

The Resilience of the American Federal System

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Abstract

Federal systems of governance have the *capacity* to be robust—meaning that despite internal and external changing circumstances, they can continue to produce the benefits of a decentralized but internally coordinated polity. Whether or not a federal system is robust is a function of its institutional design and federal culture. The American federal system, distributing authority between levels of government, has been remarkably resilient, failing only once during the past two centuries. Its resilience surprises many who keep expecting it to wither away as the national government grows. In this chapter I make two contributions. In the first part, I review the claims of the American federation’s inherent centralization, and suggest the evidence as well as institutional and cultural reasons why federalism may still be meaningful in the American context. Second, I present the science of federal robustness: its key is its adaptability, provided by a set of safeguards that jointly protect federalism’s boundaries while permitting experimentation around the edges. Future progress in the study of federalism obliges us to move beyond the standard equilibrium-based analysis to take a more dynamic view of federal system design and operation.

This view of chaos in government is not one of despair. The system of American government flaunts virtually all tenets of legislative responsibility and administrative effectiveness. It appears always to be wasteful of manpower and money. At times it threatens the very democracy it is established to maintain. But it works, it works—and sometimes with beauty. (Grodzins, 1966: 7)

The American federal system is an artifact of circumstances at the founding, has waxed and waned and suffered one near-death failure, but on the whole, has proven remarkably resilient. Over the past half-century a number of great scholars of the American federation have been ready to declare it functionally dead. Instead, it seems to fluctuate and is adaptable. This essay offers an overview of this political science literature.

It is helpful to begin with a basic definition of federalism. Halberstam (2012), for example, points to the “coexistence within a compound polity of multiple levels of government each with constitutionally grounded claims to some degree of organizational autonomy and jurisdictional authority.” And, although perhaps not logically required, these compound polities are almost always territorially divided into specific states or provinces. Madison (*Federalist* 39) and Bednar (2009) further tie federalism to the public by emphasizing the importance that each level of government have a direct policy-making relationship with a public that holds it directly accountable for its decisions.

I divide this essay into two related sections. In the first I take up the argument that American federalism is inherently centralized, that it is, to adopt Gerald Rosenberg’s language in another context, a “hollow hope” with regard to withstanding the forces of nationalization. In exploring that debate I discuss the importance of the distribution of authority and the variety of safeguards—judicial, but especially extrajudicial—that uphold it. The diversity of the safeguards, and their individual and collective imperfection, permit fluctuations to the distribution of authority without pinning responsibility for those changes on any single author.

In the second section I describe the literature that argues that this fluctuation can be beneficial. Minor violations of federalism’s boundaries give the union experience with adjustments to the distribution of authority. From that experience, a population can learn about useful changes to the authority assignment, or end the experiment, with renewed confidence in the boundaries as already set.

1 Centralization and Decentralization in the American Federal System

1.1 The Centralization Claim

In 1955, William Riker wrote of the insignificance of the states. The United States federal system was centralized, by which he meant that all important decisions were being made by national representatives. He contrasted this characterization against a peripheralized federation, where the states make the important decisions. According to Riker's account, at mid-century the U.S. states were nearly administrative details. Riker reasoned that peripheralized federations were doomed to rupture, and the natural tendency of centralized federations would be to unify, to concentrate authority at the national level. The American federal system was inefficient and worse: it enabled pockets of racism to persist (1964).

Riker was not alone in his assessment. It was common during the post-war period to describe the American federation's growing centralization; federal government dominance was viewed as essentially inevitable. For Elazar (1962), centralization was a product of American expectations and could be found in early federal-state partnerships. Efficiency demands (1976:9) pushed the federation to an ever more centralized state. Grodzins (1966) noted the "marble cake" nature of the American federation, where the authorities of federal and state governments are blurred. As the central government grows more efficient it dominates the state governments in any areas of shared authority. More recently, Feeley and Rubin (1993, 2008) argue that meaningful federalism is dead, and our lingering fascination with it is a "national neurosis". Kollman (2013) offers fresh analysis to reach the same conclusion regarding the inevitability of centralized power.

Nevertheless, in the past decade the U.S. states have played meaningful roles in determining the shape of many domestic policies, whether through co-decision-making, backroom lobbying, or open, media-celebrated battles. The federal government could wipe out the burgeoning Colorado marijuana trade, but it hasn't; it stepped back from blocking the progression of gay marriage; it has made concessions to the states in affirmative action policy, gun control, abortion policy, and immigration policy. The federal government copied a state's policy when designing its most ambitious domestic policy in a generation, the Affordable Care Act, and state pressure within Congress

stymied the federal government’s attempt to reduce educational inequities, the No Child Left Behind Act. Despite attempts, there is no required common K-12 educational standards, no common eligibility for health insurance for the poor, and states have won the ability to create their own poverty relief programs using federal funds. The federal government depends on state environmental protection agencies to enforce its signature environmental standards, giving states the discretion that comes with implementation. Heather Gerken and and Jessica Bohlman-Pozen have coined the term “uncooperative federalism” to acknowledge the ways that states maintain the practical power to put significant roadblocks in the way of implementing national policy. States enjoy significant, meaningful autonomy, shaping policies that matter to the public.

