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## FEDERALISM AS A PROBLEM OF GOVERNANCE, NOT OF DOCTRINAL WARFARE

EDWARD L. RUBIN\*

### I. FROM DOCTRINE TO GOVERNANCE IN FEDERALISM SCHOLARSHIP

Heather Gerken's call for a *détente* in the "merry war" between nationalists and federalists is a welcome one.<sup>1</sup> That is not because this war is hurting anyone; unlike real wars, which invariably shed blood and lead to loss of life, academic wars are the lifeblood of their scholarly combatants. The problem with this particular war is not its casualties but its casuistries. Its participants attack each other with arguments based on different premises and divergent definitions, each designed to make their own conclusions appear irrefutable. One result is that the war not only lacks the dreadful finality of real combat, but also the more benign and satisfying finality of competitive sports; nothing ever gets resolved. An even more unfortunate result, however, is that the participants have been distracted from the truly interesting and important questions that lie just beyond the field of their bootless battle.

Everyone who has ever addressed the issue of American federalism, according to whatever definition he or she has chosen to wield, must agree to the following propositions, which are truly irrefutable. First, both the national government and the state governments carry out a great many governmental functions. Second, neither the national government nor the state governments are going to disappear in the foreseeable future. Third, these two sets of governments must deal with each other on a continuous basis in order to carry out their tasks. Fourth, this relationship between them involves the variations and complexities that invariably arise when large institutions interact. An only slightly less unarguable point is that the interaction reveals a level of complexity that resembles the famous Mandelbrot set, where increasing levels of detailed scrutiny, instead of getting past the areas of overlap, only reveal further imbrications that reiterate the general pattern.<sup>2</sup>

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1. Heather K. Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 997 (2015).

2. See BENOIT B. MANDELBROT, *FRACTALS AND CHAOS: THE MANDELBROT SET AND BEYOND* 12–19 (2004) (describing the complexity of Mandelbrot sets).

The fractal complexity of federal-state relations may be seen as an affliction or an opportunity, but one thing about it seems reasonably clear, perhaps close to irrefutable: as Professor Gerken points out, it is unlikely to be resolved by the judiciary.<sup>3</sup> A few decades ago, the Legal Process School, still the dominant approach to judicial doctrine in the legal academy, was convinced that it had interred the doctrine of federalism in its entirety.<sup>4</sup> Then the Supreme Court decided to raise it from the dead, striking down a few federal statutes under the Commerce Clause,<sup>5</sup> fashioning the novel doctrine of forbidden commandeering<sup>6</sup> and, most recently, invalidating conditions attached to federal funding through an equally novel rationale of excessive compulsion.<sup>7</sup> At most, however, these decisions do little more than nibble at the edges of comprehensive federal authority; like the Walking Dead, they would be easy targets for an aggressive Congress that was determined to return them to their graves. There is simply no chance that the Court will impose any major limitation on federal authority, and no possibility that it could disentangle state and national authority.

When legal scholars continue their war over the intricacies of this marginally important doctrine, therefore, they distract themselves from the

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3. Gerken, *supra* note 1, at 1030.

4. The decision that seemed to have confirmed federalism's demise was *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 530–31, 555–56 (1985). For the Legal Process argument supporting the decision, see JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT* 171–259 (1980) (arguing questions regarding the separation of state and national power are best left to the political process and not the Court); D. Bruce La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577 (1986); and Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 558–60 (1954) (Congress is better suited to manage federalism issues than the courts).

5. *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding the civil damages provision of the Violence Against Women Act unconstitutional); *United States v. Lopez*, 514 U.S. 549, 551 (1995) (holding the Gun-Free School Zones Act of 1990 unconstitutional). See Robert A. Schapiro & William W. Buzbee, *Unidimensional Federalism: Power and Perspective in Commerce Clause Adjudication*, 88 CORNELL L. REV. 1199, 1201 (2003) (examining recent commerce clause cases including *Lopez* and *Morrison* where the Court has limited Congressional power).

6. *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding enforcement provisions of the Brady Handgun Violence Prevention Act unconstitutional); *New York v. United States*, 505 U.S. 144, 149 (1992) (holding enforcement provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 unconstitutional). See Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2182, 2200 (1998) (discussing *Printz* and its effects upon Federal commandeering).

7. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2608 (2012) (holding a provision of the Patient Protection and Affordable Care Act that made all Medicaid payments to a state conditional on the state's participation in Medicaid expansion unconstitutional).

irrefutable reality of American government: the on-going, complex, and wide-ranging interaction between the national government and the state governments. In recent years, however, as Professor Gerken notes, there has been a salutary tendency to leave the churned up battlefield of these doctrinal issues behind and focus on this interaction.<sup>8</sup> It can be described as a shift from questions of doctrine to questions of governance, a trend evident in other fields of legal scholarship as well.<sup>9</sup> Although the new approach dispenses with the intricate analysis of judicial opinions that characterized its predecessor, it must not be regarded as abandoning the study of law, the way traditionalists might claim. The statutes that necessarily authorize federal action, and that typically authorize action by the states, are law. The regulations promulgated by federal and state agencies to implement these statutes are law. The agreements that these agencies enter into with each other, and the internal memoranda that they each produce to govern their relations to the other are law as well. If we lack familiar categories and criteria for analyzing these various pronouncements, that is simply a limitation of our traditional approach that must be overcome, not any indication of these pronouncements' less-than-legal character.

In her Childress Article, Professor Gerken raises a series of interesting questions that emerge from the governance approach to federal-state relations. The first question that I will discuss in this brief Comment is a descriptive one: what purposes are served by this complex relationship between two levels of government? The second is normative: is the existence of this relationship a good or bad thing for the nation's citizens?

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8. Gerken, *supra* note 1, at 1012–22.

9. Most obviously evident in the New Public Governance school. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004) (introducing the new governance model and challenging the traditional model of formal regulation). For examples of this approach, see Lisa T. Alexander, *Afterword—Part III: Reflections on Success and Failure in New Governance and the Role of the Lawyer*, 2010 WIS. L. REV. 737 (discussing New Governance, the role of lawyers, and the impact on legal education); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 281–82, 472 (1998) (identifying and discussing “Democratic Experimentalism”); Bradley C. Karkkainen, “New Governance” in *Legal Thought and in the World: Some Splitting as Antidote to Overzealous Lumping*, 89 MINN. L. REV. 471 (2004) (discussing the new governance model in light of *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*); Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1234, 1254 (1995) (arguing the Eco-Management and Audit Scheme best illustrates reflexive environmental law); Edward Rubin, *The Myth of Accountability and the Anti-Administrative Impulse*, 103 MICH. L. REV. 2073, 2084 (2005) (noting that pro-federalism arguments can be formal or functional and that *Printz* embodies a functional argument); and Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 553–555 (2001) (identifying reasons opposition to a structural shift in addressing second generation bias would prove futile).

## II. THE PURPOSES OF TWO-LEVEL GOVERNMENT

In assessing the purposes served by America's two-level government, it is necessary to be clear about the terminology, even at the risk of revisiting the battlefield of doctrinal federalism debates. Professor Gerken identifies her governance-oriented approach as part of the "nationalist school" of federalism, which she defines as insisting that "devolution can further nationalist aims."<sup>10</sup> This is, she mentions at various points, "not our father's federalism."<sup>11</sup> The phrase comes from pop culture pundits, who point out that the music being written today is "not your father's rock'n roll." While the point is undoubtedly right, it allows for a considerable range of rejected parentage, from The Penguins' "Earth Angel"<sup>12</sup> to Bryan Adams's "Heaven."<sup>13</sup> Similarly, Professor Gerken's formulation could range from the Founding Fathers to our scholarly fathers of the Legal Process movement.

The Founding Fathers' federalism may well have been nationalist, in Professor Gerken's sense: George Washington, Alexander Hamilton, James Wilson, and a number of other paternal figures in our nation, including perhaps James Madison at the time the Constitution was drafted, were all committed to a dominant central government.<sup>14</sup> They recognized, however, that most governmental functions in the new nation would be carried out by the states, and that the new national government would need to cooperate with them closely. This was not a product of the Framers' design, but of Britain's North American colonial policy. There was no unified British administration in North America: the thirteen colonies were regarded as separate entities, each having its own founding documents, its own governing bodies, and its own relationship with the British government (the Board of Trade, the Secretaries of State, and the Privy Council).<sup>15</sup> When the Revolution occurred, the colonies became states by taking over the existing colonial governments, but they were

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10. Gerken, *supra* note 1, at 1001.

11. *Id.* at 1006.

12. THE PENGUINS, *Earth Angel*, on EARTH ANGEL / HEY SENORITA (Dootone Records 1954).

13. BRYAN ADAMS, *Heaven*, on RECKLESS (A&M Records 1984).

14. See JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161–202 (1996) (discussing the framers' views on Federalism as deduced from their writings); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC 1776–1787, at 463–564 (1969) (discussing the conditions which led to constitutional reform of the central government by the Federalists). As both authors point out, there were, of course, dissenting voices among the Framers who expressed concern about the scope of central government authority.

15. See SAMUEL ELIOT MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE: VOL. 1, PREHISTORY TO 1789, at 84–155, 243–48 (1965); ALAN TAYLOR, AMERICAN COLONIES 117–272 (Eric Foner ed., 2001); CARL UBBELOHDE, THE AMERICAN COLONIES AND THE BRITISH EMPIRE 1607–1763, at 12–26 (Arthur S. Link ed., 2d ed. 1975).

required to develop national institutions for the first time, and these were improvised on a makeshift, emergency basis. Thus, the new nation was inevitably federalist, in the sense that the states exercised extensive, often dominant governmental power.

