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The Once and Future Challenges of American Federalism: The Tug of War Within

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Abstract

This essay is drawn from a lecture for the "Ways of Federalism" conference (University of the Basque Country, October 19, 2011) and a forthcoming book, FEDERALISM AND THE TUG OF WAR WITHIN (Oxford, 2012), which explores how constitutional interpreters struggle to reconcile the core tensions within American federalism. The essay reviews the current challenges of the American federal system through the theoretical lens developed in the book, focusing on the role of state-federal bargaining within the U.S. federal system.

FEDERALISM AND THE TUG OF WAR WITHIN traces American federalism's internal struggle through history and into the present, critiquing the Rehnquist Court and Tea Party's embrace of greater jurisdictional separation, the limits of New Federalism and Cooperative Federalism approaches, and the growing disjuncture between federalism theory and practice in the United States. In response to the ongoing challenges for American federalism posed by constitutional design, the book outlines a theory of Balanced Federalism, which mediates the core tensions of American federalism on three separate planes: (1) fostering balance among the competing federalism values, (2) leveraging the functional capacities of all three branches of government in interpreting federalism, and (3) maximizing the wisdom of both state and federal actors in so doing. The essay introduces the book's overarching themes and explores how well-crafted intergovernmental bargaining provides one means of navigating these core tensions.

1 Introduction: The Once and Future Challenges for American Federalism

This essay reviews the challenges facing the U.S. federal system through the theoretical lens developed in a forthcoming book, FEDERALISM AND THE TUG OF WAR WITHIN.[1] It also considers the opportunities federalism enables, focusing especially on responsive developments in state-federal intergovernmental bargaining. Part I frames the discussion in terms of American federalism's inherent tensions, the perpetual tug of war within.

The dilemmas of American federalism have become especially palpable in recent years, reflecting the progressing demands on all levels of government to meet the inexorably more complicated challenges of governance in an increasingly interconnected world.[2] Some reflect similar dilemmas in other federalist societies, while others are unique to our own particular constellation of national, state, and municipal

[1] ERIN RYAN, FEDERALISM AND THE TUG OF WAR WITHIN (Oxford, 2012). (With apologies to the reader, I note that citations to the book here cannot include specific page numbers, as the book is still in the final stages of production. To assist the location of cited material in the final book, I provide detailed parentheticals.)
[2] *Id.* at Chapter Five (discussing interjurisdictionality in governance).

governance.[3] Some federalism dilemmas are of genuine constitutional import, others more sound and fury—signifying little beyond the substantive political agenda of one interest group or another.[4] Each heralds the potential for real consequences in the political arena—and indeed, these consequences are what receive the most sustained public attention.

The political consequences of federalism dilemmas are apparent throughout the policy spectrum. They are visible in the litigation over health care reform efforts that has now reached the United States Supreme Court[5] and in similar battles over environmental governance and climate policy,[6] banking and financial services regulation,[7] immigration policy,[8] and gay marriage.[9] Consequences are also visible in the emergence of popular constitutional political movements, such as the "Tea Party" [10] and even the "Tenthers."[11] The latter are named for the Tenth Amendment to the U.S. Constitution that affirms our system of dual sovereignty, which divides sovereign authority between local and national government at the state and federal levels.[12] After decades of playing a merely supporting role in U.S. federalism theory,[13] the Tenth Amendment has emerged as a passionate site of political contest, rallying advocates for state right-to-die legislation,[14] home schooling,[15] and sectarian education,[16] and among opponents of

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[3] *Cf.* Vicki C. Jackson, *Comparative Constitutional Federalism and Transnational Judicial Discourse*, 2 Int'l J. Const. L. 91, 93-96 (2004) (exploring points of comparison and points of singularity among federal systems).

[4] *See, e.g.*, Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 910-14 (1994) (reviewing opportunistic invocation of federalism ideals in political debates throughout history); Neal Devins, *The Judicial Safeguards of Federalism*, 99 NW. U. L. REV. 131, 133-35 (2004) (same).

[5] Complaint for Declaratory and Injunctive Relief, Virginia v. Sebelius, No. 3:10-CV-188 (E.D. Va. Mar. 23, 2010) (arguing that the Patient Protection and Affordable Care Act, H.R. 3590 of March 2010, exceeds federal power under the Commerce and General Welfare Clauses and conflicts with state law); Complaint, Florida v. Dep't of Health & Human Servs., No. 3:10-cv-91 (N.D. Fla. Mar. 23, 2010) (similar challenge in a suit joined by more than a dozen other states); Complaint, Shreeve v. Obama, No. 1:10-cv-71 (E.D. Tenn. Apr. 8, 2010) (similar suit).

[6] *See, e.g.*, Brian Roberts, *Welcome to the Constitutional Crisis*, TENTH AMENDMENT CENTER, Apr. 27, 2010, http://www.tenthamendmentcenter.com/2010/04/27/welcome-to-the-constitutional-crisis/ (reporting on states' rights challenges to federal authority for proposed climate and financial reform legislation, among other bills).

[7] *Id.*

[8] United States v. Arizona, 2010 U.S. Dist. LEXIS 75558 (D. Ariz. July 28, 2010).

[9] *E.g.*, Massachusetts v. U.S. Department of Health and Human Services, No. 1:09-cv-11156-JLT, 21-36 (D. Mass. July 7, 2010) (holding that the federal Defense of Marriage Act violates the Tenth Amendment).

[10] *See* Kirk Johnson, *States' Rights is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010, http://www.nytimes.com/2010/03/17/us/17states.html (reporting on Tea Party support for 'state's rights' initiatives.)

[11] *See* Rick Montes, *What is a Tenther?*, NEW YORK TENTH AMENDMENT CENTER (2010), http://www.tenthamendmentcenter.com/2010/05/06/what-is-a-tenther/ (defining the movement); Radley Balko, *The "Tenther" Smear*, REASON.COM, Sept, 21, 2009, http://reason.com/blog/2009/09/21/the-tenther-smear (defending the movement).

[12] U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[13] RYAN, *supra* note 1, at Introduction (discussing the evolving role of Tenth Amendment in federalism analysis) and Chapter Four (discussing the Supreme Court's evolving Tenth Amendment jurisprudence).

[14] *See* Craig Peyton Gaumer & Paul R. Griffith, *Whose Life Is It Anyway?: An Analysis and Commentary on the Emerging Law of Physician-Assisted Suicide*, 42 S.D. L. REV. 357, 372 (1997) (arguing that if the Tenth Amendment requires greater federal deference to states rights, it should also require greater federal deference to certain individual rights); Emily J. Sovell, *Elderly, Be Alert: The Battle Continues over Deathbed Rights*, 45 S.D. L. REV. 670, 675 (2000) (discussing how right-to-die proponents rely on the Tenth Amendment). *Cf.* Gonzales v.

Medicaid and Medicare,[17] federal gun laws,[18] tax collection,[19] drivers' license requirements,[20] and the deployment of National Guard troops abroad.[21]

The principles of constitutional federalism are invoked in each of these substantive debates over policy, but the underlying challenge for American federalism—the reason we get so mired in these policy debates—goes much deeper. In fact, the great underlying challenge for American federalism is the same one that has preoccupied American jurists for more than two hundred years.[22] That underlying problem is that the U.S. Constitution mandates, *but incompletely describes*, our system of dual sovereignty.[23] This requires constitutional interpreters to turn to some exogenous, normative theory of federalism—some philosophy about what federalism is for and how it should work—in order to fill in the blanks that inevitably arise when vague constitutional directives are applied to actual cases and controversies.

Should the proper relationship between state and federal power approximate the dual federalism model—characterized by mutually exclusive spheres of separate subject-matter jurisdiction—or is it better understood in terms of the cooperative federalism model and its emphasis on concurrent jurisdiction?[24] When conflicts arise, should local or national decision-making trump? And which branch of government is best equipped to resolve the issue: the judiciary or the political branches? Always, the question is: "who gets to decide?" The state or federal government? Congress or the Court? And for that matter, what about state and federal executive agencies?[25]

Without clearer constitutional guidance on the details of federalism theory, the result has been decades (if not centuries) of vacillating federalism jurisprudence as the nation experiments with different theoretical models—each with its own advantages and disadvantages, the latest model usually over-

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Oregon, 546 U.S. 243 (2006) (upholding the Oregon Death with Dignity Act without directly invoking the Tenth Amendment but broadly addressing the relationship between state and federal power).

[15] *See* Lynn M. Stuter, *Are Public Schools Constitutional?*, Jan. 20, 2003, http://www.newswithviews.com/Stuter/stuter9.htm (arguing that the Tenth Amendment prevents the federal government from interfering in education).

[16] *See* EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING AND ABORTION 176 (1989) (arguing that the Tenth Amendment reserves state authority to assist sectarian schools and encourage religious activities in public schools).

[17] *See supra* note 5.

[18] Montana Firearms Freedom Act, MONT. CODE ANN. § 30-20-101 (2009).

[19] *E.g.*, State Authority and Tax Fund Act, H.B. 877, 2010 Sess. (Ga. 2010), State Sovereignty Act, H.B. 2810, 2010 Sess. (Okla. 2010); Washington State Sovereignty and Federal Tax Escrow Account of 2010, H.B. 2712, 2010 Sess. (Wash. 2010).

[20] ACLU, *Anti-REAL ID Legislation in the States*, http://www.realnightmare.org/news/105/ (noting that no state met the December 2009 deadline contemplated by the statute, and over half enacted or considered legislation prohibiting compliance with the Act, defunding its implementation, or calling for its repeal). *See also* Anthony D. Romero, Editorial, *Opposing View: Repeal Real ID*, USA TODAY, Mar. 5, 2007, http://www.usatoday.com/news/opinion/2007-03-05-opposing-view_N.htm (arguing that REAL ID violates the Tenth Amendment, destroys dual sovereignty, and makes Americans vulnerable to identity theft).

[21] *See* Kirk Johnson, *States' Rights is Rallying Cry for Lawmakers*, N.Y. TIMES, Mar. 16, 2010, http://www.nytimes.com/2010/03/17/us/17states.html (reporting on a Utah bill).

[22] RYAN, *supra* note 1, at Chapter One (describing the interpretive challenge of American federalism); Chapter Three (tracing it through American constitutional history).

[23] *Id.*; *cf.* EDWARD A. PURCELL, JR., ORIGINALISM, FEDERALISM, AND THE AMERICAN CONSTITUTIONAL ENTERPRISE: A HISTORICAL INQUIRY (2007); ALISON L. LACROIX, THE IDEOLOGICAL ORIGINS OF AMERICAN FEDERALISM (2010).

[24] RYAN, *supra* note 1, at Chapter Three (reviewing dual and cooperative federalism among the various operative federalism theories in play over the course of American history).

[25] For analysis of the textual ambiguity that leads to indeterminacy in U.S. federalism theory, see *id.* at Chapter One.

correcting for the errors of its predecessor while introducing new problems of its own.[26] Many of these approaches continued to be claimed on different sides of today's substantive policy debates about health care, environment, immigration, and so on. Meanwhile, innovations in multijurisdictional governance have far outpaced the vernacular of current federalism theory. The relationships between local, state, and federal actors in all branches of government have become more complicated, more entangled, and in many respects, more empowered.[27]

To that end, what American federalism most needs going forward is the development of a more coherent theoretical approach, one that can better cope with the three fundamental tensions within American federalism: the tension between the underlying values of federalism, that among the roles of the three branches of government in interpreting constitutional federalism directives, and that between local and national wisdom and expertise in implementing federalism ideals.[28] These core tensions—the three individual "tug of war" battles underlying the whole—remain the great unresolved challenges of the U.S. federal system. They are the ultimate source of the many substantive policy debates regularly framed in federalism terms. And to meet these challenges, American federalism must undertake three critical tasks.