1.2 Federal Goals and the Importance of Boundaries

The centralization debate is preoccupied with the boundaries of federalism—the distribution of authority between national and subnational governments. These boundaries are of fundamental importance because, simply put, they animate the nature of the federal system. The allocation of authority between national and state governments affects what policy is generated and the overall health of the federation. These boundaries are drawn thickly, with a lot of contention. Most authorities are coveted, but some are tossed between local, state, and federal governments like a hot potato: examples of undesirable responsibilities include poverty relief, road maintenance, and toxic waste cleanup and disposal.

As noted at the outset, most definitions of federalism cite the constitutionally allocated distribution of authority to national and subnational levels of government. Lawyers tend to emphasize formal constitutional constraints (often enforced by courts). Political scientists are apt to focus instead on the empirical relationships between the units; it is a matrix of power, not a hierarchy—it is noncentralized (eg. Weare 1964, Elazar 1981, 1987, Riker 1964). “Decentralization” may or may not be constitutionally required; the point is that it exists—and to understand why it persists. Ostrom (2008) applies his influential theory of polycentric governance—where decision-making authority is dispersed among actors and agencies and democracy emerges from the bottom up—to the American federal system and argues that the federal principle of overlapping, polycentric decision points is a condition for democracy to thrive. Elazar (1981, 1987) writes that as long as the public

holds a non-hierarchical, noncentralized view of governance then federalism can survive.

As a phrase, though, “boundaries of federalism” is misleading, implying too much of a clean separation between national and state authorities. The language taking us back to an era of legal formalism, captured in the term “dual federalism,” where the two levels of government were treated as if they acted in distinct spheres. However, Grodzins’ (1966) terrific marble cake analogy captures the essentially shared nature of authorities—the boundaries are not neat like a layer cake, but are thick and blurry, ill-suited to the rigid categories of legal analysis. This intergovernmental cooperation extended well back into the nineteenth century (Elazar 1962).

Curiously, the boundaries that the average person on the street associates with federalism—the state lines—have received far less attention from federalism scholars, despite the allocation of authority those territorial divisions imply. As Madison often wrote, the Constitution rides the tension between a National government—uniting a single national people—and a federal one—uniting states composed of citizens with distinct subnational identities. In the American federal system all states are treated equivalently, in contrast with some other federal systems where the center negotiates a separate power-sharing relationship with each subunit (Benz 1999, Congleton 2006, Swenden 2002, Zuber 2011). The explicit recognition of the states as a fundamental element of the union causes popular representation to be grossly distorted from a one-person, one-vote principle, and this characteristic has motivated analysis, stirring democratic theorists to denounce American federalism as anti-democratic. The late Robert Dahl, asking “How Democratic is the United States Constitution?” (2003) answered, in effect, “not very much,” presenting the malapportionment of the Senate as Exhibit A of his argument. Of course, every student of the Philadelphia convention knows that this so-called “Great Compromise” was essential to creating the Constitution.

The original Constitution required that senators be appointed by state legislatures. The turn to popular election in the 17th amendment worries theorists given the apparent loss of a strong concern in Congress for the preservation of state prerogatives (Rossum 2001). Contemporary senators will care about the flourishing of state political institutions only if their constituents do, whereas legislative appointment created incentives to be sensitive to the desires of state officials, at least in theory.

In the American system, federalism was devised by the founders as a

means to achieve the goals of mutual security, growth through internal trade, cooperative democracy, and personal liberty.¹ Federalism is a tool, a means of organizing policy-making to meet these broad goals. One might imagine turning a dial that distributes authority to the federal or state governments: turn it toward centralization, and policies grow more coordinated, standardized, and able to capture economies of scale. Goods and people circulate freely without internal legal barriers. Turn the dial toward decentralization, and policies grow more specialized, designed to fit the particular needs of local populations. Local differences are tolerated, and other communities can copy successful policy experiments (Brandeis 1932). People can relocate to areas with policies that suit them best, creating a competition between governments to provide policy honestly and efficiently (Tiebout 1956). Moreover, the ability of states to elect their own officials creates a potential cadre of leaders able and willing to challenge national government overreach (*Federalist* 51, Hayek 1945, Filippov et al 2006). In the ideal design, the dial would be set “just right”, at a balance between centralization and decentralization that captures as much of the benefits of both as possible.²

The distribution of authority as set out in the Constitution embraces multiple meanings (Rakove 1996). Few powers are explicitly “reserved” to the states, in contrast to other national constitutions that, for example, place in states an exclusive control over education or language. This fluidity of meaning meant that bargaining did not end once the Constitution was ratified. Indeed, it has served as a constant of American politics. Opposing forces each try to manipulate institutions, including, of course, judges themselves, to interpret rules in their own favor.³

Although the distribution of authority is the product of negotiation and

¹In other work I review at length the literature laying out the theory for how federalism might help a society reach its goals. Bednar 2009 esp. ch 2; Bednar 2011, Bednar and Parinandi 2014.

²See, eg., Oates’ Decentralization Theorem: “In the absence of cost-savings from the centralized provision of a [local public] good and of interjurisdictional externalities, the level of welfare will always be at least as high (and typically higher) if Pareto-efficient levels of consumption are provided in each jurisdiction than in *any* single, uniform level of consumption that is maintained across all jurisdictions” (Oates 1972:54). In plain English, Oates advises that federal unions be centralized only as much as required to coordinate policies that have effects that spill across political boundaries; otherwise, decentralize to satisfy local wants.

³Rakove 1996, Riker 1984, 1986, 1996, Filippov et al 2006; Filippov 2005 explains well how Riker ties the deliberation of self-interested individuals to constitutional outcomes.

continued manipulation—rendering the “just right” ideal a Solonic dream—the distribution of authority matters. It is set for a reason and has real policy effects, with consequences that affect the public welfare. Even as they change—the subject of this article’s second part—the rules must be upheld. We turn to the safeguards of federalism next.