Whether the Legal Process scholars were nationalists, in any sense, is an interesting question, but their main concern was the scope of judicial authority.<sup>16</sup> On the basis of the institutional analysis that was perhaps the defining feature of their approach, they argued that courts should only use their constitutional power to reverse majoritarian decisions when individual rights are at stake. The relationship between the national government and the states can be safely left to the political process, they insisted; judicial involvement is not only unnecessary, but unlikely to be effective, and will only squander the legitimacy of the constitutional courts.<sup>17</sup>

It is thus notable that both of these two plausible candidates for parentage of our current approach to federalism endorse one of the propositions that Professor Gerken advances so convincingly: that federal-state relations will be negotiated by the political process, and that they cannot be understood unless one pays attention to that process. The origin of the views that she opposes lies between the two and can be described as the classic phase of American federalism scholarship, perhaps corresponding to Led Zeppelin's "Stairway to Heaven"<sup>18</sup> or Bob Dylan's "Knocking on Heaven's Door."<sup>19</sup> This was the period when the federal courts fashioned and enforced a federalism doctrine that imposed limits on the national government's authority to engage in various regulatory activities. It was a doctrine that the Founding Fathers had not yet envisioned, and that the Legal Process School explicitly rejected, and it is the main matter of contention in the merry war to which Professor Gerken refers.

But if both the Founding Fathers and the Legal Process School can be regarded as endorsing Professor Gerken's point about the precedence of politically based decisions, they ignore her second point about the managerial

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16. See, e.g., ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 35 (1962); CHARLES L. BLACK, JR., *THE PEOPLE AND THE COURT: JUDICIAL REVIEW IN A DEMOCRACY* 183, 186–87, 191, 193 (1960); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 354, 368 (1978); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 922, 930 (1965); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 3, 6–7, 9 (1959). Although Fuller's article was only published in 1978, it circulated in draft during the late 1950s and was quite influential at the time.

17. For two leading statements of this approach by scholars who can be fairly described as children of these Legal Process parents, see CHOPER, *supra* note 4, at 2, 188, 258; and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 181–83 (1980).

18. LED ZEPPELIN, *Stairway to Heaven*, on LED ZEPPELIN IV (Atlantic Records 1972).

19. BOB DYLAN, *Knockin' On Heaven's Door*, on PAT GARRETT AND BILLY THE KID (CBS 1973).

nature of this decision-making process. At the time of the Founding Fathers, even European nations had only begun thinking about government in managerial or administrative terms,<sup>20</sup> and these aborning thoughts were even harder to conceptualize in a nation largely consisting of some isolated clearings in the forest. Legal Process scholars, who had the advantage of two centuries of history and nearly a century of administrative governance at the national level,<sup>21</sup> were certainly aware of the issue, but could barely discern it through the din and haze of their doctrinal warfare. It is in this sense that the contemporary focus on managerial or governance issues is truly not “our father’s federalism,” whether we identify that parent as the Founding Fathers, the Legal Process School, or the intervening doctrinalists.

It is at this point in the analysis, however, that clarification is required. As Professor Gerken notes, one major managerial issue at stake in the interaction between the national and state governments is the level of decentralization.<sup>22</sup> With respect to virtually any task of governance, a highly relevant and important question is whether that task is more effectively implemented at a central or regional level. In some cases, uniformity is crucial, or there are major economies of scale; in others, responsiveness to diverse communities is of more concern, and large-scale structures prove unwieldy. Of course, federal agencies can decentralize on their own. Most agencies that regulate or provide services within our borders, such as the Federal Reserve System or the Social Security Administration, have regional offices. But states, because they are well-established governmental institutions and have extremely high

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20. France first adopted a modern, managerial approach to government during the Revolution, which began after the Constitution was drafted. Austria adopted it during the reign of Emperor Joseph II, 1780–90. Britain, always precocious in matters of governance, began to develop this approach in the seventeenth century, but only brought it to fruition under William Pitt the Younger. EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* 29–34 (2005). The first theoretical writers to focus on management or administration were probably the German Cameralists. ALBION W. SMALL, *THE CAMERALISTS: THE PIONEERS OF GERMAN SOCIAL POLITY* 2, 6 (1909); ANDRE WAKEFIELD, *THE DISORDERED POLICE STATE: GERMAN CAMERALISM AS SCIENCE AND PRACTICE* (2009). Their work began in the mid-eighteenth century, but it is unlikely that anyone in the thirteen colonies was familiar with it.