First, American federalism requires better and more transparent balance between the competing values of good governance at the heart of American federalism. Indeed, this is the core idea of the book: that the best way to understand American federalism is in terms of the core values that give federalism meaning, or the good-governance principles that Americans turn to federalism to help actualize in public administration. The four of greatest significance are : (1) the checks and balances between local and national power that protect individuals against overreach or abdication by either sovereign; (2) accountability and transparency in governance that enables meaningful democratic participation throughout the jurisdictional spectrum; (3) the protection of local autonomy, innovation, and interjurisdictional competition of the sort the great federalism "laboratory of ideas" enables;[29] and finally (and most overlooked) (4) the interjurisdictional synergy that federalism enables us to harness between the unique governing capacity that develops at the local and national levels, needed to address the different parts of interjurisdictional problems that require response from both.[30]

The core federalism values are doubtlessly all good things, and we have aspired to each of them throughout American history. The problem, of course, is that each value is suspended in a web of tensions with the others—fueling a perpetual "tug of war" for privilege when they conflict. We can't always satisfy all of them in any given regulatory context at the same time. For example, the very system of dual sovereignty that creates checks and balances frustrates governmental transparency, as it would certainly be easier to follow the lines of accountability in a fully unitary, centralized system! And yet we willingly accept the compromise to avail ourselves of the benefits of local autonomy and

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[26] *Id.* at Chapter Three (reviewing vacillations over the course of American history) and Chapter Four (reviewing them specifically in the context of the Rehnquist Court's New Federalism jurisprudence).

[27] *Id.* at Parts III and IV (describing opportunities for state-federal collaborative governance). *See also* ERWIN CHEMERINSKY, ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY (2008) (casting federalism as a means of empowering governance at all levels on the jurisdictional spectrum); ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM (2009) (emphasizing the importance of jurisdictional overlap and dynamism in American federalism).

[28] *See generally* RYAN, *supra* note 1.

[29] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (praising the "laboratory of ideas" enabled by federalism in observing how "a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country").

[30] *Id.* at Chapter Two (reviewing the intellectual history of these values in federalism theory).

interjurisdictional synergy associated with federalism, creating deeper opportunities for democractic participation and effective regulatory response.[31] Until now, the discourse has done a poor job of even recognizing these tensions, let alone providing meaningful guidance for coping with them, leading to the famously fluctuating approaches to federalist governance over American history.[32]

The second ongoing challenge is that American federalism requires better balance among the functional capacities of the different branches of government in interpreting constitutional federalism directives, in both abstract and concrete circumstances.[33] This begins as a rather intuitive point: we all understand that courts are better at answering certain legal questions and legislatures better at others (and though the American federalism discourse has been slow to recognize it, even the executive branch brings some talent to the table). However, the previous American federalism discourse has largely been a "tug of war" between the proponents of judicial supremacy in federalism interpretation on the one hand[34] and proponents of legislative supremacy on the other.[35] To flourish most healthily, American federalism must afford space for all three branches to contribute what they do best in making sense of the whole. Indeed—it already does, variously enabling the allocation of contested authority through judicial review, legislative policymaking, and executive implementation in different federalism-sensitive contexts.[36] Federalism theory has just been slow to understand how it all works together.

Finally, American federalism must better maximize the input of local as well as national actors in allocating contested authority, which, of course, is the ultimate federalism project. This is the most fundamental "tug of war" of all—the reason for our wrestling with federalism to begin with. After all, if local decision-making were always best, there would be no need for a strong federation in the first place (although the failed Articles of Confederation that predated our Constitution suggested otherwise).[37] Similarly, if national decision-making were always best, there would also be no need for the federation—we could have a fully centralized government, like that in China or France.[38] But for reasons both historical and philosophical, American federalism has proven robust in spite of the alternatives. The critical question is how best to balance the wisdom and interests of the local and national governments that have remained so robust within our federal system.

A diagnostic view of actual American governance reveals this as an area where federalism practice has especially outpaced federalism theory.[39] Today, local input in federalism decision-making extends far beyond the canonical device of providing representatives for election to national bodies like Congress. Instead, there is compelling evidence of ample state and local input on allocating contested

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[31] *Id*. (discussing the various tensions and trade-offs between core federalism values).

[32] *Id*. at Chapter Three (reviewing the overall history of American federalism) and Chapter Four (reviewing the New Federalism jurisprudence of the Rehnquist Court era).

[33] *Id*. at Parts III and IV (reviewing the allocation of federalism interpretive authority among the three branches).

[34] *E.g.*, Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 128 (2001); William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 782–83, 797–98 (1987).

[35] *E.g.* 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, 588 (1954); JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-76 (1980).

[36] RYAN, *supra* note 1, at Parts III and IV (exploring the roles of the branches in interpreting federalism).

[37] *Id*. at Chapter Three (discussing the Articles of Confederation).

[38] *Id*. at Chapter Two.

[39] *Id.* at Part IV (exploring the enterprise of state-federal bargaining).

policy-making and implementation authority in direct negotiations with federal actors, through a variety of constitutional and statutory frameworks that enable such negotiation to take place.[40] The role of intergovernmental bargaining in federalism interpretation is a fascinating and important development in federalism theory, which is only just now beginning to attract the scholarly attention it deserves. It is by no means the only subject of American federalism worthy of study, but in light of its academic debut and to encourage further such inquiry, it is where I will focus the balance of this essay.

Negotiated federalism, which presents on a continuum from the obvious to the opaque, plays a surprisingly foundational role in the American system of dual sovereignty. FEDERALISM AND THE TUG OF WAR WITHIN helps catalog this largely uncharted landscape in a taxonomy of opportunities for state-federal bargaining available within various constitutional and statutory frameworks.[41] The full taxonomy groups them into categories of conventional examples, negotiations to reallocate authority, and joint policymaking negotiations. It reviews the familiar forms of bargaining used in lawmaking, over law enforcement, under the federal spending power, and for exceptions under otherwise applicable laws. It then considers the more interesting (and progressively less obvious) forms of negotiated policymaking, including negotiated federal rulemaking with state stakeholders, federal statutes that share policy design with states, iterative programs of joint policymaking that stagger leadership over time, and even intersystemic signaling negotiations, by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policies.[42]

This emerging understanding of intergovernmentally negotiated federalism—or "federalism bargaining," as we can call it for short—speaks to each of American federalism's core challenges.[43] When federalism bargaining is well-crafted, it creates a legitimate forum for balancing values, functional governance capacity, and local and national input—all through a bilateral dynamic of governance that tracks the very purpose of federalism as a dynamic equipoise between local and national decision-making. Indeed, by incorporating the interests of local, state, and federal actors into negotiated balance, intergovernmental partnerships can safeguard the objectives of federalism on a structural level that unilateral policymaking by state or federal actors alone can never accomplish.[44]

In my forthcoming book and several previous articles, I have explored how state and federal actors use various forms of bargaining to navigate the federalism challenges that invariably arise in contexts of concurrent regulatory jurisdiction.[45] This essay summarizes that literature, showcasing two

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[40] *Id.*

[41] *Id.* at Chapter Eight (presenting the taxonomy); *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV 1 (2011) (presenting an earlier version).

[42] *Id.*

[43] My discussion of federalism bargaining focuses on the vertical federalism relationship within each given array of state and federal participants. For simplicity, I treat municipal participants in intergovernmental bargaining as state actors, consistent with the Supreme Court's inclusion of municipal activity in its Tenth Amendment jurisprudence. For discussion on how independent municipal activity further complicates the analysis, see *id.* at Part IV Introduction and accompanying notes; *infra* note 132 (quoting the relevant text).

[44] *Id.* at Chapter Ten (contrasting the structural safeguards of bilateral and unilateral interpretation).

[45] *Id.*; *see also* Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV 1 (2011) (the basis for Chapters Eight, Nine, and Ten); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLORADO. L. REV. 1 (2010) (the basis for Chapter Seven); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MARYLAND L. REV. 503 (2007) (the basis for parts of several chapters in Parts I and II).

examples of federalism bargaining that demonstrate governance models well suited to the challenges of negotiating policy among multiple levels of government. The Coastal Zone Management Act enables broadly negotiated local initiative within a framework of federal law that alternates leadership between national and local decision-makers over time.[46] It provides a good model for governance that matches broad national goals with policies best implemented at the local level. By contrast, the iterative policymaking negotiations within the Clean Air Act's mechanism for regulating motor vehicle emissions offers space for limited interjurisdictional competition within a tighter federal framework.[47] This approach serves governance hinging on a national market while preserving space for regulatory innovation, avoiding the concerns of stagnation and capture associated with regulatory monopoly.

Finally, the essay shows how federalism bargaining enables structural and procedural devices that can help resolve federalism's core challenges in a uniquely principled way. Based on these and other examples, the final section of the essay provides theoretical justification for the role that intergovernmental bargaining can play in supplementing the unilateral interpretive efforts of the Courts, Congress, and the Executive to make sense of our ongoing federalism dilemmas. In short, the more (or less) that federalism bargaining incorporates legitimizing procedures founded on mutual consent and federalism values, the more (or less) interpretive deference should be accorded its substantive outcome.[48]

The following discussion provides a digestible introduction to more painstaking analysis in prior work. Part II of this essay explores the dilemma of jurisdictional overlap within American federalism and locates the significance of negotiated federalism within the existing U.S. federalism discourse, especially the ongoing federalism safeguards debate. Part III introduces the federalism bargaining enterprise, providing highlights from the full taxonomy and examples from the U.S. Coastal Zone Management and the Clean Air Acts. Part IV explores of the interpretive potential of federalism bargaining that meets specified procedural criteria associated with fair bargaining and core federalism values. It shows how well-crafted federalism bargaining, subjected to limited but meaningful judicial review for abuses, harnesses the appropriate capacity of all branches at all levels of government in jointly navigating the tensions among federalism values toward good governance.

2 Jurisdictional Overlap, Bilateralism, and the Great Federalism Safeguards Debate

This section explores the zone of concurrent state-federal regulatory jurisdiction that complicates American federalism. It also reviews the significance of negotiated governance within this zone to the longstanding debate about which branch of government should resolve regulatory jurisdictional issues. This analysis precedes the fuller exegesis of intergovernmental bargaining in Part III in order to demonstrate up front why that exegesis is worth pursuing.