1.3 Protecting the Boundaries

Conventionally, the U.S. Supreme Court is regarded as the chief umpire of disputes regarding the distribution of authority. The American federal history is often told through significant Court decisions, and for most of that history, the Court oversaw authority migration from the states to the national government. It established national government supremacy⁴ and launched a long line of decisions to recognize the national government’s authority to regulate interstate commerce⁵ and then broadened the meaning of commerce to include labor relations⁶ and civil rights.⁷ Perhaps, as John C. Calhoun had suggested, one ought not be surprised by this outcome inasmuch as the justices are appointed by the President, even if they must be confirmed by the Senate. Still, one would scarcely expect the President or the Senate to put in office persons antagonistic to the nationalist enterprise (Calhoun, 1832).

To be sure, there were several decades during which the Court struck down a number of congressional statutes on the grounds that they invaded the “reserved powers” of the States, and in recent years the Court, as the result of Republican appointments during the Nixon, Reagan, and both Bush administrations, has proven friendly to state petitions for increased authority or protection from federal intrusion. Thus it has limited Congress’s use of the commerce clause,⁸ protected the states from federal coercion,⁹ defended

⁴ *McCulloch v. Maryland*, 17 U.S. 316 (1819).

⁵The initial case was *Gibbons v. Ogden*, 22 U.S. 1 (1824).; *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941) established federal exclusivity.

⁶*National Labor Relations Board v. Jones & Laughlin Steel Corporation*, 301 U.S. 1 (1937).

⁷*Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964) and *Katzenbach v. McClung*, 379 U.S. 294 (1964).

⁸*United States v. Alfonso D. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000).

⁹*New York v. United States*, 505 U.S. 144 (1992), *Mack and Printz v. United States*, 521 U.S. 898 (1997).

its sovereign immunity from suit,¹⁰ and effectively restored state autonomy in electoral law.¹¹ It has made room for states to pursue different policies regarding restrictions on access to abortions and affirmative action bans.¹² Most important, perhaps, is its willingness to limit the ability of Congress to impose onerous conditions on the states as a condition of receiving federal funds.¹³ Each of these decisions marks a turning point in the national/state relationship.

Undeniably these shifts in doctrine are meaningful, but that does not imply that the Court is responsible for shaping American federalism. As the reference to Republican appointees should make clear, the Court reflects important changes in the American political system, including the election of Republican presidents far more antagonistic to expanding national power than Democratic presidents since Franklin Roosevelt. It is inaccurate to infer that the Court is exclusively—or even primarily—responsible for shaping American federalism. Instead, other forces may lay the groundwork, with the Court finishing a process begun in other arenas, by other agents.

Federal systems are highly complex, with many interconnected and overlapping components. Because of their complex, interconnected nature, the character of the federal system can change rapidly. Attention naturally turns to whatever event immediately preceded the change as the likely causal factor, but in complex systems, there are often underlying changes that precede it. Big changes may start with small events—and those small events may not only be necessary precursors, but be responsible for the direction of the change.

One way to think of the difference between seemingly small decisions and those that make significant changes is by analogy. Consider a ball resting on the flat top of a hill. It can roll around on top of the hill, but at some point, it will descend following a single downward path (among many potential paths). As it falls it will speed up at the steepest part of the slope. However, the direction that it takes down the hill was determined when it started rolling down the side, even though at that point it was moving rather slowly. These slow changes near the top are most important in determining the path that it takes; once rolling down the hill, the ball's direction is set. To focus

¹⁰*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

¹¹*Shelby County v. Holder*, 570 U.S. ___ (2013).

¹²*Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992); *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. ___ (2014).

¹³*National Federation of Independent Business v. Sebelius*, 567 U.S. ___ (2012).

only on the steep descent misses the importance of earlier, if apparently less dramatic moments. These moments may exhibit only marginal changes in the characteristic of the system, but be critical for the future shape of it.¹⁴

Theorists of popular constitutionalism observe that behind Court decisions is a public will; the Court may validate or express vaguely formed public impressions.¹⁵ Underlying social pressures and approval, manifested, for example in social movements or elections, may create an environment where it is possible for the Court to make pivotal decisions. Small policy adjustments, or new ideas circulating in political discourse, may not alter the distribution of authority in any significant way, but these first steps give the public a way to shift its perception about the appropriate distribution. They lay the groundwork for bigger, more formal change. Seen this way, major Court decisions or legislative acts—those described as “pathbreaking”—are nearly inevitable once cultural shifts lay the groundwork. The direction of change was already set by cultural forces, and the only question is how far and how quickly the Court will push the federation in a new direction.

Popular safeguards—the capacity of the public to enforce the distribution of authority—accords with the intuition of a wide array of federalism theorists that the ultimate force shaping federalism is the existence of a federal culture.¹⁶ The Framers repeatedly mention the ultimate backstop to the federal bargain would be “the people themselves”. In wrapping up the *Federalist*, Hamilton mentions not the courts, but the people as those who would determine whether authorities had been overreached, for example in determining whether a tax was appropriate (Rakove 1996).¹⁷ Despite its theoretically-acknowledged importance, these popular safeguards of federalism are elusive. There exist few attempts to measure them (but see Kam and Mikos 2007 and Cole and Kincaid 2006 and their subsequent surveys).

