other side, lots of things should be left exclusively to the states—exclusive of any federal regulation, and exclusive of any federal funds. This principle limits the federal government and, more importantly, forces state competition. Each state’s citizens will have to tax themselves for whatever level of public services and redistribution they want. When a state offers a lousy mix of taxes and services, productive citizens and businesses move to a more hospitable jurisdiction. Over time, one hopes, states that don’t give citizens their money’s worth will learn their lesson.

Read the Constitution against this baseline: the architecture, and every single clause within it, makes perfect sense. Congress has powers where national uniformity is at a high premium—national defense, interstate commerce, naturalization, patents, and so on. States are prohibited from adopting laws that are particularly likely to interfere with a competitive federalism order—import-export duties, paper money, the abrogation of contracts, and so on. And the federal courts’ jurisdiction, outlined in Article III of the Constitution, is calculated to sustain that order. Supposedly sophisticated people often ask why we should pay any attention to the designs of long-dead people, for a long-gone agrarian society of some four million people. The answer, at least with respect to federalism, is that the Founders wrought well, and probably better than they knew. Competitive federalism is a terrific prescription for a big, diverse country with a highly mobile citizenry and a national government that responds poorly to democratic demands. In other words, it is a terrific prescription for the United States of today. It’s the good federalism. We need more of it.

The bad federalism is the one we have. The Supreme Court calls it “our federalism”; I call it “cartel federalism.” Cartel federalism is competitive federalism, upside-down: it systematically suppresses healthy policy and economic competition among states.
The federal minimum wage is a state cartel. On one side, it protects states with high-wage industries. On the other side, states that would like to compete for business—and to reduce unemployment, especially youth unemployment—are effectively prohibited from doing so.

The Clean Air Act is a cartel. Of course, you need federal law to prevent transboundary pollution; but that is not what the Clean Air Act actually regulates. What it regulates is local pollution in certain places, such as the Los Angeles air basin. Los Angeles has many advantages, from sunshine to beaches—and the disadvantage of natural conditions that tend to produce bad air. Left to fix that problem on its own, Los Angeles would have to build mass transit, impose steep commuter taxes, and take other draconian steps that would be very costly and inconvenient for its citizens and businesses. Its competitive position would deteriorate. Thus, the federal Clean Air Act imposes air quality controls, such as car emission standards, that don’t really solve Los Angeles’s smog problem but impose costs across the country, including states (like Idaho) that don’t need the controls. When you buy a car with thousands of dollars of emission control equipment, you’re not paying for clean air; you’re paying to let Congressman Waxman’s millionaire constituents keep and drive their Bentleys.

One could endlessly multiply the examples, from dairy cartels to surface mining to ObamaCare. But my two examples illustrate both the general pattern and two additional features of cartel federalism. The minimum wage example illustrates our federalism’s one-directional nature. States that for one reason or another want to set a higher minimum wage may still do so, and many do. In other words, our federalism does not prohibit all state competition—only state competition that threatens to produce smaller, more disciplined, less interest-group driven government. The Clean Air Act illustrates the “cooperative” nature of cartel federalism. For the most part, the act is implemented by states, not by federal bureaucrats. That way, when
environmentalists complain about smog or businesses about excessive burdens, federal and state officials can blame each other. Who is actually responsible? Everyone, and therefore no one. Every major regulatory statute operates on this principle.

Equally pervasive are fiscal federalism cartels: instead of letting states fund programs from own-source revenues, under competitive conditions, Congress collects taxes from citizens across the country and then sends them to state and local governments. Medicaid, education, welfare, and countless others operate on this principle. The programs usually require states to comply with federal funding conditions and to match the federal funds, but they are driven by fiscal incentives. No state would devote 25 percent of its budget to Medicaid if it had to tax its own citizens for the cost. But states are evidently willing to tax themselves for half the cost because if they don’t, they leave federal dollars on the table. And so every state ends up with a level of spending that no state would adopt on its own.

