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Negotiating Federalism Past the Zero-Sum Game


--Erin Ryan

Opponents of the new Medicaid expansion decried the move as a “gross federal overreach,” invoking familiar tropes about the bitter contest between state and federal authority in contexts of jurisdictional overlap. But regulators in the trenches of health care law know that the truth is more nuanced—that the Medicaid program really represents a site of extensive negotiation between state and federal actors about the specifics of each state plan, set within purposefully broad federal boundaries. Those who opposed the 2009 Stimulus Bill on federalism grounds similarly discounted the substantial role of state actors in negotiating the terms of the federal law. And those who challenged the Clean Water Act’s Phase II Stormwater regulations on federalism grounds missed the pivotal role state and municipal actors played in negotiating the terms of the rule—which itself became a forum for ongoing negotiation between state and federal regulators about how each municipality would ultimately comply within the open-ended permitting program they designed.

These instances of intergovernmental bargaining offer a means of understanding the relationship between state and federal power that differs from the stylized model of “zero-sum” federalism that has come to dominate political discourse. The zero-sum model sees winner-takes-all jurisdictional competition between the federal and state governments for power, emphasizing sovereign antagonism within the federal system. Yet countless real-world examples of interjurisdictional governance show that the boundary between state and federal authority is really an ongoing project of negotiation, taking place on levels both large and small.

Working in a dizzying array of regulatory contexts, state and federal actors negotiate over both the allocation of policymaking authority and the substantive terms of the mandates that policymaking will impose. Bargaining takes place both in policy realms plagued by legal uncertainty about which side has the final say, and in realms unsettled by uncertainty over whose decision should trump, regardless of legal supremacy. Reconceptualizing the relationship between state and federal power as one heavily mediated by negotiation reveals just how far federalism practice has departed from the zero-sum rhetoric. Better still, it offers hope for moving beyond the more paralyzing features of the federalism discourse, and toward the kinds of good governance that Americans of all political stripes hope for.

As I describe in Federalism and the Tug of War Within (Oxford, 2012), federalism is the Constitution’s mechanism for dividing regulatory authority between the national and local levels. At its most basic, federalism assesses which kinds of policy questions should be decided nationally—yielding the same answer throughout the country—and which should be decided locally—enabling different answers in different states. Accordingly, the basic inquiry in all federalism controversies is always the same: who should get to decide? Is it the state or federal government that should make these kinds of policy choices? But just as important is the meta-question of who gets to decide that—the political branches or the judiciary? When federalism issues are debated by Congress in lawmaking, it is the federal legislature who decides. When they are adjudicated in court, the federal judiciary decides. But when they become the subject of appropriate intergovernmental bargaining, state and federal actors in all branches of government participate valuably in different elements of decision-making.
Indeed, even as federalism scholars remain mired in debate over questions about “who should decide” in the abstract, the regulators who actually work in contested contexts manage federalism uncertainty by simply negotiating through it—working directly or indirectly with their counterparts across state-federal lines to build consensus about sharing and dividing authority as needed to move forward with interjurisdictional governance. In this way, executive and legislative actors engage in various forms of state-federal bargaining subject to different levels of judicial review, balancing both local and national input and the distinctive functional capacities of the three branches. When they do so through principled processes, they are negotiating answers to federalism’s core questions in a manner that vindicates constitutional goals.

State-federal bargaining is thus endemic in areas of concurrent regulatory jurisdiction, or those policy realms in which both state and federal actors hold legitimate regulatory interests or obligations simultaneously. Negotiation theorists broadly understand bargaining as “an iterative process of joint decision-making”—that is to say, any outcome that is the result of more than one mind after some back-and-forth process of communication. This broad definition encompasses many aspects of interjurisdictional governance, ranging from conventional political haggling (as over the terms of the Stimulus Bill), formalized methods of collaborative policymaking (as the Medicaid partnership does within individual state programs), and even the more remote signaling processes by which state and federal actors share responsibility for evolving public decision making over time (as they have, for example, over medical marijuana enforcement).

Together with the research that preceded it, Federalism and the Tug of War Within begins the process of cataloging the largely uncharted regulatory landscape of state-federal bargaining. Highlighting categories of conventional bargaining, negotiations to reallocate authority, and joint policymaking bargaining, its taxonomy traces at least ten different types of opportunities for intergovernmental bargaining that are available within various constitutional and statutory frameworks.