The safeguard emphasized most memorably in the *Federalist* is *structural*:

¹⁴Introduction to the science can be found in Lamberson and Page 2011. Within political science, both Capoccia and Kelemen 2007 and Herzog 2014 caution against the temptation to focus on large events.

¹⁵See, eg., Kramer 2005, Friedman 2009.

¹⁶See, eg., *Federalist* 46, 51, Riker 1964, Ostrom 1971, Elazar 1987, Weingast 1997, Levy 2007, Mikos 2007, Erk 2007, Bednar 2009.

¹⁷Hamilton wrote: “If the federal government should overpass the just bounds of its authority and make a tyrannical use of its powers, the people, whose creature it is, must appeal to the standard they have formed, and take such measures to redress the injury done to the Constitution as the exigency may suggest and prudence justify.” *Federalist* 33.

fragmentation of national powers and the incorporation of the states in to the federal government’s decision-making (making it both federal and national).¹⁸ When the federal government’s legislative power is separated by bicameralism and checked with an executive veto, policy approval must meet multiple majorities. When states appoint delegates to the federal legislature, federal encroachment is further inhibited. These formal elements of structural safeguards are most apparent, there are important informal channels as well.

Riker (1964) promoted the potential of the party system to prevent centralization. The party system connecting political organizations and candidates can be an important safeguard of the authority boundary. Political parties create interdependencies between local, state, and federal politicians, what Filippov, Ordeshook, and Shvetsova (2004) refer to as *integrated* parties. Federations with integrated party systems will see greater respect for the boundaries of federalism than those with disjointed party organizations because when a politician is dependent on his or her party, she is less likely to pursue policies that would damage the interests of politicians at other levels of government.

In addition to the judicial, structural, political, and popular safeguards, states work informal channels, private and public, to press their interests as Congress writes laws, activity that was celebrated by Columbia law professor Wechsler (1954) and has received much more attention from political scientists in recent federalism scholarship.¹⁹ The early input from the states reduces the extent that federal legislation oversteps its boundaries. Nugent (2009) decisively documents the way that states actively monitor, lobby, and often help to craft legislation. Ryan’s study of environmental law (2011) supports Nugent’s findings; she argues that federal-state bargaining is sufficiently robust that the courts should limit their “safeguarding” activities. Dinan (2011) perceives a similar pattern with regard to the construction of the Affordable Care Act: states provided expertise, used their congressional delegations to threaten to block passage until they achieved desired compromises, and when needed, turned to the public to press federal officials to incorporate state demands. The co-decision-making blurs boundaries of

¹⁸*Federalist* 51, Madison 1999: 40, 41, 110, Wechsler 1954. Note that Wechsler referred to these safeguards as *political*, a tradition that carries on in much of the legal discourse. Given that there is nothing inherently political about these safeguards, in contrast to the next that I describe, I prefer the term *structural*.

¹⁹See, generally, Wright 1982, Krane 2007, and Dinan 2008.

responsibility, making it more difficult for voters to hold their representatives accountable (Bednar 2007).

Depending on the channel used, states may work through structural safeguards (when they are incorporated into decision-making), political (when they work through their party organization), or popular, when they rally their own publics to contradict national action. And in some cases, their actions fall into a separate class of safeguards: *intergovernmental retaliation*, sometimes leading them to cooperate with one another in a collective defense, as revealed by Woods and Bowman (2011), sometimes spurring them to push the boundaries of their own authority when they are displeased with the federal government’s actions (Arizona’s immigration policies, California’s environmental standards, Massachusetts’ health insurance policy). Indeed, one can find revivals of seemingly discredited arguments in behalf of state “nullification” of offensive national legislation or even threats to secede from an overbearing Union.

The chief lesson from this section is that there are many types of safeguards. The judiciary does not drive federalism’s shape; in questions of federalism, it is not the sole interpreter of the Constitution’s rules about federalism. If safeguards are a system, how do they work together, and how well do they work? If federalism is in flux, why—what are the mechanisms that drive its fluctuation? How does the system remain in balance and productive? To answer these questions, we next consider the science of federal dynamics.

2 The Benefits of Fluctuation

In the first section I emphasized the importance of the distribution of authority to the federal system; it is the means for engineering socially-desirable outcomes. Change the distribution and what the government as a whole is capable of doing changes, for better or for worse. Federalism is a complex system, and change is only rarely orchestrated from the top; instead, most often, it happens “from the bottom”—meaning by uncoordinated agents acting in their own self-interest rather than with the productivity of the federal union in mind. The greater the gap between agent self-interest and public interest, the more the federal union is at risk of failure. Our first task is to understand this inherent, inevitable, but potentially problematic change. In this section we’ll look at the current state of the science of federal dynamics

from a complex systems perspective.

2.1 Problems

In a system as complex as federalism, the problem space is multi-dimensional, with many and diverse components, each acting in a different way. The agents—the governments—have different interests, and different capacities, both formally—i.e., their treatment by the Constitution itself—and informally. With different resource endowments, their powers vary with regard to their ability to leverage desirable outcomes or to insulate themselves against costly policies. The diversity and capacity of the safeguards is even more important to take under study. Finally, the nature of the problem environment itself should be taken into account. Thus a proper examination of the federal problem cannot rest within the four corners of the constitutional document, with an analysis of the rules as text, but instead must consider how the complex interaction of diverse parts bring those rules to life.