Forget the demagogy and the histrionics about the dawn of socialism: to the extent that our system of government is capable of socialism, we already have it. We call it federalism.

**Constitutional Roots, and Inversion**

My distinction between the right, competitive federalism and the wrong, cartel federalism may strike you as something that a clever academic or Washington consultant would crank up. But it is not my invention; it is as old as the Constitution. James Madison never used the word “federalism” in our modern sense. Rather, he described our constitutional system as a “compound republic.” His term has long disappeared from our political lexicon. In substance, however, the “compund republic” is perfectly congruent with what I, along with all
contemporary federalism scholars, call “competitive federalism.” (By that same token, what I call cartel federalism was the leading Antifederalists’ program.)

This is my favorite subject, and I would love nothing better than to regale you with it for another two hours. To your good fortune, however, there is neither time nor need for it. As I have already suggested, the text of the Founders’ Constitution demonstrates the point. The Constitution prohibits states from impairing the obligation of contract. It commands each state to grant outsiders the same privileges and immunities that it grants to its own citizens. It prohibits states from levying duties and imposts on imports or exports. For good measure, the Constitution explicitly prohibits states from forming cartels: no state may form a compact with another state without the consent of the Congress. All of these prohibitions are calculated to protect a competitive federal order. And to protect them against evasion the Founders created a federal judiciary with expansive jurisdiction over the nation’s maritime and interstate commercial affairs (diversity jurisdiction, as the Constitution and the lawyers call it). The protection of a competitive federal order is the Supreme Court’s central task—in fact, the only task that the Constitution unmistakably entrusts to it.

If you don’t trust the Founders or the constitutional structure, maybe you’ll trust Justice Louis Brandeis, author of the famous metaphor of states as “laboratories of democracy.” States, Justice Brandeis wrote, should be allowed to experiment “without risk to the rest of the country.” The proviso is all-important: it encapsulates the competitive baseline. It is violated when states “experiment” by heaping burdens on interstate commerce, or “experiment” with expansive welfare state programs on our collective dime. It is also violated when Congress or the Court prohibits state competition in areas where no risk to the rest of the country is visible—labor relations, for example, or education, or marriage law.
Against this backdrop, our constitutional federalism order seems not just forgotten or eroded; it’s been turned upside down. All the domains in which states could usefully compete—labor law, local environmental standards, family relations, criminal law—are subject to federal superintendence. States may differ and “experiment,” but only underneath the umbrella of a federal cartel. At the same time, state power has been unleashed in domains where its exercise poses monumental dangers to the rest of the country—control over the commerce of the United States, expensive social experiments on our collective federal taxes, wild gambles on federal dollars. And everywhere you look: Washington and the states cooperate, collude, and conspire. Political responsibility has disappeared.

Federalism Mistakes, and Remedies

How did this happen? If the “what federalism” question is so obvious, why does it seem so esoteric? If competitive federalism has such a firm constitutional tradition and such obvious attractions, how and why did we end up with the bad, anti-competitive, cartel federalism?

Again, these are my favorite subjects. Again, though, it’s too late to noodle over the history—too late in the evening, and too late for the country. We have to remind ourselves of, or rather re-learn, the Constitution’s true, competitive logic, and we have to do so very soon.

This is very, very hard. You have to know more about our Constitution and its federalism than the Tenth Amendment, or whatever some politician wants you to think it means. You have to understand that federalism comes in different forms—some very good, others very bad. It’s a whole lot easier to rail against Washington and to spout “states’ rights” slogans. Poor James Madison learned this in his own lifetime: it’s why his “compound,” competitive republic never gained any traction.
What would it take to re-approximate the constitutional design? Foremost, we would have to forget the how-much-federalism question and instead put the “what federalism” question front and center. And the first order of business is to stop being so damn high-minded about federalism’s supposed “principles” or the supposed “balance” between Washington and the states. Let’s be more selfish, skeptical, and ideological—in a word, more realistic—about our institutions and our politics.