A discussion of the challenges for American federalism necessarily begins with the problem of jurisdictional overlap that American federalism necessarily creates. This is the "interjurisdictional gray area" that bridges the clearer realms of exclusive state and federal jurisdiction as delegated by the Constitution.[49] It is from within this gray area that most federalism controversy spawns, and certainly all

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[46] Coastal Zone Management Act, *codified at* 16 U.S.C. §§ 1451–66 (2006).
[47] Clean Air Act, 42 U.S.C. §7410(a)(1).
[48] RYAN, *supra* note 1, at Chapter Ten (detailing this analysis).
[49] *Id.* at Chapter One (reviewing the constitutional basis for jurisdictional overlap) and Chapter Five (exploring the gray area of overlap). For examples of exclusive delegations bridged by this gray area, see *infra* note 54.

that is currently occupying front page news. Simply stated, zones of jurisdictional overlap are those regulatory contexts in which both the local and national governments have some legitimate regulatory interest or obligations at the same time. Sovereign interests and obligations arise from constitutional delegations of federal responsibility and the remaining reservoir of police power constitutionally reserved to the states, but many are triggered by related subject matter areas of law.[50] For example, the Constitution explicitly delegates responsibility for uniform national bankruptcy laws to the federal government, but the administration of federal bankruptcy nevertheless relies on state law definitions of property.[51] In the United States, there are many such areas of overlap, from criminal law to financial services regulation, from national security to public health law.[52]

For example, in the context of environmental law, jurisdictional overlap often arises because of the way that many environmental problems partner a need for locally-based land use authority (to police the individual sources of an environmental harm) with nationally-based Commerce Clause authority (to manage boundary-crossing or spillover effects of these harms). The problem of regulating water pollution provides a classic example. Harmful stream sedimentation by a local construction project may be best regulated through a municipal construction permitting process—but if that fails, it will cause problems for downstream communities in other states without direct control over out-of-state permitting.[53] For other health and safety regulations, the same relationship plays out between the states' traditional police power to protect the health and safety of their citizens and the need for federal law to protect the public in other states.

In light of such overlapping sovereign interests, controversy often arises in these circumstances over which sovereign should be able to make which regulatory choices. This, after all, is the ultimate federalism inquiry: "who gets to decide?"—the state or federal government? To be sure, the Constitution provides valuable guidance about the issue, clearly enumerating some powers to the federal government (such as the power to declare war) and reserving others to the states (such the management of elections).[54] Even so, American federalism gives rise to two primary kinds of uncertainty, leading to so many of the substantive debates in the news.

Sometimes, there is uncertainty about the actual boundary line between realms of state and federal jurisdiction, in contexts where we think there may actually be a bright line separating them. For example, controversy of this variety has erupted over the boundary between state and federal reach over matters relating to immigration. The Constitution requires the federal government to establish uniform rules of naturalization, but several states have enacted new laws that, while not administering immigration directly, govern immigration-related activity by state businesses and law enforcement agencies.[55] Arizona's controversial legislation is currently the subject of a lawsuit by the U.S. Department of Justice,

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[50] U.S. CONST. amend X.; RYAN, *supra* note 1, at Chapter One (discussing indeterminacy among the details of constitutional delegations) and Chapter Five (discussing jurisdictional overlap in detail).

[51] U.S. CONST. art. I, § 8 (delegating bankruptcy administration to the federal government); Felicia Anne Nadborny, Note, *"Leap of Faith" into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese's Bankruptcy Estate*, 13 AM. BANKR. INST. L. REV. 839, 889 (2005) (discussing the role of state law).

[52] RYAN, *supra* note 1, at Chapter Five (demonstrating overlap in multiple areas of regulatory law).

[53] *Id.* (reviewing the interjurisdictional problem of watershed-wide pollution control).

[54] U.S. CONST. art. I, sec. 8 (empowering Congress to declare war); art. I, sec. 4 (delegating responsibility for the mechanics of congressional elections to state legislatures). *See also* RYAN, *supra* note 1, at Chapter One.

[55] U.S. CONST. art. I, § 8; United States v. Arizona, 2010 U.S. Dist. LEXIS 75558 (D. Ariz. July 28, 2010) (describing Arizona's controversial immigration-related law).

which seeks to invalidate the state measures as preempted by federal law.[56] Related controversy has been playing out in more than a decade of litigation over the proper boundary between state and federal authority over wetlands regulation.[57] Beginning with a 2001 case in which an Illinois municipal agency successfully sued to invalidate federal authority over certain intrastate wetlands,[58] the boundary-drawing problem went on to embroil the U.S. Supreme Court in one of its most fractured opinions ever, *Rapanos v. United States*, which failed to produce a majority view despite four separate opinions.[59]

In other contexts, we are more comfortable with the idea of concurrent jurisdiction and less interested in drawing bright line boundaries between state and federal reach, as demonstrated by general complacency with overlapping state and federal criminal laws[60] or cooperative state-federal management of national highways.[61] Yet uncertainty nevertheless surfaces when conflicts arise between state and federal choices in this gray area—and then the question becomes "who should trump?" Regarding criminal or environmental law enforcement, for example, should national objectives preempt, or should local priorities prevail?[62] Once again, the Constitution provides important guidance through the Supremacy Clause, which clarifies that legitimate exercise of federal authority may always trump conflicting state law.[63] Even so, the federal government often leaves purposeful space for local participation even when it could theoretically preempt the regulatory field from top to bottom under one of its enumerated powers, usually for the sake of some special regulatory expertise or capacity that local

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[56] *Id.*; Press Release, Dep't of Justice Office of Pub. Affairs, Citing Conflict with Federal Law, Department of Justice Challenges Arizona Immigration Law (July 6, 2010), http://www.justice.gov/opa/pr/2010/July/10-opa-776.html (arguing that the Arizona law exceeds a state's role with respect to aliens, interferes with the federal administration of the immigration laws, and critically undermines U.S. foreign policy objectives).

[57] RYAN, *supra* note 1, at Chapter Five (discussing the interjurisdictional problem of wetlands regulation).

[58] Solid Waste Agency of Northern Cook County v. U.S. Army Corp of Engineers, 531 U.S. 159, 173-74 (2001) (limiting federal authority over "hydrologically isolated" wetlands).

[59] Rapanos v. United States, 126 S. Ct. 2208 (2006) (casting further doubt on the reach of federal regulatory authority over wetlands without direct surface connections to navigable waters). Strictly speaking, *Solid Waste Agency* and *Rapanos* were both statutory decisions interpreting the Clean Water Act. However, the Justices and their observers clearly understood their task of statutory interpretation as taking place in the looming shadow of ongoing debate over the reach of federal Commerce Clause authority.

[60] *See* Wayne A. Logan, *Creating a "Hydra in Government": Federal Recourse to State Law in Crime Fighting*, 86 B.U. L. REV. 65, 104–06 (2006); Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553 (2002).

[61] The National Highway System is jointly administered by the states and federal government. Federal-Aid Highway Act of 1956, Pub. L. 84-627, 70 Stat. 374 (June 29, 1956).

[62] *E.g.*, Logan, *supra* note 60 at 104–06 (questioning the increasing federalization of criminal law); Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, 14 N.Y.U. ENVTL. L.J. 130, 172-73 (2005) (questioning federal preemption in areas of formerly state environmental law).

[63] U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

government has but it does not.[64] These days, more often than not, the more difficult preemption question is not whether the federal government *could* preempt, but whether (and to what degree) it *should*.[65]

Ongoing dilemmas about scope and restraint in contexts of jurisdictional overlap demonstrate the force with which federalism and preemption controversies remain alive and well in the United States. They also indicate the considerable uncertainty faced by the people who actually govern in these contexts of overlap in determining how, exactly, they should do their jobs. They face uncertainty about who should "get to decide" when a federalism-charged decision must be made, and how to otherwise share or divide regulatory authority in the performance of their obligations. Yet even as academics struggle to make sense of what the Court and Constitution say about who should decide, those who actually govern in areas of overlap do not usually struggle with academic questions. More often than not, they face down the federalism uncertainty that they confront in their work simply by *negotiating through it*. Working together with their counterparts on either side of the state-federal line, they jointly determine how best to allocate contested authority as needed to cope with the problems entrusted to their care.[66]

Accordingly, much of my own research in recent years has been a voyage of discovery into just how much federalism-sensitive governance is, in fact, the product of intergovernmental bargaining. It has been instructive—even surprising—to discover just how often the answer to the question "who gets to decide?" is reached through some process of negotiation, through a variety of constitutional and statutory frameworks that enable these negotiations to take place. Federalism bargaining includes examples of conventional political haggling, formalized methods of collaborative policymaking, and even more remote signaling processes by which state and federal actors share responsibility for public decision making over time.[67] In the following section, I sketch out some basic ways that state and federal actors negotiate with one another in federalism-sensitive contexts. But first, this section highlights two important normative consequences of this research into negotiated governance.

The first engages the growing gap between the rhetorical emphasis of the mainstream federalism discourse and the reality of intergovernmental relations in the United States. The sheer volume of negotiated governance demonstrated in the full taxonomy suggests a story far different from the presumption of state-federal antagonism that colors so many academic discussions about American federalism.[68] Indeed, it belies a pervasive mythology that arguably hangs over much of the discourse, which we might call "the Myth of Zero-Sum Federalism."[69] This is the idea that the state and federal governments are locked in a bitter, winner-takes-all competition for jurisdiction, in which every victory by one side constitutes a loss for the other. There are certainly instances in which this is true, as the Department of Justice's lawsuit over Arizona immigration law will likely demonstrate.[70] But as Part III

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[64] RYAN, *supra* note 1, Chapters Five and Eight (reviewing regulatory realms in which the federal government invites state involvement even though it could legitimately preempt the field).

[65] *Id.*; *cf.* William Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 NYU L Rev. 1547 (2007) (discussing the advantages of narrowly tailored "floor preemption", which enables state discretion to exceed a federal standard, over the alternative "unitary federal choice" or "ceiling preemption," which does not); Ann Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097 (2009) (discussing the advantages of declining to fully preempt state discretion within a national program of air pollution prevention).

[66] RYAN, *supra* note 1, at Chapters Eight and Nine (reviewing the varieties and mechanics of such bargaining).

[67] *Id.* at Chapter Eight.

[68] *Id.* at Chapter Eight (presenting the taxonomy) and Part IV Introduction (discussing its significance).

[69] *Id.* at Part IV Introduction.

[70] *See supra* note 56 and accompanying text.

of this essay reveals, the line between state and federal power is just as often an ongoing project of negotiation, at levels large and small, and often in ways that often accrue to the advantage of both sides. This simple observation warrants emphasis, because it makes a powerful point about what American federalism actually looks like in practice, and about how federalism in practice often departs from federalism in rhetoric.[71]

The second normative point addresses the significance of the interpretive potential of federalism bargaining, the subject to which Part IV of this essay is devoted. There I argue that this robust recourse to intergovernmental bargaining is not just a de facto response to interpretive uncertainty on the part of the Court or Congress about exactly who should get to decide in each instance. Instead, I show that—at least when it's done well—such bargaining can *itself* be a constitutionally legitimate way of deciding. That is to say, it can itself be a legitimate way of interpreting federalism—when we understand federalism interpretation as how we effectively constrain public administration to be consistent with the governing constitutional directives.[72] As Part IV explains, properly designed federalism bargaining can incorporate not only the consent principles that legitimize bargaining in general, but also the fundamental federalism values that should guide federalism interpretation in any forum—as a matter of good governance procedure.[73]

But before advancing to that argument, I here emphasize the significance this second point bears for an important normative problem of federalism theory, with which American jurists have wrestled for ages. If the most basic inquiry of American federalism is "who gets to decide—the state or federal government?", then the necessary corollary—the meta-inquiry, if you will—is "*who gets to decide that?*" Is it the Court, through judicially enforceable federalism constraints? Congress, through political safeguards? The executive branch, through administrative process? Scholars of American federalism will recognize this as the "Federalism Safeguards" debate with which theorists have been engaged over hundreds of years, which seeks to identify which branch of government should hold final interpretive authority over the allocation of state and federal regulatory authority in contexts of jurisdictional overlap.[74] Indeed, it is a debate spanning hundreds of years precisely because it is a hard one to resolve—all three of these branches possess useful tools to bring to bear on the project.