Opportunism

The boundaries of federalism—the rules about what policy authorities each government has, and does not have—at times require sacrifice on the part of state and federal government who might be tempted to overstep their authority. As with the classic collective action problem, the temptation alone is not the true problem; as long as the product of collective effort (the value of the federal union) is worth more to each member government than what each member government could achieve through overreach, then in theory the union can be sustained.²⁰ The real problem is two-fold: (1) union productivity is not absolutely dependent on the full compliance of each component government, and (2) each government suspects that others might act on its temptation to defect.

²⁰One might even notice that the more interwoven the federal union, the easier it is to overcome the temptation, because less beneficial aspects can be compensated by those considered more useful. As a point of comparison it is worth noting that the European Union, itself a budding federation, does not have the same all-or-nothing nature to its union as the American federation. Shortfalls in one domain prompt member states to exit that particular agreement—as with Great Britain and the European Monetary Union—rather than take the union’s benefits and obligations as a whole, where less beneficial domains are compensated by useful ones, such as the common market.

When the rules are ambiguous, or it is not immediately apparent whether legislation breaks those rules (as is abundantly the case with federalism), the free rider problem is possible. Many federalism theorists equate federalism with a public good provision problem. James Madison himself characterized federalism in free rider terms, revealing the deep influence of Hume and other members of the Scottish Enlightenment on his theory of federalism. Individual states, Madison reasoned, suspicious of the good intentions of others, will be tempted toward noncompliance with the federal rules distributing authority.²¹ This principle has been used to model formally the incentive to break the rules of federalism (Jones, Sanguinetti, and Tommasi 2000, de Figueiredo and Weingast 2005). Bednar (2006, 2009) goes a step further, to conclude that one should not expect perfect compliance with the rules. Opportunism is inevitable. The implication of these theoretical results is potentially devastating for federalism: If states cannot trust one another, federalism might not be attempted, even when all might benefit from it. Or, states might federate, but withhold their compliance defensively, greatly reducing the productivity of the union.

De Figueiredo and Weingast (2005) describe federalism's two "fundamental dilemmas": first, resolving federalism's collective action dilemma between the states, and second, preventing the federal government from assuming all authority. The latter problem, of overcentralization, was the overwhelming concern of the opponents of the Constitution, somewhat unhelpfully dubbed "anti-Federalists." In its modern form, concerns are expressed about "commandeering" of state officials; coercion of states through the spending power, or general encroachment on protected state domains (Bednar and Eskridge 1995). States, too, can overstep their authority, affecting their relationship with the national government as well as with one another. The federal problem is thus triangular, with federal encroachment, state burden-shifting (creation of negative spillovers), and state shirking (overreach or failure to meet its obligations to the union) all potential issues for the union (Bednar 2009).

As helpful as the free rider perspective is, it implies that all noncompliance is devious or at least intentional, but with ambiguous boundaries, boundary-pushing behavior can be unintentional as well. Furthermore, given the complexity of the federal union, it is possible that the assignment of authority may be respected but create unanticipated incentives that distort

²¹See Madison's "Notes on the Vices of the United States," (Rakove 1999). For details of Madison's argument, see Bednar 2009, chapter 3.

the intended effect. For example, as states compete with one another for industries, they may undercut one another's regulatory policies in an attempt to make their state more attractive. Evidence suggests that states do act strategically, taking neighboring policies into account (Brueckner 2000, Fredricksson and Millimet 2002). Texas Governor Rick Perry, for example, has aggressively tried to lure industries from California by emphasizing Texas's ostensibly far more business friendly culture of non-regulation.

The same race-to-the-bottom logic can motivate inefficient redistributive policies. When United States welfare provision was partially decentralized in 1995, many feared that states would reduce their cash assistance programs to avoid being "welfare magnets" (Peterson 1995, Rom, Peterson, and Scheve 1998). Beramendi (2012) uses the possibility of citizen and capital mobility to explain differential redistributive patterns across U.S. regions as well as cross-nationally. Others note the inefficiency of fiscal centralization and intergovernmental transfers. The average U.S. state receives 25% of its revenue as a transfer from the federal government. Fiscal transfers can introduce perverse incentives and spending inefficiencies, including a phenomenon known as the "flypaper effect": money sticks where it hits, and states and local governments spend (and tax) just as much, reducing expected efficiency gains from decentralizing the spending responsibilities (Gramlich 1969, Courant et al 1979).

Nevertheless, interstate competition can promote efficiency and protect citizens. Mobility—of people, firms, or capital—is an important determinant of governmental efficiency (Tiebout 1956). Inman (2007) describes how decentralization might build rights, as citizens can use the threat of relocation to motivate states to respect their rights. Decentralization without citizen mobility can lead to the formation of "subnational autocracies" (Gibson 2012, Mickey 2014).

Without question, state governments and the national government have pushed against the rules that bind their authority, for better and for worse, and whether they intend to redefine federalism's assignment of authority or not.

Imperfect Safeguards

A second challenge for federal systems is the inherent imperfection of the safeguards. We now reexamine safeguards from within a logical rubric, to see how they both reduce and facilitate opportunism.