I recognize that my advice sounds like yet more politics-as-usual, straight from the Beltway sewer. But this is not so. Every part of my prescription—let’s be selfish, skeptical, and ideological about federalism—has a rock-solid constitutional foundation.

Here’s what I mean by selfishness: the high-minded, “principled” federalism talk is about how much federalism—about the federal balance and about protecting the states’ constitutional prerogatives. The selfish, crass, utilitarian question is, what’s in it for me as a citizen and taxpayer? Lo and behold, that’s the question the Constitution wants you to ask. The supposedly “principled” question isn’t just beside the point; it’s the proverbial wolf in drag. And the Founders knew the beast and its disguise. Here’s a quote from a tract written in early 1788:

The adversaries to the plan of the [constitutional] convention … have exhausted themselves in a secondary inquiry into the possible consequences of the proposed degree of power to the governments of the particular States. But if the Union … be essential to the security of the people of America against foreign danger; if it be essential to their security against contentions and wars among the different States; if it be essential to guard them against those violent and oppressive factions which embitter the blessings of liberty, and against those military establishments which must gradually poison its very fountain; if, in a word, the Union be essential to the happiness of the people of America, is it not preposterous, to urge as an objection to a government, without which the objects of the Union cannot be attained, that such a government may derogate from the importance of the governments of the individual States?

Actually, it’s not “secondary” or preposterous—not if you take the position of the folks who have babbled throughout the ages about states’ rights and federalism’s balance: to them, the
importance of state governments is terribly important indeed. But there’s an answer. The passage
I just read is from Federalist 45, written by James Madison. Here is how it continues:

> Was … the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands spilt, and the hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the government of the individual States, that particular municipal establishments, might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty?

In all of Madison’s writings, there is no equally passionate language. (Even his letters to his beloved Dolley sound like they were written by her accountant.) The answer he is trying to evoke is: Hell, no. We did not fight and bleed and die for the dignity of states and their politicians. Here is what our ancestors fought and bled and died for (again, the words are Madison’s):

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> [T]he public good, the real welfare of the great body of the people, is the supreme object to be pursued; and [that] no form of government whatever has any other value than as it may be fitted for the attainment of this object

If the states can advance the “real welfare of the great body of the people,” good for them. If they stand as a hindrance, ignore them or get rid of them. If you’re interested in federalism, ask not what you can do for the states; ask what the states can do for you: that is the fundamental calculus and the irreducible premise of the United States Constitution.

Now of course: the apostles of “more federalism” assure you that they’re advocating state power not for its own sake but for ours. Decentralization, they say, will bring government closer to the people. It will mean more democratic, accountable, responsible government. This leads to my second prescription: be afraid. Or at least, be skeptical.

First, the notion that decentralization automatically means better, smaller government runs directly counter to James Madison’s principal argument for the union: the point was to constrain state politics, not to liberate it. Second, I cannot think of a period in American history
when local self-government has produced a net gain in freedom or human welfare, except perhaps for the Virginia aristocracy and anyone else “with the misfortune to have been born a slaveholder” (as one of Mr. Jefferson’s freedom-loving descendants put it). The third and most decisive point is the one I have urged throughout—the crucial difference between competitive and cartel federalism.

Why should we expect state and local politicians to be better-behaved than the national government? Why aren’t they just mice training to become rats? The only plausible answer is that states, unlike (for the most part) the national government, have to operate under competitive conditions. There is nothing good about states as such. The good thing is that there are fifty of them; if you don’t like one, you can go to another without surrendering your citizenship. But none of this holds when states can freely exploit national commerce, or fund their social programs from general revenues, or raid the national treasury. Under those conditions, which are ours, more federalism will make things worse.

My prescription—“be skeptical”—has another facet (and I promise that this will be the last theoretical argument I will inflict on you): more often than not, proposals to restore the states to their supposedly rightful position reflects an intuition that states, unless they are corrupted or oppressed by the national government, will manfully defend their citizens’ rights against federal usurpation.