However—and here is the critical point—the entire time we have been holding this debate, it has been focused exclusively on how each of these branches acts to interpret federalism *unilaterally*—on one side of the state-federal line or the other—alone in their chambers as they figure out whether to enact a law in a context of overlap, whether to uphold it if challenged, and how to implement it if it survives challenge. Yet this entire time, the debate has been missing how the three branches are also interpreting federalism *bilaterally*—on both sides of the state-federal line—through the processes of intergovernmental bargaining that are the focus of this essay.[75]

This insight into the bilateral nature of so much federalism-sensitive governance in the United States powerfully alters the Safeguards debate about federalism interpretation. Understanding bilateral interpretive tools offers new insight on the available means of federalism interpretation, providing new

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[71] RYAN, *supra* note 1, at Part IV Introduction.
[72] *Id.* at Chapter Eight (defining federalism interpretation).
[73] *Id.* at Chapter Ten (evaluating the procedural consistency of bargaining with fairness and federalism principles).
[74] *Id.* at Chapter Eight (reviewing the competing positions within the federalism safeguards debate); *supra* notes 34-35 and accompanying text.
[75] *Id*. at Part IV.

theoretical justification for existing practices that warrant deference and better means of evaluating whether they do. It also raises new questions about how best to allocate interpretive roles among the three branches and various levels of our system of government. To put flesh on the bones of these provocative assertions, we now explore the federalism bargaining enterprise itself.

3 Negotiated Federalism: An Introduction to U.S. Intergovernmental Bargaining

This section explores the variety of mechanisms available to state and federal actors for bargaining over federalism interpretation and implementation in the United States. My analysis of negotiated governance adopts the broad definition of bargaining that negotiation theorists prefer: "an iterative process of communication by which multiple parties seek to influence one another in a project of joint decision making."[76] Framing negotiation as an iterative process of joint decision making encompasses many examples that fit the conventional notion of negotiation—perhaps legislative lobbying in the back of some smoke-filled room—where the bargaining is neatly bounded in time and space, the parties are all easily identified, and participants see their objective as one of deal-making. But it also includes examples beyond the conventional— such as the iterative policymaking negotiations and intersystemic signaling examples—which may take place over a longer period of time, with a broader array of participants, who may not even think of what they are doing at the time as negotiating.[77]

As aforementioned, my previous work presents a detailed taxonomy of ten basic kinds of federalism bargaining, identifying different opportunities for state and federal actors to negotiate over the allocation of policymaking and implementation authority in federalism-sensitive contexts.[78] The taxonomy groups them into three overarching categories: conventional examples, negotiations to reallocate authority, and joint policymaking negotiations (although some examples fit within more than one category).

The first category requires little explanation in an abbreviated discussion, because most readers will already understand them at an intuitive level. Conventional negotiations are of the "smoke-filled room" variety, reflecting the most ordinary ways in which state and federal actors negotiate with all the hallmarks of traditional deal-making. They involve a simple exchange of value or a purposeful collective deliberation between well-identified participants, with a clear beginning and end. Conventional federalism bargaining is common in administrative proceedings, in settlement of litigation or other specific disputes, and over enforcement matters in which both state and federal actors have an interest. State and municipal agencies also engage in conventional negotiations with federal legislators over matters of joint concern through the interest-group representation model of lawmaking that characterizes our representative democracy.[79]

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[76] *Id. See also* ROGER FISHER & WILLIAM L. URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN xvii, 100 (1991) (describing it as "back-and-forth communication designed to reach agreement" whenever parties have both shared and differing interests); RICHARD SHELL, BARGAINING FOR ADVANTAGE: NEGOTIATION STRATEGIES FOR REASONABLE PEOPLE 6 (1999) (describing it as the "interactive communication process" that takes place when parties want things from each other).

[77] *See supra* text accompanying note 42; RYAN, *supra* note 1, at Chapter Eight (discussing these examples in detail).

[78] *Id.*; *see also* Ryan, *Negotiating Federalism*, *supra* note 41 (providing a more detailed taxonomy in comparison to the edited version that appears in FEDERALISM AND THE TUG OF WAR WITHIN).

[79] RYAN, *supra* note 1, at Chapter Eight (reviewing conventional negotiations).

These most familiar examples of federalism bargaining are also most frequently used, variously addressing matters of policymaking, implementation, and enforcement. The results usually become part of the public record, but the process itself may be largely hidden from view (a consequence of the smoke-filled room), such that details are only available through first-hand accounts. For this reason, even though conventional examples seem most comfortably familiar, they are also the most vulnerable to conventional negotiating concerns about transparency, inclusion, third-party impacts, and principal-agent tensions.[80] When manifest, and as reviewed in Part IV, such procedural issues may compromise the federalism interpretive potential of such bargaining, even if it does not complicate the legitimacy of the result for other purposes.[81]

The second category, state-federal negotiations to reallocate authority (or depart from an otherwise established legal order) includes slightly more interesting examples. These take place when there actually is some constitutional or statutory line in the jurisdictional sand that purports to answer the question of "who gets to decide?"—but the parties then negotiate around that line. The best known examples are those that take place under the Spending Clause of the Constitution,[82] which enables the federal government to bargain with the states for access to policymaking areas initially reserved by the Constitution to the states, such as education or public health policy. In an example specifically upheld as constitutional by the Supreme Court, Congress persuaded the states to adopt a minimum legal drinking age of 21 years in exchange for federal highway funding (on the theory that raising the legal drinking age would reduce deaths on federally-maintained highways from drunken driving).[83] Spending power bargains are frequently the basis for statutory programs of cooperative federalism, in which the state and federal governments take responsibility for separate parts of interlinking regulatory programs, such as the national highway system mentioned above, the Coastal Zone Management program discussed below, or social safety net programs like Medicaid.[84]

Spending power bargaining enables federal access to policymaking realms reserved to the states, but federalism bargaining to reallocate authority can work in the other direction as well. The states sometimes negotiate directly with Congress to encroach on policymaking arenas specifically delegated by the Constitution to the federal government.[85] This kind of federalism bargaining takes place whenever the states seek (constitutionally mandated) congressional approval for interstate compacts that augment state authority at the expense of federal authority.[86] States often do so when negotiating interstate compacts that would otherwise encroach on the federal commerce power.[87] For example, the Great Lakes-St. Lawrence River Basin Compact was negotiated between 2001 and 2005 when eight regional states feared that federal proposals to divert lake waters to the high plains might lead to federally mandated water transfers to arid western states.[88] The compact makes it difficult for later federal choices to divert water

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[80] *Id.*

[81] In other words, a smoke-filled room bargain that leads to the enactment of legislation may yield perfectly legitimate legislation, but the bargaining process used to create that legislation may or may not confer the kind of interpretive legitimacy described in Part IV that would require deference from a reviewing court.

[82] U.S. CONST. art. I, § 8.

[83] South Dakota v. Dole, 483 U.S. 203 (1987).

[84] RYAN, *supra* note 1, at Chapter Eight (reviewing Medicaid demonstration waivers).

[85] *Id.* (discussing bargained-for encroachment).

[86] *E.g., id.* at Chapter Seven (discussing compacts limiting interstate shipments of low-level radioactive waste).

[87] *Id.* at Chapter Eight (discussing interstate water allocation compacts).

[88] DAN TARLOCK, LAW OF WATER RIGHTS AND RESOURCES § 10:24 (2009).

from the Great Lakes basin,[89] empowering state decision-making at the expense of federal prerogative despite clear federal supremacy in the allocation of interstate waters.[90]

Nevertheless, this essay focuses attention on the third and most intriguing category of federalism bargaining, the joint policymaking negotiations, which draw on elements of the prior two. These take place in those zones of jurisdictional overlap in which the federal government could fully preempt state involvement under one of its enumerated powers—but it declines to do so, usually in light of some critical substantive expertise, legal authority, or boots-on-the-ground enforcement capacity that local government possesses but national government does not.[91] Negotiated federal rulemaking with state stakeholders provides one example, in which state actors assist federal agencies in drafting regulations ranging from environmental to national security issues.[92] Federal statutes that explicitly share policy design with participating states provide another, such as the Coastal Zone Management Act discussed below.[93] Joint policymaking also takes place through less formalized iterative processes that stagger state and federal leadership over time, such as the Clean Air Act example that follows.[94] Subtle policy negotiations are even conducted informally through the remote device of intersystemic signaling, by which independently operating state and federal actors trade influence over the direction of evolving interjurisdictional policy, such as the ongoing developments in state and national policy over medical marijuana.[95]

In contrast to conventional bargaining where only the results are made public, the process of joint policymaking negotiations is often as available for scrutiny as its results, moderating concerns about negotiated governance that hinge on transparency (and bolstering eligibility for interpretive potential under the Part IV test). Moreover, joint policymaking bargaining is usually the result of legislative design, offering opportunities to engineer support for federalism considerations into the negotiating process even when participants may be distracted by more immediate substantive goals.[96] The following discussion analyzes two examples of joint policymaking federalism bargaining to demonstrate two different models of negotiated governance in federalism-sensitive contexts. The first takes the U.S. Coastal Zone Management Act as an example of a "policymaking laboratory" negotiation, and the second draws on the U.S. Clean Air Act's mechanism for regulating automobile emissions to demonstrate the contrasting model of "iterative federalism bargaining."

3.1 Policymaking Laboratory Negotiations: The Coastal Zone Management Act

The "policymaking laboratory negotiations" are an especially fruitful variety of joint policymaking bargaining that harness the promise of federalism as a national laboratory of state-based

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[89] *Id.* at § 10-32.

[90] Sporhase v. Nebraska *ex rel*. Douglas, 458 U.S. 941, 953-54, 959-60 (1982).

[91] RYAN, *supra* note 1, at Chapter Eight (discussing joint policymaking bargaining).

[92] *Id.* (reviewing negotiated rulemaking, including examples regulating stormwater and state identification cards).

[93] Pub. L. No. 92–583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1466 (2006)).

[94] 42 U.S.C. §7410(a)(1).

[95] *See* RYAN, *supra* note 1, at Chapter Eight (discussing the example of medical marijuana policy).

[96] *Id.*

ideas and experimentation.[97] In these negotiations, the federal government invites the states to propose innovations and variations within existing federal laws that address realms of concurrent jurisdiction. Some federal statutes invite states to experiment with local improvements on the general federal approach by proposing specific waivers or exceptions, as do Medicaid and other Social Security Act programs.[98] Congress also authorizes bargaining in statutes that invite states to lead through local policymaking in support of national objectives, or to design implementation plans in support of federal standards. Federal agencies occasionally use similar processes in articulating rules to implement congressional statutes, as the U.S. Environmental Protection Agency (EPA) did in developing stormwater regulations under the Clean Water Act.[99] Policymaking laboratory negotiations often (though not always) take place in the context of a spending power-based program of cooperative federalism.