Among the most common varieties is state-federal bargaining under the constitutional spending power (see inset). In spending power bargaining, Congress uses federal funds to persuade states to partner with federal policymakers in implementing collaborative regulatory programs such as Medicaid, the national highway system, or the Coastal zone Management Act. State actors just as commonly initiate negotiations with Congress during federal lawmaking of special interest to the states, as they did in lobbying for preferred terms in the 2008 Stimulus. State-federal negotiation is also an ordinary means of managing enforcement matters in which both sovereigns have a stake, as is frequent in the many areas of overlapping state and federal criminal law.

More sophisticated forms of federalism bargaining include negotiated federal rulemaking with state stakeholders, as was used to create the Clean Water Act’s Phase II Stormwater Rule. Some federal statutes explicitly share policy design with states, such as the No Child Left Behind and Race to the Top education laws. Others create staggered programs of “iterative” shared policymaking, as does the Clean Air Act’s mechanism for regulating vehicular emissions. This program enables each state to choose between a federal regulatory standard and a California alternative—creating a limited dynamic of regulatory competition by which federal policies affect state choices that eventually impact evolving federal policies, as states “vote” with their proverbial feet about regulatory preferences.
Most subtly, all three branches of government—even state and federal courts—engage in processes of iterative joint decision-making through intersystemic signaling, by which independently operating state and federal actors trade influence over the direction of evolving public policies over time. The dialectic between state and federal regulatory preferences regarding medical marijuana enforcement and immigration law reflects this indirect form of negotiation, as have various judicial and legislative innovations in eminent domain law after the Supreme Court’s decision in *Kelo v. City of New London*, 545 U.S. 469 (2005). The breadth of examples reviewed in the taxonomy reveals just how deeply intergovernmental bargaining permeates American governance, from familiar spending power examples to subtler varieties that have previously escaped scholarly notice as forms of negotiation at all.

All negotiations take place because each side has something the other side wants, and intergovernmental bargaining is no exception. Negotiators usually trade on the various aspects of governing capacity available to each side, including available financing, implementation or enforcement resources, and the relevant expertise required to accomplish specific regulatory goals. They will occasionally bargain for release from inhibiting legal obligations that each side may hold over the other. Sometimes they negotiate over the credit expected for regulatory successes (and by implication, blame for regulatory failures). Although federal negotiators usually possess superior financial resources and often act in the powerful shadow of federal supremacy, federal leverage is often effectively counterbalanced by the state’s broader police power authority and superior capacity for implementation of specific regulatory tasks. Moreover, interviews with practicing negotiators confirm that the normative force of federalism ideals can itself form important leverage at the bargaining table, constraining the results of negotiations in which participants are also motivated by more immediate substantive interests.

In the end, it should not be surprising that so much federalism-sensitive governance is accomplished through negotiation—notwithstanding the zero-sum discourse—given the negotiation features built into the very structure of American government. The bicameral nature of the legislature, the presidential veto, and even the subtle invitation to iterative policymaking afforded by judicial review—prompting Congress to try again to meet constitutional muster, or signaling the concerns that future legislators must heed—all speak to the way American governance is, by design, an iterative process of joint decision making. The interest-group representation model of democratic governance itself anticipates how lawmaking will reflect the results of bargaining between competing interest groups.

Given the foundational role that negotiated federalism plays in American governance, lawyers and judges would be wise to better understand it: where and how it happens, what works well and what does not, and what legal constraints should apply. Most importantly, we should understand how procedural tools available within “federalism bargaining” can assist the navigation of difficult federalism terrain that other means of constitutional interpretation have failed to clarify. Intergovernmental bargaining regularly facilitates needed interjurisdictional governance in controversial arenas where it otherwise falters—for reasons of political gridlock, regulatory abdication, or fear of litigation in the face of judicial uncertainty. Through negotiated consent, bargainers substitute procedural consensus for substantive consensus about abstract jurisdictional boundaries.

Yet we can also understand the robust recourse to regulatory bargaining as more than a mere de facto response to interpretive uncertainty on the part of the Supreme Court or Congress.
Although this argument goes beyond the scope of this short essay, I close by highlighting the book’s theory of how federalism bargaining can itself be a legitimate way of interpreting federalism, when federalism interpretation is understood as a way of constraining public behavior to be consistent with constitutional values. At least when performed well, some forms of federalism bargaining provide legitimate means for answering *who gets to decide?* by procedurally incorporating not only the consent principles that legitimize bargaining in general, but also the fundamental values that should guide federalism interpretation in any forum.

After all, federalism’s core values—the good-governance principles that constitutional federalism is designed to ensure—are essentially realized through good governance *procedure:* (1) the maintenance of checks and balances to protect individual rights against government excess; (2) the protection of accountability and transparency to ensure meaningful democratic participation; (3) the preference for process that fosters local innovation, variation, and competition; and (4) the cultivation of regulatory space for harnessing the synergy between local and national capacity for coping with different parts of interjurisdictional problems. Ensuring that the bargaining process is faithful to these values enables negotiators to interpret federalism directives procedurally when consensus on the substance is unavailable, filling interpretive gaps inevitably left by judicial and legislative mandates.