The basic free rider problem assumes no exterior umpire, nor some internalized, specialized role for agents to be able to determine objectively whether one agent has shirked on its responsibilities. To enforce respect for the boundaries of federalism, constitutions establish (directly or indirectly) institutions that monitor governmental activity and respond to perceived transgressions. These are the safeguard categories discussed above—structural, popular, political, judicial, or intergovernmental retaliation. Each safeguard acts as a trigger mechanism. It compares an observed behavior against an ideal or threshold; the comparison causes the safeguard to trigger with a response. In most cases the safeguard is modeled as a “stick”; its response is negative, punishing behavior that falls short of expectations. However it is possible to model a safeguard as a “carrot”, nudging or incentivizing productive behavior, such as costly experimentation (Bednar 2011). To model a safeguard properly (whether formally or informally), one must consider the source of the safeguard’s information, what kinds of governmental actions it pays attention to, how it sets its threshold, and of course, the forcefulness of its response. Lastly, in addition to the immediate consequence of its decision, one might also want to consider to what extent the decision will carry over into other disputes. An effective trigger mechanism alters the payoff to transgressing federalism’s boundary, motivating compliance.

In theory a perfect safeguard might exist, but real safeguards are flawed. They are biased, error-prone, myopic, and narrow, or, given the Constitution’s ambiguity, they may just have different interpretations of the Constitution’s meaning. Riker believed the Court to be nothing better than the “handmaiden” of the executive, inevitably biased toward the national government, and therefore only able to hasten centralization. Friedman and Delaney (2011) describe the evolution of judicial review of federal legislation; the public grew more confident in it as they watched its measured restraint of State legislation, implying that the Court’s capacity to intervene depends upon the tenuous thread of legitimacy. Structural safeguards—incorporating the states into federal decision-making—are not designed to cover state transgressions, and there are reasons to question whether they are adequate to restrain national encroachment.²² Political safeguards (the party system) only works when there is a co-dependence between politicians at each level. Riker

²²The legal literature in “collective action federalism” focuses on the states’ ability to coordinate to defend their interests against federal intrusion (eg. Cooter and Siegal 2010). Huq (2014) questions whether it would work given the diversity of the states and the fact that coordinating 50 is much harder than coordinating a handful, as Olson 1965 teaches.

turned to the party system after losing faith in the federal culture; the public had lost its identification with the states, viewing themselves primarily as “Americans” rather than “Virginians”, and with that shift in loyalty went their interest in defending state autonomy arguably recognized in the Constitution. There are reasons to doubt the sufficiency of any of federalism’s safeguards.

When a safeguard is imperfect, sometimes it will tolerate behavior that it should have punished, and sometimes it will punish behavior it should have tolerated. If it makes the latter error too frequently, the overpunishment can ruin the benefits of participating in the union, and the union will dissolve. Instead, it underpunishes—it introduces a bit of slack, formally known as “slippage”—into its judgments. This slippage provides a window for pushing, and overstepping, the boundaries of federalism. Thus the safeguards themselves—or more precisely, their imperfection—ensure that opportunism will always be a part of federalism’s operation.

Dynamic Environment

In addition to opportunism and imperfect safeguards, there is a third problem that affects how well a federal system performs: changing environmental circumstances. The distribution of authority between national and state governments is set to help the American society to achieve a combination of goals related to the economy, security, and the effectiveness of representation. It is a problem in governmental engineering: how to design the mechanism of government by distributing authorities in order to meet social goals? Over the long history of the American system’s life, some goals have changed, such as recognizing the political rights of each citizen. But even more than changing preferences, the country has experienced changing circumstances. Altered technologies, global events, and new understandings of the capacities of each level of government means fine-tuning the distribution of authority to achieve optimal results.

Constitutional change can occur through formal amendment to the text, but the U.S. Constitution is particularly difficult to change. To align a supermajority of both citizens and states to accept a change based only on theoretical, abstract surmise—that is, without any experience at all—is a tall order. Instead, states and citizens are far more likely to accept change that they have already experienced.

In order to answer the specific question of whether the American federal

system is doomed to centralization, or the broader investigation of its resilience, we see that the system must be able manage inherent opportunism, do so with flawed safeguards, and still, somehow, enable the system to adapt. Robustness theorists have defined system characteristics, to which I now turn.

2.2 Properties of Resilient Systems

To this point in the article I've followed the tradition in most social science literature in using the terms *robustness* and *resilience* interchangeably, and equating them with their intuitive sense, as a system that can recover. There is a blossoming science of resilience, particularly in ecology, and robustness, in engineering, that is beginning to find its way into the social science literature. We lean on that literature now, briefly, to establish criteria for judging the American federal system.

Complex systems are sets of interlocking, diverse parts with measurable properties, such as performance. Identifying the structure of the system—the way the parts fit together—is often as important as analyzing the parts themselves, because complex systems are prone to feedback effects. Effects spill over into other parts of the system, or are reinforcing, or trigger counterbalancing forces. These nonlinear dynamics can be better understood when one maps the structure of the system, how the parts fit together. Vermeule (2011) notes, in his treatment of the Constitution as a system, that although the federal judiciary is not itself representative, it has often been used to defend and improve the democratic qualities of the political system.

Resilience is the capacity of a system to recover after a shock, and robustness incorporates the effects of human-designed elements. There are three key dimensions for evaluating the robustness of a system: modularity, redundancy, and diversity. Modularity contributes to robustness in a number of ways: it breaks down the scope of the problem to manageable chunks, local diversity can be exploited appropriately, and failures can be contained within the module. They are often hierarchical, but with self-similar subcomponents, meaning, approximately, that the system's elements and properties are repeated at each scale. Redundancy aids recovery. Should one element of the system fail, a redundant pathway, with identical functionality, can play the same role. It is crucial that redundant components have uncorrelated vulnerabilities, that is, they must fail for different reasons. Diversity is related to system robustness (Page 2010); it is an engine for mutation and adaptation. In adaptive systems, the system needs a means of mutation and a selection

method to reproduce the beneficial mutations but let the detrimental ones die out.