The Coastal Zone Management Act[100] (CZMA) presents a model in which the federal government frames the overall goals of regulatory policy and invites the states to take the lead in proposing how best to attain them locally, based on their own unique economic, environmental, or demographic factors. The CZMA creates a complex forum for ongoing intergovernmental bargaining, designed to protect coastal resources from the cumulative impacts of development pressures on a scale beyond that addressed by traditional local land use planning.[101]

The CZMA addresses a classic problem of overlap, one hopelessly mired in the gray area of concurrent state and federal regulatory interest.[102] The clearest interjurisdictional factor lies seaward of the coast, given water's notorious unwillingness to abide by political boundaries. No matter how hard a coastal community works to protect the resources on the wet side of its shoreline, it will find little success without the cooperation of its neighbors. Coastal waters flow across state lines, resources suspended in that water will do the same, and pollutants threatening the quality of all of these resources will also freely migrate across these boundaries. Fisheries, water quality, and other straddling coastal resources simply cannot be managed purely at the local level; the boundary crossing nature of the resource requires a more coordinated approach.

However, neither can the federal government effectively manage these resources on its own. As marine scientists have long warned, among the greatest threats to these shared resources is marine pollution originating from land-based activities regulated at the state and local level. Even traditional land use planning decisions that affect industrial development patterns, suburban sprawl, and private transportation choices can effect marine pollution levels, by encouraging or discouraging the conveyance to coastal waters of manufacturing pollutants, lawn pesticides and fertilizers, and vehicular residues.

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[97] *Id.* (discussing policymaking laboratory negotiations). *See also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *supra* note 29 and accompanying text.

[98] *See* RYAN, *supra* note 1, at Chapter Eight (discussing Social Security Act waiver programs).

[99] 33 U.S.C. § 1342(p)(4) (2000) (authorizing stormwater regulation); EPA OFFICE OF WATER, OVERVIEW OF THE STORM WATER PROGRAM 8 (1996), http://www.epa.gov/npdes/pubs/owm0195.pdf. *See also* RYAN, *supra* note 1, at Chapters Five and Eight (discussing the "Phase II" stormwater rule developed through negotiated rulemaking).

[100] Pub. L. No. 92–583, 86 Stat. 1280 (1972) (codified as amended at 16 U.S.C. §§ 1451–1466 (2006)).

[101] *Id.* at § 1451(i) (2006); 136 Cong. Rec. 26030, 26030–67 (1990) (statement of Rep. Walter B. Jones); S. Rep. No. 92–753 (1972), *reprinted in* 1972 U.S.C.C.A.N. 4776, 4778.

[102] RYAN, *supra* note 1, at Chapter Eight (discussing the Coastal Zone Management Act in detail).

Recognizing the need for an intergovernmental partnership on this and other grounds, Congress engaged the states in an elaborate, three-tiered program of intergovernmental bargaining through the CZMA.[103]

In the first stage of negotiations, Congress initiates bargaining under its spending power, offering financial and technical assistance for voluntary state management programs to protect resources in coastal waters, submerged lands, and adjacent shorelands.[104] Unlike other laws that promise federal control if states choose not to participate, the CZMA establishes no mandatory compliance standards and does not authorize federal implementation for states that opt out.[105] Nevertheless, the states have responded enthusiastically, with formal participation by all thirty-five eligible coastal and Great Lakes states, as well as extensive participation from municipal governments.[106]

In the second stage of bargaining, the relevant state and federal agencies haggle over the terms of a state's proposed plan, dickering over provisions that one side or the other would most prefer to see in the final plan. In this conventional bargaining forum, the federal government appears to have the most negotiating leverage, given that it maintains final approval authority and holds the ultimate carrot of federal funding. However, all bargaining is driven by circumstances in which both sides need something from the other. In this case, only the state possesses the local land use planning authority and governance capacity needed to create and implement these management plans. In this regard, and as is true in so many fields of spending power bargaining, federal fiscal leverage is matched by the leverage of state governance capacity.[107]

In the final and most fascinating stage of the bargaining, the apparent leverage shifts. Once the federal government approves the state plan, it effectively agrees *itself* to be bound by the state plan going forward, or to ensure that all federal activities directly or indirectly affecting the coastal zone will be consistent with the approved state plan.[108] Under a limited waiver of federal supremacy known as the CZMA "consistency provision," federal actors must seek state permission for any actions that could impact protected coastal resources. States may review not only those activities conducted by or on behalf of a federal agency, but also activities that require a federal license or permit, activities conducted pursuant to an Outer Continental Shelf Lands Act exploration plan, and any federally-funded activities that may impact the coastal zone.[109] States may disapprove activities that "affect any land or water use or

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[103] *Id.*

[104] 16 U.S.C. § 1453(1).

[105] *Summary of Coastal Zone Management Act and Amendments*, EPA, http://epa.gov/oecaagct/lzma.html#Summary%20of%20Coastal%20Zone%20Management%20Act%20and%20Amendments.

[106] Office of Ocean & Coastal Res. Mgmt., Coastal Zone Management Act Performance System 2 (2006), http://coastalmanagement.noaa.gov/resources/docs/npmsupdate.pdf.; Jeffrey H. Wood, *Protecting Native Coastal Ecosystems: CZMA and Alaska's Coastal Plan*, 19 NAT. RESOURCES & ENV'T 57 (2004) (discussing local participation).

[107] For a detailed discussion of the leverage dynamics within federalism bargaining, see RYAN, *supra* note 1, at Chapter Nine.

[108] Coastal Zone Management Act Federal Consistency Regulations, 71 Fed. Reg. 787 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930).

[109] 16 U.S.C. § 1456(c); NOAA, *Basic Statutory Tenets of Federal consistency*, 71 Fed. Reg. 789-90.

natural resource of the coastal zone" unless they are "consistent to the maximum extent practicable" with accepted state management programs.[110]

In this way, the Act creates a rare instance in which the federal government must negotiate for *state* permission before taking action, opening the door for ongoing communication, exchange, and innovation over regulatory decision-making affecting the protected resources. The Act also provides a mandatory but flexible mechanism for resolving potential conflicts between state and federal priorities, fostering early consultation and negotiated coordination.[111] The three stages of CZMA bargaining thus effectively engage state and federal actors in an ongoing, *ad infinitum* dialogue about coastal management, informed by both local and national insight in exactly the way that federalism intends.

In extraordinary circumstances, and only if the proposed federal action is "in the paramount interest of the United States," the Act enables the President to override state disapproval after administrative and judicial mediation have failed to produce consensus.[112] However, the vast majority of federal consistency determinations are negotiated and administered without controversy.[113] The National Oceanic and Atmospheric Administration reports that, "[w]hile States have negotiated changes to thousands of federal actions over the years, States have concurred with approximately 93%-95% of all federal actions reviewed."[114] The presidential exemption is exceedingly rare, and may have been used only once, to authorize the military use of sonar in training exercises.[115]

The CZMA enables broadly negotiated local initiative within a framework of federal law that ensures fidelity to both local and national concerns. It provides a useful model for interjurisdictional governance matching broad national goals with policies best implemented at the local level, especially where local land use authority or "place" is a necessarily salient feature of the regulatory problem.

3.2 Iterative Federalism Bargaining: The Clean Air Act

The Clean Air Act incorporates a very different example of federalism bargaining, one that provides a good model for governance when an especially salient feature of the regulatory problem is its

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[110] 16 U.S.C. § 1456(c)(1)(A). A federal agency may override objection only if it demonstrates that its activity is consistent with the approved plan to the maximum extent practicable. CZMA §307(c)(1)-(2).

[111] CZMA section 307 (16 U.S.C. §1456(h)(2)). *See also* Florida Department of Environmental Protection, *Coastal Zone Management Act*, http://www.dep.state.fl.us/secretary/oip/czma.htm.

[112] CZMA §307 (16 U.S.C. §1456(c)(1)(B), §1456 (h)(2)); California v. Norton, 311 F.3d 1162, 1167 (9th Cir. 2002).

[113] 136 Cong. Rec. H8068-01, 8072 (daily ed. Sept. 26, 1990) (statement of Rep. Jones).

[114] NOAA, Department of Commerce, *Coastal Zone Management Act Federal Consistency Regulations*, 71 Fed. Reg. 787, 789 (Jan. 5, 2006) (codified at 15 C.F.R. pt. 930). *See also* RYAN, *supra* note 1, at Chapter Eight (noting that such high levels of consensus "[may] reflect the federal ability to override state protest through the presidential exemption, which could reduce a state's incentive to expend resources fighting a battle it expects to lose. However, given that the presidential trump has been used so sparingly… a more likely explanation is that the consistency process itself moderates what federal agencies seek. Understanding that federal action will require state approval may promote greater federal deference to state interests in the very spirit intended by the Act. After all, the process that must be navigated after a state objects is costly to resource-poor federal agencies as well.").

[115] *See* Joseph Romero, *Uncharted Waters: The Expansion of State Regulatory Authority over Federal Activities and Migratory Resources Under the Coastal Zone Management Act*, 56 NAVAL L. REV. 137, 146 (2008).

relationship to a national market. It showcases "iterative federalism bargaining,"[116] in which the federal and state governments share policymaking influence in precise, discrete steps over time. It also provides a good example of the kind of intergovernmental bargaining that may not at first even register as negotiation. In contrast to the formality of policymaking laboratory federalism, iterative federalism bargaining happens so slowly that one might fail to notice the joint decision-making process unfolding within its structure. In this scenario, the federal government creates a uniform national regulation while allowing a single state to improve upon it—and then allows other states to select their preferred alternative over time. By enabling ongoing choice between the federal standard and a single-state alternative, iterative federalism programs create a limited dynamic of regulatory innovation and competition by which state choices pressure federal standards.

For example, the Clean Air Act (CAA) governs the emission of air pollutants, including those by automobiles and other mobile sources.[117] Congress delegated the primary task of setting national emissions standards to the EPA, saving the automobile industry from the crippling multiplicity of manufacturing standards it feared if states could regulate independently. Nevertheless, it allowed the state of California to set a competing state-wide standard that could be more (but not less) stringent than EPA's.[118] The "California" exception was created initially out of respect for California's leadership in the field, and also because air quality in parts of the state so exceeded national averages that more stringent motor vehicle regulations were necessary to meet other CAA obligations.[119]

Then, in a stroke of great legislative wisdom, Congress later enabled other states to choose between following either the EPA or California standards.[120] This critical structural modification created a powerful forum for policymaking negotiation over the national direction of air quality management, through an iterated process of subtle but joint state-federal decision-making. Over time, more and more states initially following the EPA standards have migrated to the California alternative. As of 2009, fourteen states were following California's more stringent standards[121] and a dozen more were exploring the possibility.[122] The force of state preferences has put upward pressure on EPA standards to match the alternative, even as California's standard continues to evolve.[123] The overall effect, as states vote with

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[116] Carlson, *supra* note 65, at 1099 (2009) (coining the term to describe "repeated, sustained, and dynamic lawmaking efforts involving both levels of government").

[117] 42 U.S.C. § 7543.

[118] 42 U.S.C. § 7543(b)(1) (so authorizing all states with an emissions program before 1966—i.e., California).

[119] DAVID WOOLEY & ELIZABETH MORSS, CLEAN AIR HANDBOOK § 5:11 (2009).

[120] 42 U.S.C. § 7507; NATIONAL RESEARCH COUNCIL COMMITTEE ON STATE PRACTICES IN SETTING MOBILE SOURCE EMISSIONS STANDARDS, STATE AND FEDERAL STANDARDS FOR MOBILE-SOURCE EMISSIONS 70-71 (2006) (explaining that states Congress did so in response to state requests for more tools to meet ambient air standards).

[121] JAMES MCCARTHY & ROBERT MELTZ, CRS REPORT: CALIFORNIA'S WAIVER REQUEST UNDER THE CLEAN AIR ACT TO CONTROL GREENHOUSE GASES FROM MOTOR VEHICLES 4, n. 13 (2009), http://ncseonline.org/NLE/CRSreports/09Mar/RL34099.pdf.