In a nutshell, the more the bargaining process incorporates legitimizing procedures founded on genuine mutual consent and these federalism values, the more its results warrant deference when challenged in court on federalism grounds. Bargained-for results do not warrant deference if mutual consent is questionable (for example, if bargainers cannot freely opt out, cannot be trusted to understand their own interests, or cannot be trusted to faithfully represent their principals), or if the bargaining process impermissibly contravenes core federalism values of checks, transparency, localism, or synergy. At a minimum, courts adjudicating federalism-based challenges to the results of intergovernmental bargaining should consider procedural factors when deciding the appropriate level of deference to extend.

Intergovernmental bargaining is thus a foundational element of governance within the American system of dual sovereignty. In the face of persistent uncertainty about the boundaries between state and federal reach, regulatory actors move forward by substituting procedural consensus for substantive clarity about the central federalism inquiry—*who gets to decide?*—in individual regulatory contexts. And when it incorporates the principles of mutual consent and core federalism values procedurally, negotiated governance opens possibilities for filling interpretive gaps in congressional legislation and even the Court’s federalism jurisprudence.

This analysis advances both the regulatory and federalism discourses by providing better theoretical justification for the interpretive work that intergovernmental bargaining has long provided, calling for greater judicial deference to qualifying examples. It also reveals legislative and executive opportunities to engineer legitimizing procedures into state-federal bargaining at the level of regulatory design, improving the quality of federalism bargaining in general. Finally, it moves beyond the hallowed debate about the appropriate roles of the Supreme Court, Congress, and federal executive in unilaterally protecting federalism to fully appreciate the critical role that state and federal actors play in *bilaterally* implementing constitutional directives. Regulatory realms characterized by jurisdictional overlap yield many instances in which the very process of intergovernmental bargaining proves more able to preserve constitutional values than judicial or legislative decisions alone. Recognizing how negotiation
supplements these more conventionally understood means of allocating authority provides a new lens for understanding the uniquely collaborative process of American governance.

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Inset:

Spending Power Bargaining After Sebelius

--Erin Ryan

In the wake of the Supreme Court’s Affordable Care Act (ACA) decision, it’s easy to get lost in debate over the various arguments about how the commerce and tax powers do or don’t vindicate the individual mandate. But the most immediately significant portion of the ruling—and one with far more significance for most actual governance—is the part of the decision limiting the federal spending power that authorizes Medicaid. It is the first time the Court has ever struck down congressional decision-making on this ground, and it has important implications for the way that many state-federal regulatory partnerships work.

The Spending Clause authorizes Congress to spend money for the general welfare. Congress can fund programs advancing constitutionally specified federal responsibilities (like post offices), and it can also fund state programs regulating beyond specifically delegated federal authority (like education). Sometimes, Congress just funds state programs that it likes. But it can also offer money conditionally—say, to any state willing to adopt a particular rule or program that Congress wants. In these examples, Congress is effectively saying, “here is some money, but for use only with this great program we think you should have” (like health-insuring poor children).

In this way, the spending power enables Congress to bargain with the states for access to policymaking arenas otherwise beyond its reach. A lot of interjurisdictional governance takes place within such “spending power deals”—addressing matters of mixed state and federal interest in realms from environmental to public health to national security law. Congress can’t just compel the states to enact its preferred policies, but spending partnerships are premised on negotiation rather than compulsion, because states remain free to reject the federally proffered deal. (If they don’t like the strings attached, they don’t have to take the money.) In South Dakota v. Dole, 483 U.S. 203 (1987), the Court famously upheld spending power bargaining, so long as the conditions are unambiguous, reasonably related to the federal interest, promote general welfare, and do not induce Constitutional violations. No law has ever run afoul of these broad limits, which have not since been revisited—until now.

In challenging the ACA, about half the states argued that Congress had overstepped its bounds by effectively forcing them to accept a significant expansion of the state-administered Medicaid program, even though Congress would fund most of it. All states participate in the existing Medicaid program, and many feared losing that federal funding (now constituting over 10% of their annual budgets) if they rejected Congress’s new terms. Congress had included a provision
in the original law stating that it could modify the program from one year to the next, as it had done nearly fifty times previously. But the plaintiff states argued that this time was different, because the changes were much bigger and because they couldn’t realistically divorce themselves from the programs in which they had become so entangled.