We can use the concepts from the robustness literature, particularly the need for modularity, redundancy, and diversity, to reexamine the U.S. federal system.

2.3 The System of Safeguards

In the constitutional context, robustness is the capacity of the system to continue to function—to continue to meet the goals of security, economic prosperity, and responsive representation—even when hit by an internal or external shock. Challenges to the federal system include inherent opportunism, imperfect safeguards, and a varying environment, creating a need for adaptation.

Imperfect Safeguards and Compliance

No single safeguard—not the Court, not structural channels of input, not the party system—can prevent all opportunism. Each safeguard is both flawed and limited. However, in viewing the safeguards as a set, as a system within the federal system, there is potential that no independent safeguard has on its own. Drawing on the robustness literature insights, the set of safeguards can be evaluated for three properties: the system can be complete, complementary, and redundant.²³

To be complete, a safeguard must minimize all types of opportunism without fail, whether the transgressor be the national government or state, whether the state burden-shift or shirk. Its interpretation of the boundary of federalism must be accepted as more or less legitimate by the general public. No single safeguard is endowed with this range and depth of influence. Most focus their attention on a specific level of government (for example, the structural safeguards only inhibit federal encroachment) and each is prone to failure by considering biased information, such as legally-circumscribed evidence in the courtroom, or mass perceptions or concentrated interests for political or popular safeguards. These biases limit the domains of where their interventions are accepted, although experience with them may alter public acceptance of their interventions. Because the Court’s interventions follow

²³See Bednar 2009, especially chapters 5, 6, and 7, for a complete specification of the theory of safeguards as a system.

alleged transgressions, rather than blocking them before they happen, and because the Court is a non-elected body reviewing actions taken by elected bodies, the Court's interventions are highly scrutinized. As cited above, Friedman and Delaney chronicle the development of the Court's legitimacy in reviewing congressional action. In complex systems terms, their judgments of state activity had feedback effects; the public changed its perception of the Court's interventions when it was able to observe the nature of the Court's activities from a neutral position, as a resident of a state unaffected by the Court's judgment. Feedback from neutral observations built the Court's legitimacy. In most federal systems—certainly in the U.S. case—multiple safeguards are needed to cover all types of opportunism.

Second, the safeguards can *complement* one another, compensating for one another's weaknesses. Some, like the judiciary, are relatively weak, while intergovernmental retaliation—the pushback from the states—has the potential to escalate out of control. A trigger mechanism requires proper calibration to be an efficient deterrent, and the judiciary may not have a sufficiently severe punishment capacity to deter major transgressions, while state pushback may be too difficult to control for everyday use. However, in combination, performance can be improved. The judiciary's negative judgment may increase the likelihood that further transgressions will trigger safeguards with more severe consequences, such as popular response or intergovernmental retaliation. Note that the mere threat of triggering a response from more severe safeguards is sufficient to improve compliance. Rodden's influential study of the federal fiscal discipline, where the national government's pledge not to bail out irresponsible states is made credible through the party system, relies on complementary safeguards: the party system itself is dependent on public expectations (Rodden 2006).

Finally, an optimal set of safeguards is functionally *redundant*, where more than one safeguard is capable of umpiring the same type of dispute. These safeguards should be diverse in perspective and diverse in methods. The judiciary, acting deliberately, can revisit determinations made in haste, or in the name of special interests, or for political compromise that was not in the union's long-term interest. The judiciary, itself imperfect, is itself reviewed, in a sense, by the public. The robustness literature also prescribes that the redundant institutions be diverse in the causes of their failures. The chief source of safeguard failure is prioritizing particular interests over the needs of the whole. Given that every safeguard is inescapably biased toward some interests, it is important to diversify which interests concern

each safeguard. One means to diversify the safeguards' vulnerabilities is to elect or appoint their members through different channels: direct election, staggered terms, differing aggregations of voters, state nomination, party nomination, or executive appointment are all distinct processes, and each will favor somewhat different interest. It is the Madisonian remedy for faction's evils: dilute and distribute them.

Weingast's (1998) analysis of the cascade of institutional failures in the antebellum U.S. and the eruption of the Civil War is an important case study of how the alignment of biases can imperil a federal union. Weingast argues that during the antebellum period, most Americans believed in limited national government but had disagreement about the national government's specific authorities related to slavery, internal improvements, and economic growth. While these beliefs were expressed through the party system, institutions—particularly the structural safeguard of the balance rule equating sectional representation in the Senate—prevented these sectionally-divisive topics from reaching the national agenda. With the changing Northern economy, the growing population in the North (thanks in large part to immigration), and eventually, the demise of the convention that slave-related legislation would have to achieve bi-sectional support (Graber 2006), southern states believed they had lost their protection. The election of Abraham Lincoln was perceived as system-destabilizing, not least because he seemed unwilling to accept the decision of the Court in *Dred Scott* that limited Congress's power to prevent the expansion of slavery into the territories that were not yet states. The South felt unprotected in the Senate, the House, the Presidency, and the Court, leaving them with intergovernmental retaliation as their means of protection. After a few nonviolent initial attempts (nullification, for example) tensions escalated, erupting into secession and war. The system failed because the safeguards did not—could not—remain diverse in a manner that would have preserved sectional divisions within a single federal union. Whether one would have wished that the safeguards had not adapted, given that that would have meant the preservation of slavery as well, is another matter. Of course the collaboration with slavery interests was a fundamental feature of the federalism achieved in 1787, and adaptation away from privileging of these interests nearly split the union.