[122] Emily Chen, *State Adoption Status on California Vehicle Emissions Control Requirements*, Feb. 2008, http://www.westar.org/Docs/Business%20Meetings/Spring08/ParkCity/03.2.2%20CAA%20177%20states.xls (listing states considering adoption of California standards).

[123] David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1840 (2008) (explaining the dissemination of CA standards over time as other states, EPA, and automakers gradually adopt them).

their regulatory feet, is that the nation's vehicular emissions standards are in a constant state of evolution toward more ambitious, targeted, and rational goals.

The power of iterative policymaking is in the way that it uniquely balances the needs for federalism innovation and economic uniformity in a national marketplace.[124] In the case of the CAA, automobile manufacturers may prefer a single set of emissions standards, but coping with two is certainly preferable to fifty moving targets. Similarly, states may ideally prefer to set their own standards, but a choice between at least two levels of stringency is preferable to no choice at all. Meanwhile, the managed exchange enables a limited level of regulatory innovation and competition, creating regulatory dynamism that is more responsive to new data and preferences—and less vulnerable to regulatory capture—than a pure regulatory monopoly.[125] In effect, it offers a precisely constrained, miniature laboratory of ideas.

Iterative federalism strikes a wise compromise in regulatory marketplaces where legitimate concerns over stagnating regulatory monopoly compete with legitimate economic needs for regulatory uniformity. The approach serves governance hinging on a centralized national market while preserving space for regulatory innovation. The iterative policymaking structure also protects state innovators that invest in efforts to resolve their share of an interjurisdictional problem before the rest follow—as California did in regulating automobile emissions, and as several are now doing in attempting to regulate other greenhouse gas production.[126] State innovators would suffer disproportionately if forced to abandon path-breaking regulatory infrastructure to conform to a preemptive federal standard.[127] For these reasons, some scholars have proposed that the CAA's model of iterative federalism policymaking may be a useful means of navigating federalism concerns in U.S. climate policymaking.[128] Given the implied collective action problem at hand[129] and the role many states have already played in early rounds of climate policymaking negotiations,[130] the suggestion may have merit.

4 The Interpretive Potential of Federalism Bargaining

Drawing from the examples of federalism bargaining in the previous section and the full taxonomy, this final part of the essay demonstrates how some of this bargaining represents more than just a de facto response to federalism uncertainty (although, to be sure, some of clearly represents that as well). But in addition, some such intergovernmental bargaining can *itself* yield constitutionally legitimate

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[124] RYAN, *supra* note 1, at Chapter Eight (discussing iterative federalism bargaining in detail).

[125] *Id.*; c*f.* Buzbee, *supra* note 65, (showing how unitary federal choice ("ceiling") preemption leads to poorly tailored regulation and public choice distortions of the political process in comparison to "floor" preemption).

[126] *See* Michele M. Betsill & Barry G. Rabe, *Climate Change and Multilevel Governance: The Evolving State and Local Roles*, *in* Toward Sustainable Communities: Transitions and Transformations in Environmental Policy 201–26 (Daniel A. Mazmanian & Michael E. Kraft eds., 2nd ed. 2009); *see generally* Kirsten H. Engel, *Whither Subnational Climate Change Initiatives in the Wake of Federal Climate Legislation?*, 39 Publius 432 (2009) (reviewing existing state and regional initiatives).

[127] RYAN, *supra* note 1, at Chapter Eight (further discussing the problematic effects of a preemptive national policy, the threat of which would disincentivize states from early action that could most efficiently address the problem).

[128] Carlson, *supra* note 65, at 1099.

[129] *E.g.*, Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 Nw. U. L. Rev. 579, 579–80 (2008) (proposing a collective action framework to determine when state law should be federally preempted).

[130] *See supra* note 126.

answers to federalism's core questions—helping to bridge federalism's once and future challenges. It explores how the procedural incorporation of fair bargaining and federalism principles into state-federal bargaining contributes to the overall federalism interpretive project. The analysis establishes a sound theoretical basis for the ways that bilaterally negotiated partnerships legitimately supplement the unilateral efforts of the Court, Congress, and the Executive to protect constitutional values in the structure of American governance.[131]

To clarify the terms of the discussion, I use the word "substantive" to refer to the substance of a legal rule or negotiated outcome, and "procedural" to refer to the process by which that rule or outcome was reached. Although the federalism discourse sometimes uses the term "unilateral" to distinguish the independent acts of separate branches of government (for example, unilateral judicial or legislative action), I use it here to distinguish the independent acts of one level of government from another (in other words, exclusively state or federal activity). By contrast, "bilateral" refers to governance that incorporates both state and federal decision-making.[132] Finally, in discussing "federalism interpretation," I emphasize the variety of means we employ to ensure that governmental practice is conducted in accord with the relevant constitutional directives. In addition to conventionally understood methods of unilateral interpretation, such as legislative statement and judicial review, this Part shows that certain bilateral bargaining does similar work, especially within the gaps of legal indeterminacy in which unilateral methods often underperform.[133]

To summarize my ultimate proposition, it is that the more bilateral intergovernmental bargaining incorporates legitimizing procedures founded on mutual consent and federalism values, the more it warrants deference as a means of interpreting federalism.[134] Bargaining confers less interpretive legitimacy as the factual circumstances depart from the assumptions of mutual consent that underlie fair bargaining—in other words, when negotiators cannot freely opt out, cannot be trusted to understand their own interests, or cannot be trusted to faithfully represent their principals—and when the bargaining procedures contravene the good governance ethics of checks, accountability, autonomy, and synergy that underlie federalism. Courts adjudicating federalism-based challenges to negotiated results should consider these factors when deciding the appropriate level of deference to extend. Political branches engaged in federalism bargaining should consider how to better engineer procedural regard for these values into their various processes of public administration.

The remainder takes a cursory stab at unpacking this provocative claim about the interpretive potential of federalism bargaining. The claim is that intergovernmental bargaining can be a constitutionally legitimate way of resolving federalism uncertainty, when it is procedurally consistent

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[131] For a fuller presentation of this analysis, see RYAN, *supra* note 1, at Chapter Ten.

[132] *See supra* note 43, noting how this discussion treats municipal activity as state action, consistent with the Supreme Court's Tenth Amendment jurisprudence. *But see* RYAN, *supra* note 1, at Chapter Two ("For the sake of simplification, my discussion frequently lumps municipal, state, and regional governance (everything more localized than the national government) together under the heading of 'local,' to best contrast the federal and state-based authority that most federalism doctrine differentiates. However, important scholarship has shown the significance of intra- and interjurisdictional governance that takes place between localities independently of their states (and occasionally their nation-states) and between municipal and federal collaborators—exposing not only the horizontal but the diagonal dimensions of interjurisdictional governance.") (citations omitted).

[133] RYAN, *supra* note 1, at Chapter One (discussing indeterminacy in constitutional federalism directives) and Chapter Ten (discussing circumstances in which bilateral interpretation outperforms unilateral interpretation).

[134] *Id.* at Chapter Ten.

with two sets of principles. The first set tests the fundamental fairness of the bargaining process, and the second tests the consistency of that bargaining process with federalism values.

4.1 The Bargaining Principles of Mutual Consent

The first requirement for interpretive-quality federalism bargaining is that it must be consistent with the generic principles of mutual consent that serve to legitimize bargaining in general. These are the fairness-based principles that make us willing to defer to the results of negotiated agreement, as human cultures have done for the thousands of years over which we have relied on bargaining as a rational means of pursuing the good in the absence of consensus about the perfect.[135] We do this, in fact, by substituting procedural consensus for substantive consensus—consensus about the process for reaching an agreed-upon outcome, even when we can't agree on a substantive rationale for why this outcome is the objectively correct result. Although admittedly unsexy when rendered in its component parts, the mechanism for legitimizing a negotiated agreement basically goes something like this:

Consider a group that begins in disagreement over how to resolve a dispute, allocate a scarce resource, or otherwise divide a given surplus of value. At the outset, they lack consensus about an objectively correct substantive outcome; they have no reasoned basis for dividing that surplus of value according to shared principles. But if, after some meaningful process of communication, these competing parties nevertheless reach agreement on some specific outcome—because each has determined that it this specific outcome is better for their own individual interests than no agreed-upon outcome at all—then, um, well—then that outcome must be, in at least some respect, a good idea. (!) It deserves some degree of deference beyond what we might accord a random-chance distribution.

This reasoning may seem too raw to carry the weight of legitimacy that we hang on bargained-for results, but it really does come down to this exceedingly simple lived wisdom. If, through a fair process of exchange, each determines that they are really better off with this result than no deal, then that result must have some inherent merit. So long as we believe the agreement was fairly procured, it warrants respect beyond one obtained by force, guile, or chance—even if the parties have different reasons for why they prefer this alternative. It is in this respect that we substitute *procedural* consensus for *substantive* consensus.[136] And the substitution works, so long as the three underlying assumptions of fair bargaining are met: (1) exit-ensured autonomy, (2) interest literacy, and (3) faithful representation.[137]

First, it must be true that genuine exit is available to all negotiators, ensuring participant autonomy.[138] Each must be able to "walk away" from the bargaining table if they so choose, or else the agreement cannot carry the weight of bargained-for legitimacy. If a party lacks a meaningful exit alternative, then the result isn't necessarily better for their interests than random chance or no agreement, and accordingly warrants no such deference. An outcome procured in the absence of genuine autonomy may reflect the result of force more than independent judgment. As contract law recognizes, an agreement reached under true duress (and not just relative hardship) should not be enforceable.[139]

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[135] *Id.* (discussing the principles of mutual consent).
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Cf.* 17A C.J.S. CONTRACTS § 176 (2010).

Nevertheless, both contract law and negotiation theory hold parties responsible for their choices when true exit is available, differentiating between strong leverage and actual coercion.[140]

Second, for the process to confer negotiated legitimacy, we have to believe that the parties possess the requisite level of interest literacy.[141] In other words, we must be assured that the parties each understand their own interests well enough for their agreement to be a meaningful indicator of the merit of the negotiated outcome—or, once again, there is no reason to presume its superiority to random chance or no deal. Negotiators must not be operating under a contract-law disability (such as incompetency or infancy) or other circumstance that might cast doubt on their independent judgment as to why this result is really better than the alternatives.

Finally, we must be confident that the negotiating agents involved in the bargaining process are faithfully representing their principles.[142] In the case of intergovernmental bargaining, this means that the government officials engaged in federalism bargaining must faithfully advance the interests of the citizens they serve. Principal-agent concerns are endemic to all negotiation,[143] and they may be especially fraught in public negotiations of this sort.[144] Evidence of self-dealing on the part of the government negotiators would certainly negate their legitimacy.[145]

Probing the examples of federalism bargaining in my taxonomy yields examples that put pressure on each of these assumptions. For example, some have argued that spending power bargains are coercive of states that have grown dependent on federal funding, to the point that some have lost the element of free will necessary to satisfy the bargaining autonomy criterion.[146] Some have raised concerns about the principle-agent tension in intergovernmental bargaining that may advance the career-interests of the bargainers more than those of their constituents.[147] Indeed, the more pressure the underlying facts in an

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[140] *Id.* ("[O]ne may not avoid a contract on the ground of duress merely because he or she entered into it with reluctance, the contract is very disadvantageous to him or her, the bargaining power of the parties was unequal, or there was some unfairness in the negotiations . . . ."). *See also* RYAN, *supra* note 1, at Chapter Ten ("Even when the stronger party crafts terms without input from the weaker party, the latter can still decide whether its interests are better served by taking or leaving the proffered deal.").