21. For the origins of the administrative state at the national level, see THOMAS K. MCCRAW, *PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS, LOUIS D. BRANDEIS, JAMES M. LANDIS, ALFRED E. KAHN* 57–79 (1984); STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920*, at 3–4 (1982); RUBIN, *supra* note 20, at 34–36. Recent scholarship suggests an even longer history. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* (2009) (exploring the evolution and exercise of national power in the nineteenth-century); see JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* (2012) (discussing the early development of administrative law to reveal its “enduring structure”).

22. Gerken, *supra* note 1, at 1001–07.

recognition factors (how many people know which Social Security Region their city of residence belongs to?), are often the best modality for decentralization.

Malcolm Feeley and I have argued that decentralization should be distinguished from federalism.<sup>23</sup> We note that every nation larger than the Vatican is decentralized and that virtually every nation, right down to Luxembourg, has the same three levels of authority distribution—national, regional, and local—as the United States. If decentralization counts as federalism, then every nation in the world is federal. There is, however, a well-recognized distinction between nations where all legal authority is held by the central government, which then decentralizes as a matter of policy, and nations where sub-national governments possess some set of autonomy rights and the central government is precluded from countermanding or undermining those rights. To take non-controversial examples, France, China (PRC), Japan, and the Netherlands belong in the former category, while Canada, Belgium, India, and Switzerland belong in the latter. What term should we use to indicate this distinction? All these nations employ various forms of decentralization, and their national-regional interactions all display the same Mandelbrot-like imbrications as American government. Professor Feeley and I argue that the perfectly good, if less than inspiring, term “decentralization” should be used for the managerial process and that the term “federalism” should be reserved for nations in the second group that grant juridical rights of some sort to sub-national governmental units.

For American scholars, the problem with this use of terminology is, of course, America. Professor Gerken notes that our national government can do virtually anything it chooses to,<sup>24</sup> as the Legal Process School argued and as the courts in the post-War decades held. The Supreme Court’s recent efforts to breathe life into federalism as a legal constraint on national authority have been largely symbolic; the real issues, as she says, are the managerial ones, which are highly complex and merit extensive scholarly attention. But it is also true that Americans identify their mode of government as a federal one, and more specifically as “our federalism.” If one wants to honor this self-designation, as Professor Gerken does, instead of challenging it, as Professor Feeley and I do, then it will be necessary to find another term for those nations which grant definitive and significant autonomy rights to sub-national units. In the interest of getting on with the important task of analyzing decentralization and other managerial practices, and escaping from the casuistry-strewn

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23. MALCOLM M. FEELEY & EDWARD RUBIN, FEDERALISM: POLITICAL IDENTITY AND TRAGIC COMPROMISE 20–29 (2008); Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 39 (2001); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 910 (1994).

24. Gerken, *supra* note 1, at 998.



battlefield of our father's federalism, the grant of autonomy rights might be described as "juridical federalism."

This terminology carries an implication that the autonomy rights granted to sub-units can be enforced by the courts, or, more specifically, by an independent government institution that adjudicates disputes between persons and institutions within the nation. As a matter of practice, this is in fact the case throughout most of the world, but it is not essential to the definition. Something other than a court, such as a specially constituted council, could be used instead. In that case, the sub-units would have the autonomy necessary for the nation to count as juridically federalist, but that status would be instantiated by something other than "rights." What may be crucial to the concept of juridical federalism is that the institution that places limits on the central government, and protects or validates the autonomy rights of the sub-unit, must be politically independent from the central government. This would seem to be implicit in the notion that the sub-units possess definitive and enforceable autonomy.

A federal nation need not be a democracy. European monarchies during the feudal era fit comfortably into the definition of juridical federalism. As Hannah Arendt points out, these were regimes that were clearly governed by law, even though their public officials were not elected by the populace;<sup>25</sup> medieval counts, earls, and sometimes even petty castellans had definitive and enforceable rights against the king.<sup>26</sup> Modern totalitarian nations present a closer question. Like all nations, they must decentralize authority; while an individual or single corporate body may have the authority to make any decision, it cannot, as a practical matter, possibly make all decisions. But would we be willing to describe a totalitarian nation as federal if the leader granted autonomy rights to political sub-units, subject only to the leader's ability to countermand that grant? This was in fact the situation in the Soviet Union during certain periods.<sup>27</sup> Like all definitional questions, it does not yield

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25. HANNAH ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 96–97 (1993).

26. See ANTONY BLACK, *POLITICAL THOUGHT IN EUROPE, 1250–1450*, at 152–55 (1992) (discussing the relationship between the king and the law); JOSEPH CANNING, *A HISTORY OF MEDIEVAL POLITICAL THOUGHT, 300–1450*, at 59–64 (1996) (discussing the feudal form of fidelity and its effects on the king and his magnates); Janet Nelson, *Kingship and Empire*, in *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350–C. 1450*, 211, 211–51 (J.H. Burns ed., 1988) (discussing the evolution of the understanding of a king's realm from c. 750 to c. 1150 into a "territorial and sociological entity" wherein the king shared power with the aristocracy and the Church).