Since when? The general pattern of our federalism isn’t state resistance to federal ambition; it is state demand for federal intervention. Look at the famous Supreme Court cases that first struck down and then routinely sustained the nationalist innovations of the New Deal—*U.S. v. Butler, Schechter Poultry, Steward Machine Company, U.S. v. Darby, Wickard v.*
Filburn: as the captions suggest, each and every one of those cases was brought by (mostly small) business owners, not by states. In each case, states supported the federal laws.

The pattern hasn’t changed. In an earlier life, I founded and directed the law firm that litigated United States v. Morrison, one of only two modern cases in which the Supreme Court found a federal law to exceed the powers of Congress. One state, Alabama, supported our position, in a terrific brief by then-Attorney General and now-Judge Bill Pryor. Thirty-six states filed a joint amicus brief in support of the federal law. “Dear Feds, come govern us. Dear Justices, listen to us because we are too wretched to govern ourselves.”

Read any press release from the National Governors Association or any other state association: they all they the same thing. They do not say, “let us compete.” They say, “Give us more money, and leave us alone. Let us be Greece.” Trusting states to defend the good, competitive kind of federalism is like trusting the Fortune 500 to defend free markets. They will make the right noises when it suits them. But in truth, they hate competition, because it has a nasty way of eroding their profits. Corporations’ holy grail is a seamless, government-sponsored cartel. In that perennial quest, corporations employ armies of lawyers and lobbyists to agitate for laws, regulations, and fiscal transfers that will hamstring their competitors—an ethanol mandate here, a solar energy subsidy there, a fuel efficiency regulation elsewhere. They and the national government aren’t antagonists; they are joined at the hip. States behave the same way, to the same end, for the same reasons. Competition among states makes it harder for politicians to do favors for their friends and constituents; therefore, state politicians hate it. Conversely, every federal food stamp or housing subsidy is a benefit that state officials do not have to finance from their own tax revenues, and so they lobby for a bigger federal welfare state, so long as they get to hand out the money. You can always trust states to defend their own privileges, just as you can
always trust corporations to defend tax exemptions for the CEO’s private jet. But you don’t want
to trust them in the defense of a competitive order.

This brings me to my third and final prescription: be ideological about federalism. The
states default position, we have just seen, is “cartels at every level.” But just as competition
survives in the private economy because some company finds it to its temporary, opportunistic
advantage, political competition may survive if and when individual states find it to their
advantage.

You may have followed the controversy over Boeing’s decision to locate a production
facility in South Carolina, a right-to-work state, rather than its home state of Washington, which
has compulsory union laws. If so, you also know of the National Labor Relations Board’s
insistence that the company’s decision constitutes an unfair labor practice, which is prohibited by
federal law. Note the ideological dimension: this is not a conflict between the big, bad, Obama
government and the virtuous states. It is a conflict between right-to-work states and union states,
who support the NLRB.

If you believe the newspapers and the expert commentary, it’s all about whether Boeing’s
decision does or does not violate some subsection of the National Labor Relations Act, and
regulations promulgated thereunder; whether Boeing is or is not a good corporate citizen; and
whether it has been sufficiently nice to its unions. I haven’t followed this any more closely,
because I fail to comprehend what a grown-up federal country is doing with a National Labor
Relations Board in the first place. Labor law is precisely the sort of issue where states should
experiment; where voters should make their own decisions, state by state; and where everyone—
employers and employees, liberals and libertarians—can sort themselves into a state they like.
Let competition reign. Let freedom ring. Let’s hear it for federalism. But you can’t get to that
point unless you first understand that this isn’t about how much federalism we want; it’s about the kind of federalism we want.

**You Against Yourself**

I have tried to impress upon you an intuitive, constitutional consideration: what federalism, not “how much,” is the central question of our politics. It is the question that our Constitution wants us to ask, and to which it supplies an answer. Ignore the question: any effort to return power to the states may do more harm than good. I hope to have persuaded you that this is not an abstract, high-falutin theoretical concern but a menace to the country.