[141] RYAN, *supra* note 1, at Chapter Ten.

[142] *Id.*

[143] *See, e.g.*, ROBERT MNOOKIN, ET AL., BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES 69 (2000) (describing the principal-agent tension in negotiations).

[144] *See, e.g.*, JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 287 (1987) (describing how elections can distort incentives for representatives in government).

[145] RYAN, *supra* note 1, at Chapter Seven (discussing the principle-agent tension in state-federal bargaining over jurisdictional entitlements), Chapter Nine (discussing the currency of "credit" in state-federal bargaining) and Chapter Ten (discussing the problem of self-dealing in evaluating federalism bargaining legitimacy).

[146] Lynn A. Baker & Mitchell N. Berman, *Getting Off the* Dole*: Why the Court Should Abandon Its Spending Doctrine, and How a Too-Clever Congress Could Provoke It To Do So*, 78 IND. L.J. 459, 499–500 (2003) (arguing that spending power bargains are coercive for this reason); Mitchell N. Berman, Guillen *and Gullibility: Piercing the Surface of Commerce Clause Doctrine*, 89 IOWA L. REV. 1487, 1523–26, 1531–32 (2004) (same). *See also* RYAN, *supra* note 1, at Chapter Ten (analyzing these claims and contrasting the examples of the CZMA with the No Child Left Behind Act, which conditioned federal education funds on state adoption of various federal priorities).

[147] John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 90 (2004) (warning that states may collude with federal actors in undermining federalism constraints). *See also* RYAN, *supra* note 1, at Chapter Seven (analyzing this claim and evaluating them in the context of the Low Level Radioactive Waste Policy Act).

instance of bargaining put on any one of these assumptions, the more doubt is generated about the legitimacy of the bargained-for result.[148] Inversely, however, the more the facts in a given example of bargaining *do* line up with these assumptions, then the more legitimacy is conferred on the resulting outcome. Many examples in the taxonomy proceed from solid ground on all three assumptions, and these become the candidates for constitutionally meaningful interpretive potential.[149]

4.2 Procedural Faithfulness to Federalism Values

The principles of mutual consent that legitimize bargaining in general are the threshold procedural criteria that must be met before advancing to the second stage. The final analysis tests the criteria that render such bargaining not only fair, but constitutionally significant. And to some extent, the analysis begins with a similar story.

Indeed, we can introduce the procedural application of federalism values in terms not unlike those used to explain the principles of mutual consent. Just as individuals turn to negotiation as a legitimizing procedure of allocation, so do state and federal actors to allocate jurisdiction in areas of overlap. And very often, it is for the same basic reason—the lack of any up-front, substantive consensus about the objectively correct result. As history is our witness, Americans seem to have a lot of trouble agreeing at the outset about whether a given regulatory outcome in a context of jurisdictional overlap does or doesn't satisfy the requirements of constitutional federalism. Based on overwhelming evidence in the academic, judicial, and political realms, we can see that it's not always immediately clear how to interpret the federalism contours of a substantive regulatory policy.[150] (At the very least, what may seem immediately clear to some interpreters proves anything but to others.)

Perhaps the most persuasive evidence for this proposition is the wealth of federalism decisions that regularly split the U.S. Supreme Court, in which roughly half of the justices determine that the challenged policy is perfectly consistent with federalism while the other half consider it a constitutional violation. For example, compare the majority and dissenting opinions in *New York v. United States*,[151] a famous Tenth Amendment case holding that a Congressional statute forcing states to internalize their own toxic waste had unconstitutionally commandeered state authority—even though the law had been drafted by the states and the plaintiff had actively lobbied Congress to enact it.[152] Writing for the majority, Justice O'Connor solemnly reminded the nation that "[w]hatever the outer limits of [state] sovereignty

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[148] RYAN, *supra* note 1, at Chapter Ten.

[149] *Id.* (discussing procedural faithfulness to federalism values in bargaining).

[150] *See, e.g.*, *id.* at Chapter One (discussing controversy over the Bush Administration's response to Hurricane Katrina, including invocations of federalism by some officials as grounds for the halting federal involvement), Chapter Three (reviewing marked instability in the Supreme Court's federalism jurisprudence over American history), and Chapter Four (reviewing academic controversy over the New Federalism revival of the 1990s).

[151] New York v. United States, 505 U.S. 144, 174-75 (1992) (invalidating on Tenth Amendment grounds a federal law requiring states to site waste disposal facilities or assume liability for harm). Unlike many controversial 5-4 Supreme Court federalism decisions since then—including *United States v. Lopez*, 514 U.S. 549, 551 (1995) (overturning the Gun-Free School Zones Act of 1990 for exceeding federal commerce authority); *Printz v. United States*, 521 U.S. 898, 935 (1997) (invalidating parts of the Brady Handgun Control Act of 1993 under the Tenth Amendment for compelling state law enforcement); and *United States v. Morrison*, 529 U.S. 598, 613 (2000) (invalidating portions of the Violence Against Women Act of 1994 (VAWA) for exceeding Congress's commerce power)—*New York* was actually decided by a vote of six to three.

[152] *New York*, 505 U.S. at 174-75, 180-83; RYAN, *supra* note 1, at Chapter Seven (analyzing the case in detail).

may be, one thing is clear: The Federal Government may not compel the States to enact or administer a federal regulatory program."[153] In near incredulous dissent, Justice White argued that "to read the Court's version of events… one would think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem [when the Act] resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached."[154] In this fascinating review of bargained-for encroachment, the two opinions diverge so dramatically that they almost appear to be interpreting different fact patterns. When it comes to federalism interpretation, reasonable minds can (and very frequently do) disagree—even the most highly skilled legal minds of the day.

Of course, part of the reason for so many divided-Court federalism decisions is that the individual justices often apply different theories of federalism in reaching their diverging conclusions (indeed, this is one of the core themes of my book). But another important factor, one that is too often missed, has to do with the special difficulty of applying structural federalism directives in specific contexts of jurisdictional overlap, at least in comparison to more straightforward individual rights analysis.[155] In a nutshell, the problem is that it can be very difficult to sort out *just the federalism considerations* that go into a regulated outcome from all the other substantive considerations that must also go into that outcome—for example, to separate out concerns about who should be making health care policy from the complicated substantive elements of health care policy itself. By contrast, it's much easier to figure out whether the *process* by which the parties come to an agreement about substantive policy is consistent with constitutional federalism. And the critically important reason for this, as foreshadowed earlier, is that the foundational federalism values *are themselves* procedural in nature.[156]

Recall the federalism values that I introduced at the beginning of the essay: checks and balances, transparency and accountability, local autonomy and innovation, interjurisdictional synergy. In fact, these values don't hold a lot of particularly substantive meaning. At the end of the day, they don't really tell us much about what the substantive content of good government policy should be. Instead, they hold much more meaning as *procedural* values. They describe what the processes of good government look like—governance that operates with checks and balances, in an accountable way, with space for local

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[153] 505 U.S. at 188.

[154] 505 at 189-90 (J. White, dissenting) (citations omitted).

[155] RYAN, *supra* note 1, at Chapter Ten. As I explain there,

> In contrast to adjudicating rights, a substantive realm in which the Constitution's directions are relatively clear, the adjudication of federalism draws on penumbral implications in the text that leave much more to interpretation. The boundary between state and federal authority is implied by structural directives such as the enumeration of federal powers in Article I and the retention of state power in the Tenth Amendment, but neither commands the clarity of commitment that the Constitution makes to identifiable individual rights. Setting aside marginal uncertainty about the extent that 'no law' really means *no law* in the First Amendment context, the Constitution is comparatively clear in its substantive commitment to free speech and free exercise. It is equally clear on the allocation of certain state and federal powers, such as which is responsible for waging war (the federal government) and which is responsible for locating federal elections (the states). But the document gives less guidance about the correct answers to the federalism questions that become the subject of intergovernmental bargaining, such as how to balance local and national interests in coastal zone management, or how to allocate state and federal resources in criminal law enforcement. For these reasons, negotiated federalism is not only inevitable but appropriate, and arguably constitutionally invited….

Id. (citations omitted).

[156] *Id.* at Chapter Ten.

innovation and interjurisdictional synergy.[157] Indeed, each of the fundamental federalism values are most directly vindicated through good governance procedure: (1) the maintenance of checks and balances that procedurally protects individuals against government excess or abdication, (2) the protection of governmental accountability that procedurally ensures meaningful democratic participation, (3) the preference for regulatory processes that foster local innovation and competition, and (4) the procedural cultivation of regulatory space in which to harness the synergy between local and national governance capacity.[158] Incorporating these values into the bargaining process procedurally allows negotiators to advance federalism directives when consensus on the substance is unavailable—filling the inevitable interpretive gaps left by judicial and legislative mandates that lead to so much substantive controversy.[159]

Accordingly, if we review the process for reaching some negotiated outcome among state and federal actors and we discover that, in fact, it is consistent with these values—it protects rights, enables meaningful democratic participation, and allows for innovation, competition, and synergy—then we can conclude that the given instance of federalism bargaining is consistent with constitutional federalism, and its results warrant interpretive deference. The process itself becomes the center of gravity for constitutional analysis. After all, facilitating the active operation of these values in governance is what American federalism is most essentially *for*. Ensuring governance that is consistent with these values is what federalism is meant to accomplish in the first place, and what federalism interpretation of any kind is designed to advance. In this regard, engineering governance processes to operate this way gets us to the same point as any other form of federalism interpretation, such as the more conventionally understood unilateral forms of congressional lawmaking, executive rulemaking, or judicial adjudication.[160]

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[157] *Id.*

[158] *Id.* at Chapter Two (discussing the values in detail) and Chapter Ten (discussing them as procedural values).

[159] *Id.* at Chapter Ten.

[160] *Id.* Of note, this evaluation of bargaining procedure operates from the *ex ante* perspective, proposing procedural judicial review and the purposeful engineering of interpretive-quality bargaining forums. Bolstering my claim, however, is a skillful empirical literature that goes further to correlate negotiated governance processes and outcomes in terms closely aligned with the foundational federalism values. As I describe in the book,

> [W]hen the bargaining process is designed to safeguard rights, participation, innovation, and synergy, the proposal assumes that federalism bargaining will harmonize with federalism as a procedural matter without reference to the substantive results. Of note, however, bargained-for results that advance federalism values at the more challenging substantive level are further evidence of good federalism process. To this end, the negotiation literature offers encouraging empirical evidence that correlates the use of similar procedural tools with outcomes that are highly consistent with federalism values. For example, Professor Lawrence Susskind has empirically evaluated volumes of governance outcomes against criteria of fairness, efficiency, stability, and wisdom, and found that negotiated governance consistently outperforms alternatives. He convincingly argues that these criteria closely align with federalism values, noting that the problem-solving qualities of negotiation naturally advance localism and synergy values, while representation is the key to successful accountability and transparency.