27. See MARTIN MCCAULEY, *THE SOVIET UNION, 1917–1991*, at 111–27, 156–65 (2d ed. 1993) (discussing the nationalist policy in soviet Russia and describing the autonomy issues that sprung up from the acceptance of new republics into the Soviet Union).

to empirical determination; the important point, as generally the case with such questions, is to be clear.

I have proposed one further definitional distinction regarding federalism, or juridical federalism if one prefers. This is the distinction between comprehensive and particularized federalism.<sup>28</sup> In some cases, a nation is entirely divided into provinces or states that all possess equivalent autonomy rights, as is the case with Belgium, Canada, Switzerland, and India.<sup>29</sup> Sometimes, as in the original United States,<sup>30</sup> this form of federalism emerges from historical experience; alternatively, it may reflect a conscious recognition that the different portions of the nation all vary significantly from one another, or at least that there are enough regional variations to merit granting every sub-unit autonomy rights.

Unitary nations, where the central government possesses plenary authority, sometimes have delimited regions that are perceived as distinctive or separate, often but not always as a result of their particular history or culture. Such regions are often granted some set of autonomy rights, even though the bulk of the nation is divided into provinces with no such rights. This approach can be described as particularized federalism. Nations that have adopted it include Italy, an otherwise unitary nation that has designated several autonomous regions, such as Sicily,<sup>31</sup> Spain with the Basque Country and Catalonia,<sup>32</sup> and

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28. Edward L. Rubin, *Federalism as a Mode of Governance: Autonomy, Identity, Power and Rights* (forthcoming) (on file with author).

29. See BELONGING: THE MEANING AND FUTURE OF CANADIAN CITIZENSHIP (William Kaplan ed., 1993) (discussing the history and features of the Canadian federalist system); BIDYUT CHAKRABARTY & RAJENDRA KUMAR PANDEY, INDIAN GOVERNMENT AND POLITICS 18–22, 35–53 (2008) (discussing the uniqueness of the federalist system in India as it relates to authority between the central government and the states); LIEVEN DE WINTER & WILFRIED SWENDEN, THE POLITICS OF BELGIUM: INSTITUTIONS AND POLICY UNDER BIPOLAR AND CENTRIFUGAL FEDERALISM 2 (Marleen Brans et al. eds., 2009); KENNETH MCROBERTS, QUEBEC: SOCIAL CHANGE AND POLITICAL CRISIS 32–37 (3d ed. 1988) (discussing the impact of Canadian political institutions upon Quebec); M. GOVINDA RAO & NIRVIKAR SINGH, THE POLITICAL ECONOMY OF FEDERALISM IN INDIA 46–49, 95–96 (2005) (discussing India's constitutional development toward a federalist system with the states retaining significant authority and recent decentralizing trends); JONATHAN STEINBERG, WHY SWITZERLAND? 77–78 (2d ed. 1996) (discussing the distinction between cantons and federal power).

30. My assessment of American federalism is that it was the result of historical necessity, not conscious choice, and became vestigial in a process of nationalization that began with the Civil War and advanced by the growth of the national administrative state. FEELEY & RUBIN, *supra* note 23, at 96–123.

31. SANDRA BENJAMIN, SICILY: THREE THOUSAND YEARS OF HUMAN HISTORY 387–91 (2006); CHRISTOPHER DUGGAN, A CONCISE HISTORY OF ITALY 248–49 (1994).

32. See MICHAEL EAUDE, CATALONIA: A CULTURAL HISTORY (2008) (describing Catalonia's history, its visual artists, and twentieth-century Catalonia); JOHN HOOPER, THE NEW SPANIARDS 217–82 (2d ed. 2006) (discussing the autonomy of various regions within Spain); MICHAEL KEATING, NATIONS AGAINST THE STATE: THE NEW POLITICS OF NATIONALISM IN

even more recently in the U.K., which has granted increasing amounts of autonomy to Scotland, and only thereby avoided its secession.<sup>33</sup>

Another version of particularized federalism occurs when the sub-unit that is granted federalist autonomy rights is not conceived as a region of the nation, but rather as the area inhabited by a particular group of people. Often, this approach is used for an aboriginal or indigenous population, like Indian tribes in the United States, the Aborigines in Australia, and the Yakuts in Russia.<sup>34</sup> In contrast to the regionally defined approach, where the area granted autonomy is typically the same size as the decentralized provinces in the unitary part of the nation, the group or tribally defined approach can involve areas that are quite small relative to the remainder of the nation.