Unfortunately (for me at least), the odds of making the insight stick are awful. James Madison couldn’t do it, and neither can I. (I am way taller, but not nearly as smart.) But I don’t want to be the only one to leave this hall in a somber mood. So let me leave you with a depressing thought: *even if* you were to hold on to my thought—Mr. Madison’s thought—in the states’ rights drivel that will continue to wash over you over the next fourteen months, you won’t be able to do anything about it as a citizen and voter.

Suppose it’s 2013, and President Perry persuades a Tea Party Congress to repeal the Dodd-Frank Act (a platform item not just on Mr. Perry’s program but on every Republican candidate’s agenda): you have neither deregulated the economy nor even decentralized its regulation. You have just committed the nation’s financial system to the tender care of Eric Schneiderman. None of you know Mr. Schneiderman. You have never voted for him, and you never will: he is the attorney general of the State of New York. But because he is the most ambitious regulator, and because no financial firm can escape New York, only the national government can stop him. National aggrandizement, however—telling states what they can and
cannot do—is what you have just voted against. Your vote for federalism and freedom will be a vote for whatever Mr. Schneiderman’s agenda may be. God help us all.

Or suppose we follow the recommendation—again, of all Republican candidates, as well as Congressman Ryan’s budget plan—to restore federalism by turning Medicaid and other federal programs into block grants: instead of being ordered about by federal bureaucrats, states will get to design and run the programs in accordance with their needs and at much lower cost, or so we are told. That looks sensible to sensible voters in sensible states—Indiana, Utah, South Carolina, Idaho, for that matter. But a national policy that allows good states to do good things also allows bad states to do bad things. California, which all by itself is much bigger than all good states combined, will hand the block-granted money to its unions, toss the most destitute Medicaid recipients into the street, and then complain about federal “mandates.” Two Washington Post columns later, the funding will be increased. But who will call the bluff—President Perry, who ran on the states’ rights platform and, specifically, on block-granting Medicaid? The Republican majority in Congress? California legislators? Not a chance. Meanwhile, what should your governor or senators do? Support a “states’ rights” scheme that allows California to ruin the nation—or, to forestall that result, insist on rigid federal rules that then constrain perfectly sensible, cost-effective policies in Idaho? Damned if you do, damned if you don’t. You are going to get a bigger, more intrusive, less efficient government either way.

We like to think that our constitutional stories must have happy endings: We are Americans. We rise to great challenges. Distracted and confused in ordinary times, we are capable of heroic sacrifice when it is called for.

All true—but also beside the point: the sheer insidiousness of our politics, and the harsh fact that regardless of my voice and your vote, our institutions will lurch from one dysfunction to
the next. Frankly, I don’t know what to do about it. What I do know, one last time, is the need for a renewed appreciation of the point of departure: *what* federalism, not how much, is the central question of American politics and constitutionalism. The question, I have remarked, is as old as the Constitution, but in fact, it is older still. “There is something noble and magnificent,” Alexander Hamilton wrote on July 4, 1782,

> in the perspective of a great Foederal Republic, closely linked in the pursuit of a common interest; tranquil and prosperous at home, respectable abroad; but there is something proportionably diminutive and contemptible in the prospect of a number of petty states, with the appearance only of union, jarring, jealous and perverse, without any determined direction, fluctuating and unhappy at home, weak and insignificant by their dissentions, in the eyes of other nations.

The spirit of a diminutive, contemptible, petty, jarring, jealous, fluctuating politics, Hamilton knew, would survive the Founding. It would have to be killed, he said; or else, it would kill the Constitution. The struggle has continued ever since; and by all indications, the spirit is alive among us, seeking the ruin of souls. The question before us is whether we are still capable of rediscovering our more noble and magnificent traditions, and the constitutional conditions of a more tranquil and prosperous politics.