Id. For a sampling of this literature, see LAWRENCE SUSSKIND & JEFFREY CRUIKSHANK, BREAKING THE IMPASSE: CONSENSUAL APPROACHES TO RESOLVING PUBLIC DISPUTES 14 (1987) (discussing this in detail); Kirk Emerson et al., *Environmental Conflict Resolution: Evaluating Performance Outcomes and Contributing Factors*, 27 CONFLICT RESOL. Q. 27 (2009) (analyzing the outcomes of 60 mediated agreements between local, state, and federal governments); LAWRENCE SUSSKIND & OLE AMUNDSON, USING ASSISTED NEGOTIATION TO SETTLE LAND USE DISPUTES: A GUIDEBOOK FOR PUBLIC OFFICIALS (1999) (analyzing the results in 105 cases); Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 N.Y.U. ENVTL. L.J. 60, 60–64 (2000) (reporting on empirical data in studies of collaborative governance).

Moreover, federalism bargaining has the added advantage of accomplishing these ends *bilaterally*, providing structural support for the local-national equipoise that federalism strives for, in a way that goes beyond what unilateral interpretive mechanisms can offer. Federalism bargaining that meets the requisite criteria necessarily incorporates both local and national interests, perspectives, and wisdom in the very manner that federalism intends—and regardless of the subjective considerations of the bargainers. By virtue of its bilateral operation, qualifying state-federal bargaining accomplishes federalism's goals of state-federal equipoise even if the participants never once think about federalism while they are bargaining. Federalism bargaining that meets the procedural criteria therefore provides structural safeguards exceeding the considerations of the previous federalism safeguards debate.[161]

By this analysis, when reviewing federalism-based challenges to such bargaining, the judicial role should shift from de novo review to deferential oversight for these criteria. If an instance of federalism bargaining is challenged under any of the judicially-enforceable federalism doctrines, the court should engage this procedural analysis as a threshold matter before reviewing the substantive results of the bargaining. If bargaining took place in a legitimate zone of jurisdictional overlap and the procedural criteria of fair bargaining and federalism values are met, then the court should defer to the substantive results of that bargaining process.[162] Chances are good that the substantive outcome involves an intricate balance among the many considerations of interjurisdictional governance in which political actors generally outperform judicial actors—one reason why courts have so often deferred to such results.

Nevertheless, were we to review the process and discover that it fails the second set of criteria—if the bargaining process threatens rights, hampers participation, dampens innovation, or subverts interjurisdictional synergy—then this bargaining would not be consistent with federalism values, and its results would warrant no deference as a matter of constitutional interpretation. As foreshadowed earlier, "smoke-filled room" bargaining that takes place beyond the realm of public accountability might be vulnerable in this analysis, as would bargaining with poor procedural commitment to the other values.[163] If such bargaining were judicially challenged on federalism grounds, the court should review it *de novo* without deference to the choices of the political actors involved. And of course, when a court reviews even a qualifying instance of federalism bargaining that is challenged on grounds unrelated to federalism—perhaps for violating the terms of the underlying statute or some other constitutional guarantee—then it should also proceed without deference to the negotiated outcome.[164]

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[161] RYAN, *supra* note 1, at Chapter Ten ("[E]ven unilateral governance that procedurally honors the federalism values may warrant some lesser degree of judicial deference when challenged on federalism grounds. Still, although unilateral policymaking may herald interpretive potential in proportion to its satisfaction of similar criteria, negotiated governance provides structural support to federalism values that unilateral regulation can never truly replicate.")

[162] *Id.* at Chapter Six (setting forth a gatekeeping inquiry to test legitimate assertions of jurisdictional overlap) and Chapter Ten (exploring the application of these procedural criteria in judicial review).

[163] *See supra* note 81 and accompanying text (differentiating between legitimate results and legitimizing procedure).

[164] RYAN, *supra* note 1, at Chapter Ten. As I explain there, judicial review of bargaining should unlimited in three circumstances:

> First, if the challenged intergovernmental bargaining takes place beyond the defensible realm of jurisdictional overlap, it receives no interpretive deference. Second, if the challenged bargaining fails the court's threshold procedural review, then the court reviews the substance of the outcome de novo, applying its own interpretive judgment on the federalism-related challenge. Third, non-federalism related challenges to the products of valid interpretive federalism-bargaining warrant ordinary judicial scrutiny—limiting judicial deference only to federalism challenges, and not other claims of constitutional or statutory

The foregoing analysis accomplishes two normative objectives. First, it proposes a material change in the mechanics of judicial review of federalism-based challenges to intergovernmental bargaining. When the results of qualifying bargaining are challenged under judicially enforceable federalism doctrines, courts should apply procedural scrutiny before substantive review, reflecting the deferential standards used in judicial review of administrative action under the Administrative Procedures Act[165] and agency statutory interpretation under *Chevron v. NRDC*.[166] If the court determines that the bargaining process meets both sets of requisite criteria, then it should defer to the substantive results of the bargaining. If not, it may review the substantive results de novo. The overall effect is to limit judicial interference in qualifying federalism bargaining while retaining judicial oversight for bargaining abuses.

Second, it offers needed theoretical justification for the valid constitutional work that qualifying federalism bargaining has long provided. By clarifying the connection between federalism values and governance procedure, it provides the missing constitutional basis for arguments from political safeguards proponents that the judiciary should refrain from second-guessing political allocations of contested authority in contexts of overlap.[167] Nevertheless, by procedurally differentiating between negotiated governance that warrants deference and that which does not, it preserves at least some role for the judicial review championed by judicial safeguards proponents.[168] In this regard, it strikes a pose of measured balance within the federalism safeguards debate, one made possible by recognizing the broader ways in which judicial, legislative, and executive interpreters on both sides of the state-federal divide contribute.

Drawing on the procedural application of fair bargaining and federalism values, negotiated governance thus opens possibilities for filling interpretive gaps in realms of doctrinal indeterminacy. Indeed, it has been doing so all along. But for the first time, this analysis provides theoretical basis for the actual practice of American federalism in clearer constitutional terms. It offers the missing justification for operative political safeguards while preserving a role for limited judicial review. It creates legitimate regulatory space for bilateral and accountable allocations of authority in zones of overlap, balancing values, governmental capacity, and local-national input just as federalism requires.

Conclusion

I conclude by clarifying what I've tried to accomplish in this simplified discussion. My first objective was to identify the fundamental tensions within American federalism that lead to so much

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> violation. Otherwise, however, judicial review should be limited to scrutiny of the bargaining process against fair bargaining and federalism principles, deferring to results in a procedural analog to rational basis review. This enables an interpretive partnership between the political and judicial branches that harnesses what each best contributes to federalism implementation while honoring the premise of *Marbury v. Madison*.

Id. (citations omitted).

[165] 5 U.S.C. §§ 551–559 (2006).

[166] 467 U.S. 837, 842–43 (1984). *See also* RYAN, *supra* note 1, at Chapter Ten ("New Governance scholars have also proposed theories of judicial review that position courts to monitor and incentivize problem-solving processes, rather than adjudicate substantive disputes. Review of bargaining autonomy, interest literacy, and faithful representation would rely on familiar judicial tools from contract law, agency law, and due process interpretation, and courts could draw from established federalism jurisprudence and scholarship in articulating the tests for procedural consistency with federalism values.") (citations omitted).

[167] RYAN, *supra* note 1, at Chapter Ten. *See also* Chapter Eight (discussing the federalism safeguards debate). For examples of literature from the political safeguards school, *see supra* note 35.

[168] *Id.* at Chapters Ten and Eight (as above). For examples of literature from the judicial safeguards school, *see supra* note 34.

controversy in the political sphere. By virtue of its flexible but indeterminate design, American federalism will always struggle with the intrinsic competition among its underlying values of checks and balances, accountability and transparency, local innovation and interjurisdictional competition, and interjurisdictional problem-solving synergy. It will always struggle to balance the roles of the three branches of government in interpreting the Constitution's federalism directives. And of course, federalism is, by definition, a struggle for balance between local and national wisdom in implementing the ideals of good governance.

As outlined in Part I, these ongoing struggles are the once and future challenges of American federalism. The U.S. federal system has been grappling with these challenges since its formative years, as evidenced during the eighteenth century debates of the Constitutional Convention and the precursor Articles of Confederation. They were front and center during the nation's greatest moment of crisis, the nineteenth century Civil War. Our federal system heaved and shifted again to adjust for these tensions during critical moments of the twentieth century, including the Great Depression and the attacks of 9/11. At the turn of the new century, the United States is again embroiled in federalism controversies over the reach of federal authority and the resilience of state alternatives. Over this period, scholars and jurists have turned to successive and competing theories of federalism to make sense of these challenges. To the same end, FEDERALISM AND THE TUG OF WAR WITHIN proposes a theory of Balanced Federalism that accounts for these internal tensions and reconnects normative federalism theory with a more theorized understanding of actual federalism practice, merging elements from its predecessors with new insights.[169]

Drawing from the Balanced Federalism analysis, I then introduced the growing enterprise of state-federal intergovernmental bargaining as one response to federalism's ongoing challenges in an age of increasing interconnectivity. In Part II, I introduced the zones of jurisdictional overlap that complicate federalism theory, and I highlighted the significance of bilaterally negotiated governance to the overall discourse and the federalism safeguards debate that has long focused only on unilateral activity. Part III outlined the basic categories of negotiated federalism and demonstrated its mechanisms with two examples of regulatory laws that create forums for genuine state-federal joint policymaking negotiation. The prevalence of negotiated federalism undermines a stale, tacitly adversarial assumption on which too much of the American federalism discourse is predicated. It also highlights opportunities for the development of tailored forms of intergovernmental bargaining to address the regulatory challenges that arise in interjurisdictional contexts.

Finally, in Part IV, I sketched a bold claim about the interpretive potential of bargaining that is procedurally consistent with the principles of fair bargaining and federalism. When state and federal actors resolve federalism dilemmas through processes consistent with these criteria, I argue that they are negotiating the answer to federalism's fundamental question—*who gets to decide?*—in a manner that vindicates constitutional goals. Negotiated results that are challenged on federalism grounds warrant judicial deference to the extent they satisfy the requisite criteria. Meanwhile, executive and legislative actors can use the criteria identified here to better engineer procedural regard for federalism values into the bargaining processes they employ, improving governance more generally.

This conception of negotiated federalism showcases one application of the fuller Balanced Federalism theory set forth in the book. When it meets the requisite criteria, intergovernmental bargaining can facilitate rational balancing among the competing values of good governance at the heart of American federalism. It effectively leverages the distinct functional capacities of the three branches in

[169] *See generally* RYAN, *supra* note 1.

interpreting federalism directives, harnessing the best of legislative ingenuity, executive expertise, and judicial neutrality. And it maximizes the balanced input of local and national actors beyond the conventional political safeguards of unilateral governance. The proposal for measured judicial deference to qualifying federalism bargaining draws on the insights of the political safeguards school by respecting political federalism determinations that incorporate state and local perspectives. Simultaneously, it draws on the instincts of the judicial safeguards school in preserving a limited role for courts to police for abuses. The tailored dialectic between judicial and political safeguards draws on legislative and executive decision-making where the political branches are most able, backstopped by judicial review of the right issues.

Negotiated governance is hardly the only point of interest in modern American federalism, which continues to grapple with federalism's core challenges on all dimensions, unilateral as well as bilateral, substantive as well as procedural. Nevertheless, effective intergovernmental bargaining is increasingly used to cut through the fiery federalism debates that threaten to paralyze regulatory initiative and punish interjurisdictional collaboration. Better understanding of this realm of federalist governance is a critical new development in federalism theory, warranting attention and future study.