Both comprehensive and particularized federalism grant autonomy rights to sub-units of the nation, but they often result from differing perspectives and motivations. A comprehensive federal regime is more likely to regard federalism as a defining feature, a way of structuring its overall approach to governance. Public authority is seen as being systematically allocated or divided, with some elements allocated to the central government and other allocated to the sub-units. Citizens of the regime tend to regard themselves as full members of the nation, but also as members of their sub-unit, with their loyalty divided between the two. Particularized federalism is frequently employed as a means of granting special privileges to a minority group or peripheral region, perhaps because of some perceived social or economic disadvantage that the members or inhabitant suffer. In other words, the regime is likely to regard itself, and be regarded by its majority inhabitants, as a unitary one with some exceptions being made for special situations. The inhabitants of the sub-units that have been granted autonomy will tend to

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QUEBEC, CATALONIA AND SCOTLAND 141–65 (2d ed. 2001) (discussing the growth of nationalism and political autonomy in Catalonia); PADDY WOODWORTH, *THE BASQUE COUNTRY: A CULTURAL HISTORY* (2007) (discussing the Basque region through cultural, political, and historical analysis and personal anecdotes).

33. See KEATING, *supra* note 32, at 207–29 (discussing the growth of Scottish nationalism); MICHAEL KEATING, *THE INDEPENDENCE OF SCOTLAND: SELF-GOVERNMENT AND THE SHIFTING POLITICS OF UNION* (2009) (discussing the trajectory toward Scottish independence and the legal, political, and institutional implications thereof); MURRAY PITTOCK, *THE ROAD TO INDEPENDENCE? SCOTLAND IN THE BALANCE* 210–13 (rev'd 2d ed. 2013).

34. RICHARD BROOME, *ABORIGINAL AUSTRALIANS: A HISTORY SINCE 1788* (rev'd 4th ed. 2010); JESSICA R. CATTELINO, *HIGH STAKES: FLORIDA SEMINOLE GAMING AND SOVEREIGNTY* 347–49 (2008); see also Marjorie Mandelstam Balzer & Uliana Alekseevna Vinokurova, *Nationalism, Interethnic Relations and Federalism: The Case of the Sakha Republic (Yakutia)*, 48 *EUR.-ASIAN STUD.* 101, 101–03 (1996) (discussing the significance of the Sakha Republic as it relates to Russian federation survival); Greg Poelzer, *Devolution, Constitutional Development and the Russian North*, 36 *POST-SOVIET GEOGRAPHY* 204, 211 (1995); Alex Tallchief Skibine, *Reconciling Federal and State Power Inside Indian Reservations with the Right of Tribal Self-Government and the Process of Self-Determination*, 1995 *UTAH L. REV.* 1105, 1105–06.

regard themselves as separate groups, with certain characteristics that create a sense of difference between themselves and the national majority.

Neither the effort to define nor to categorize juridical federalism, however, should distract attention from Professor Gerken's basic point. Managerial decentralization is a crucial aspect of governance, one that is of major concern for virtually every domestic policy that a modern nation carries out. It is generally more important, and invariably more regularly encountered, than questions of autonomy rights. No individual's interaction with a modern state is fully, or even primarily defined, by constitutional rights; everyone is subject to a wide variety of regulatory restrictions and benefits of unquestioned constitutional validity, from social security, to motor vehicle licensing and operation. The same is true for the sub-units in a system of comprehensive juridical federalism, only more so. Their governments will generally have fewer rights than individuals and a greater range and complexity of interactions with the national government. Of course, this is truer still in a system of particularized juridical federalism, where the majority of governmental sub-units have no autonomy rights, as well as in a system like the U.S., where "our father's federalism" is vestigial. In all these systems, the important task for scholars is to identify and analyze the complex process by which the inevitably multi-level government carries out its tasks.

### III. THE VALUE OF TWO-LEVEL GOVERNMENT AND AUTONOMY RIGHTS

A second question that Professor Gerken raises, aside from the purposes that decentralization or "our federalism" serves, involves the value of this system. What is it supposed to accomplish, and is it successful in this effort? In attempting this rather formidable inquiry, the importance of terminological clarity is immediately apparent. It is necessary to know whether the system in question includes autonomy rights and for whom, or whether it is purely managerial in character. Each of these inquiries is complex, but they are different inquiries, and conflating them seems bound to confuse the issue, and perhaps re-ignite the war we should all be trying to escape, as Professor Gerken urges.