The Court’s decision set forth a new rule limiting the scope of Congress’s spending power in the context of an ongoing partnership. Chief Justice Roberts began by upholding the presumption underlying spending bargaining—that the states aren’t coerced, because they can always walk away if they don’t like the terms of the deal. In a choice rhetorical moment, he offered: “The States are separate and independent sovereigns. Sometimes they have to act like it.” The Medicaid expansion was accordingly constitutional in isolation, because states that don’t want to participate don’t have to.

But then the decision takes a key turn. What would be unconstitutional, he explained, would be if Congress were to penalize states opting out of the Medicaid expansion by cancelling their existing programs. Given how dependent states have grown on federal funds in administering these entrenched programs, this would be unfairly coercive. By his analysis, plaintiffs chose the original program willingly, but were dragooned into the expansion. But to make his analysis work, he had to construe Medicaid as two separate programs: the current model, and the expansion. Congress can condition funding for the expansion on acceptance of its terms, but it can’t procure that acceptance by threatening to defund existing programs. The upshot: Congress must allow states to opt out of the expansion while remaining in the current program.

Justice Ginsburg excoriated this logic in dissent, arguing that there was only one program before the Court: Medicaid. For her, the expansion simply adds beneficiaries to what is otherwise the same partnership, purpose, and means: “a single program with a constant aim—to enable poor persons to receive basic health care when they need it.” She criticized the Chief Justice for enforcing new limitations on coercion without clarifying when permissible persuasion gives way to undue coercion, and she pointed to myriad ways his inquiry requires “political judgments that defy judicial calculation.”

On these points, Justice Ginsburg is right. The decision offers no limiting principle for evaluating coercive offers. “I-know-it-when-I-see-it” reasoning won’t do when assessing the labyrinthine dimensions of intergovernmental bargaining, but the decision provides little else. Moreover, the rule is utterly unworkable. No present Congress can bind future congressional choices, so every spending power deal is necessarily limited to its budgetary year. But now, Congress can never modify a spending partnership without potentially creating two tracks—one for states that like the change and another for those preferring the original (and with further modifications, three tracks, ad infinitum). The decision fails to distinguish permissible modifications from new-program amendments, leaving every bargain improved by experience vulnerable to litigation. And it’s highly dubious for the Court to assume responsibility for determining the overall structure of complex regulatory programs—an enterprise in which legislative capacity apexes while judicial capacity hits its nadir.

Nevertheless, the decision exposes an important problem in spending power bargaining that warrants attention: that is, how the analysis shifts when the states are not opting in or out of a cooperative federalism program from scratch, but after having developed substantial infrastructure around a long-term regulatory partnership. It’s true that the states, like all of us, sometimes have to make uncomfortable choices between two undesirable alternatives, and this
alone should not undermine genuine consent. But most of us build the infrastructure of our lives around agreements that will hopefully last longer than one fiscal year (lay-offs notwithstanding). The Chief’s analysis should provoke at least a little sympathy for the occasionally vulnerable position of states that have seriously invested in an ongoing federal partnership that suddenly changes. (Indeed, those sympathetic to the ACA but frustrated with No Child Left Behind’s impositions on dissenting states should consider how to distinguish them.)

It’s important to get these things right, because as I show in Federalism and the Tug of War Within (Oxford, 2012), an awful lot of American governance really is negotiated between state and federal actors this way. Federalism champions often mistakenly assume a “zero-sum” model of American federalism that emphasizes winner-takes-all competition between state and federal actors for power. But countless real-world examples show that the boundary between state and federal authority is really a project of ongoing negotiation, one that effectively harnesses the regulatory innovation and interjurisdictional synergy that is the hallmark of our federal system. Understanding state-federal relations as heavily mediated by negotiation betrays the growing gap between the rhetoric and reality of American federalism—and it offers hope for moving beyond the paralyzing features of the zero-sum discourse. Still, a core feature making the overall system work is that intergovernmental bargaining must be fairly secured by genuine consent.

Supplanting appropriately legislative judgment with unworkable judicial rules doesn’t seem like the best response, but the political branches can also do more to address the problem. To ensure meaningful consent in long-term spending bargains, perhaps Congress could provide disentangling states a phase-out period to ramp down from a previous partnership without having to simultaneously ramp up to new requirements—effectively creating a COBRA policy for states voluntarily leaving a state-federal partnership. Surely this beats the thicket of confusion the Court creates in endorsing judicial declarations of new congressional programs for the express purpose of judicial federalism review. But in the constitutional dialogue between all three branches in interpreting our federal system, the Court has at least prompted a valuable conversation about taking consent seriously within ongoing intergovernmental bargaining.