In short, the boundaries of federalism are regulated not by any single safeguard, but by a system of complementary safeguards. They need not coordinate with one another to complement one another's effectiveness. In fact, in terms of system robustness, it is best if they do not—and best if

no agent tries to engineer that coordination by, say, allocating certain disputes to the judiciary and some to the political process. Part of what makes them effective is their modularity (their independence from one another), their functional redundancy (each is charged, in a sense, with protecting federalism's boundaries), and their diversity, in terms of the kinds of evidence that they pay attention to. The safeguards' reliability depends upon them "failing" for different reasons, in line with the robustness literature's concern for uncorrelated vulnerabilities. If a single force—Congress, well-intentioned legal scholars—tries to engineer the allocation of responsibilities between safeguards, the modularity is erased, and the diversity is compromised.

Imperfect Safeguards and Adaptation

The problem environment changes; over time, it has grown increasingly complex. While the broad brushstrokes remain the same—economic growth, security, individual health and prosperity, mutual respect—developments in technology and global interconnectivity bring new problems: global economic interdependence, climate change, terrorism, disease spread; while other problems, seeming perennial, rise to become a priority: persistently sour racial relations, undereducation of youth, accommodation of differences. If one takes seriously the opportunity that federalism provides in distributing authorities across multiple levels, then as the problem environment changes, the distribution of authority may need adjustment as well.

Unfortunately, rarely is it clear—meaning that a national supermajority agree—that an abrupt shift in responsibility, or even a major policy shift, would improve outcomes. And given the heightened complexity of the problems, no single solution may be conceivable, let alone effective. Here, the imperfection of the safeguards proves useful. Rather than try to design a top-down repair for federalism's safeguards, we might embrace their inevitable imperfection. Through complementarity and redundancy the more egregious of the violations of federalism's boundaries can be averted. The opportunism that remains, although at times politically dramatic, has a quiet upside: it is an opportunity to learn about the effect of changing the distribution of authority.

Both national and state governments can experiment, of course, but state experimentation offers particular advantages. Brandeis, in defending Okla-

homa’s attempt to change the regulation of ice manufacturers,²⁴ argued this point: why not let the state try out a new idea and see what happens. We may learn something. If the experiment fails, then the failure is contained within the state’s borders. Brandeis’ thesis is perfectly in accordance with the robustness paradigm. Adaptation requires mechanisms of mutation, selection, and reproduction. Mutation comes from the relatively minor pushing against federalism’s boundaries; selection comes from the system of safeguards. The selection mechanism requires diverse safeguards. Reproduction is the learning; other states—or the national government—may adopt the policy idea, perhaps tweaking it to fit the different needs of their own jurisdiction.

Research in federal dynamics has very recently been on the rise, particularly in comparative federalism. One project has gathered data on institutional transitions in dozens of federal unions over sixty years (Hooghe, Marks, and Shakel). The literature is growing, as is our theoretical understanding of change in federal systems.

Kollman (2013) argues that federal systems will naturally tend toward centralization because of the self-reinforcing nature of central accumulation of authority. Decentralization, by contrast, has to be consciously engineered. This provocative statement makes one wonder about the effect that centralization has on federal culture, especially the regard for subsidiarity, a political preference for decentralization in the absence of clear efficiency advantages to centralization. The principle is sustained, and animated, by public expectations—the federal culture. What is the effect of centralization on subsidiarity? Is it, as Kollman implies, prone to wither away as the national government acquires more authority, or could that accumulation of authority trigger new concerns for subsidiarity? If so, at what point, and how strong is the effect of culture? Scholarship that merges federalism and culture will presumably explore these questions.

3 Discussion

In this chapter I have reviewed the recent political science scholarship on federalism with the aim of shedding light on the claim that the American federation is centralizing, and that process is unidirectional and inevitable. I have presented a view of federalism as a complex system, and that system is

²⁴*New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932), in dissent.

unquestionably in flux. It has both centralizing and decentralizing features, and authority will migrate both upward and downward between the levels of government. Authority migration is natural and healthy. I suggested a paradigm for evaluating the robustness of the American federal system with a model of the conditions that protect its robustness. The United States' constitutional boundaries of federalism are inherently ambiguous, perhaps even purposefully so. While that ambiguity opens a window for opportunistic interpretation that generates tension between the governments, it also permits the adjustment needed to adapt to the growing complexity of our social, economic, and environmental needs.

My analysis also makes an implicit methodological critique. Most of the formal literature on federalism (or institutional design and performance, more generally) considers equilibria and their stability, particularly whether they are self-reinforcing. But the concepts of equilibrium and stability imply a rigidity, a permanence that runs counter to the evidence marshalled in this essay and would be dangerous, given the growing complexity of the problem space. Successful federations are not in equilibrium. The challenge for institutional design is not to create some ideal equilibrium, but to foster a system of safeguards so that change correlates, to the extent possible, with progress.

When evaluating the American system it is important to keep in mind that its resilience is *conditional*. Federalism can help solve complex problems, but only if the federal union remains meaningful in the sense that Elazar used—non-hierarchical, where each component, state and national, can provide input to aid the process of adaptation. Ultimately, an otherwise fragile federal system depends for its robustness on the diversity of its safeguards.

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