Professor Feeley and I have argued that granting autonomy rights to a sub-unit of the nation, as opposed to engaging in purely managerial decentralization, is primarily designed to deal with situations where people possess conflicting political identities.<sup>35</sup> There are many reasons to grant authority to a political sub-unit of the nation, but why would the leaders or populace of that nation want to grant autonomy rights, that is, why would they want that grant of authority to be ir retrievable? Resisting the temptation to use slavery as an example, one might turn to a contemporary issue such as medical

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35. FEELEY & RUBIN, *supra* note 20, at 7-17, 38-68.

marijuana. Here is a classic case of sub-units generating diversity, serving as laboratories, and entering into political dialogue with the central government. It is also a case that will entice many people, particularly social progressives, to think kinder thoughts about “our federalism” in general, at least if they are not afflicted with Thomas Reed Powell’s version of a legal mind.<sup>36</sup>

All very well, but this is an example of decentralization, not juridical federalism; the Supreme Court held that the federal government possessed the authority to enact a statutory ban on cannabis, in all its forms, and had done so in the Controlled Substances Act.<sup>37</sup> If it seems that juridical federalism would have produced a similar or even preferable result, that is because the subject is currently a matter of debate within the country, with a significant number of people on each side and no normative consensus. Suppose the issue were cannibalism, rather than cannabis. Suppose one state had been taken over by a religious sect which endorsed the ritual consumption of human flesh. Would we be as philosophic about the value of diversity or would we want our national government to intervene and enforce the nation’s normative consensus on this matter? Would we want to have granted the sub-unit in question an ir retrievable authority to control its criminal law?

The only reason why a nation would want to grant some geographical sub-unit an ir retrievable authority is if the residents of that sub-unit possessed a different political identity from the nation as a whole. From the perspective of the majority, or alternatively the central government, granting autonomy rights might be the only way to hold the nation together under these circumstances. From the perspective of the residents or leadership of the sub-unit, autonomy rights might be a guarantee of recognition and self-government that is necessary for their willingness to remain within the larger nation. From a normative perspective, the test of real or juridical federalism, as opposed to garden-variety decentralization, is whether the system would allow a sub-unit of the polity to adopt values that are distinctly different from the prevailing values in the society at large.

It is now unavoidable to invoke the example of slavery. When the U.S. Constitution was drafted, there was no clear normative consensus about the matter. A number of Southerners, including slaveholders such as Washington and Jefferson,<sup>38</sup> harbored serious doubts about it, while it was legal in every

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36. “If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.” Thurman W. Arnold, *Criminal Attempts: The Rise and Fall of an Abstraction*, 40 *YALE L.J.* 53, 58 (1930).

37. *Gonzales v. Raich*, 545 U.S. 1, 9 (2005).

38. JOSEPH J. ELLIS, *AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON* 315–26 (1996); JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON* 160–67, 257–64 (2004).

Northern state and prevalent in New York and New Jersey.<sup>39</sup> Consequently, the issue could be compromised in the drafting process, and reduced to minor importance in the ratification debates that followed. By the middle of the nineteenth century, however, slavery had become morally anathema to Northerners.<sup>40</sup> At that point, the grant of autonomy rights to Southern states that were committed to continuation of this “peculiar institution” became unacceptable to Northerners,<sup>41</sup> who represented the majority of the nation. The normative deviation of the Southern states had become too severe to tolerate, and the federal structure of the nation that permitted this variation was rejected.

But as Professor Gerken notes, very few of the real issues regarding national-state governmental relations involve autonomy rights. This is probably true even in nations where such rights continue to exist, and it is certainly true in the U.S., where they have become secondary or vestigial. Rather, these relations are determined by policy considerations that accompany the complex tasks of governance. What can be said about the value of “our federalism” in this context? Is it preferable to concentrate authority in the central government, and treat regional governments as mere instrumentalities of centralized control, or should authority be extensively decentralized, and regional governments granted extensive discretion to develop their own policy approaches? The answer, not surprisingly, is: “it depends.” Most obviously, it depends on the goals one is trying to achieve. But even if there is agreement about goals, the answer will still depend on a variety of pragmatic factors that makes generalization unconvincing, and perhaps impossible.

One readily agreed upon goal is freedom, or liberty, which is often invoked as an argument for “our federalism,” usually with reasoning that applies to decentralization.<sup>42</sup> But even a cursory catalogue of the world’s democratic

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39. See IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA* 47–63, 228–29 (1998) (discussing the expansion of slavery in the Northern states); CHARLES JOHNSON ET AL., *AFRICANS IN AMERICA: AMERICA’S JOURNEY THROUGH SLAVERY* 107–11 (1998) (discussing the expansion of slavery in New York and the lingering fear of rebellion in the mid-1700s); LEON F. LITWACK, *NORTH OF SLAVERY: THE NEGRO IN THE FREE STATES, 1790–1860*, at 3–29 (1961) (discussing the abolition and gradual decline of slavery in the North).

40. DAVID BRION DAVIS, *INHUMAN BONDAGE: THE RISE AND FALL OF SLAVERY IN THE NEW WORLD* 250–96 (2006) (discussing abolitionism in America); DAVID HERBERT DONALD, *CHARLES SUMNER AND THE COMING OF THE CIVIL WAR* 183–88 (1960) (discussing Sumner’s role in the abolitionist movement in Massachusetts); PAUL GOODMAN, *OF ONE BLOOD: ABOLITIONISM AND THE ORIGINS OF RACIAL EQUALITY* (1998) (discussing the origins of the abolitionist movement); LITWACK, *supra* note 39, at 214–79 (discussing the abolitionist movement’s origins and practices).

41. KENNETH M. STAMP, *THE PECULIAR INSTITUTION: SLAVERY IN THE ANTE-BELLUM SOUTH* 3, 6, 20 (1956).

42. SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 295–301, 386–88 (1993); Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425,

nations reveals no clear pattern. Nations that achieve top scores in the annual Freedom House survey are fairly evenly distributed between unified and juridically federal regimes.<sup>43</sup> Of the high scoring nations in the list given in the previous section, for example, France, Japan, and the Netherlands are unitary, while Canada, Belgium, and Switzerland are federal. Is there any plausible claim that the first group is less free than the second? All these nations, and all the other nations on the Freedom House list, are decentralized to some extent of course, and certainly vary from one policy area to another. It would be difficult to determine which ones are more decentralized, on some overall measure, but it seems unlikely that any pattern would emerge on that basis either, given the range of nations that earn top scores.

Another widely agreed upon criterion is government efficiency, that is, the effectiveness and expense with which the government carries out its assigned tasks. There are no Efficiency House ratings, and judgments in this case would be difficult, given the variety of tasks. It is easy enough to construct arguments for why either juridical federalism or higher levels of decentralization are more efficient and equally easy to construct arguments for the reverse. One might argue that decentralization works better in a large nation. But if the term “large” refers to population, then of the two nations that have more than one billion people, highly-centralized China (it even has a single time zone) seems more efficiently managed than juridically federal India. Among democratic nations, the federal status of the United States is unclear, as is that of Brazil. The nations immediately below Brazil in terms of population display no clear pattern: Germany has comprehensive juridical federalism, but Japan, France, Italy, and the U.K. use either a unitary or a particularized federal approach. Physical size might also be a consideration, but here again, the ambiguity of U.S. and Brazilian government makes judgment difficult. Canada has a robust form of juridical federalism, but that is a recent development, and it was motivated by considerations that had nothing to do with its size. France, the largest country in Western Europe, is unitary and probably one of the most centralized. The two European nations that probably have the best-developed

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1425, 1427 (1987); Charles J. Cooper, *Limited Government and Individual Liberty: The Ninth Amendment's Forgotten Lessons*, 4 J.L. & POL. 63, 64–65 (1987); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 SOC. PHIL. & POL'Y 196, 197 (1991).

43. FREEDOM HOUSE, FREEDOM IN THE WORLD COUNTRY RATING (1973–2015), available at <https://www.freedomhouse.org/report-types/freedom-world#.VJSgeUAwA>. Nations are ranked on a 1 to 7 scale for both political rights and civil liberties. Thus, a top score is 1:1, which was earned in 2014 by virtually all Western democracies and some Latin American democracies (Chile, Costa Rica, and Uruguay). In prior years, Japan came close, with a 2:1. Freedom House is an independent non-governmental organization based in Washington, D.C. Its judgments are matters of opinion, of course, but it is well-recognized and it does not appear to have any particular attitudes toward federalism that would bias its assessments.

form of comprehensive juridical federalism, Belgium and Switzerland, are tiny by international standards.

If one proceeds from simplistic considerations such as size and population to more subtle ones about government regulation and service delivery, it seems increasingly difficult to believe that any general rule about the desirability of juridical federalism will emerge and almost impossible to believe that a general rule can be framed about the desirable level of decentralization. This is not the counsel of despair; in fact, it is an academic opportunity. What is needed is microanalysis, that is, a detailed assessment of each nation and each policy area considered on its own terms.<sup>44</sup> Generalizations are certainly possible; there are some tasks that are better performed central and others that are better decentralized. But in any given policy area, such tasks are likely to combine—and conflict—in complex ways that must be traced on an individualized basis.

This is the task that Professor Gerken's Article sets for the academy. The next stage in American federalism scholarship—the one that will leave all our fathers behind—is to understand and assess the complex relationships between the national and state governments. The Supreme Court will continue to decide a federalism case every once in a while, and for the foreseeable future will probably reach differing conclusions based on Justice Kennedy's mood at the moment. But the real decisions—the ones that implicate people's lives and livelihoods—will be made by legislature and administrators. Those decisions are political, but they also constitute the law. It is time for legal scholars to leave the muddy battlefield of federalism doctrine behind and sally forth into the complex but fascinating topography that surrounds it on all sides.

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44. For further discussion of this approach, see Edward L. Rubin, *The New Legal Process, the Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1394, 1411–24 (1996).



