

ASPEN ELECTIVE SERIES

*We the People*  
*...secure domestic Tranquillity, provide for the common defence*  
*of our Posterity, We ordain and establish this Constitution*  
*Article 1*

# Federalism



■ ANTHONY J. BELLIA JR.



Wolters Kluwer  
Law & Business

ASPEN ELECTIVE SERIES

# ***FEDERALISM***

**Anthony J. Bellia Jr.**

*Professor of Law and Notre Dame Presidential Fellow  
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**Wolters Kluwer**

Law & Business

AUSTIN BOSTON CHICAGO NEW YORK THE NETHERLANDS

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Aspen Publishers  
Attn: Order Department  
PO Box 990  
Frederick, MD 21705

Printed in the United States of America.

1 2 3 4 5 6 7 8 9 0

ISBN 978-0-7355-8921-6

**Library of Congress Cataloging-in-Publication Data**

Bellia, Anthony J., Jr.

Federalism / Anthony J. Bellia, Jr.

p. cm.

ISBN 978-0-7355-8921-6 (perfectbound : alk. paper)

1. Federal government—United States. 2. Constitutional history—United States. I. Title.

KF4600.B45 2010

320.473'049—dc22

2010046666

This book contains paper from well-managed forests to SFI standards.

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For my parents

*Tony*

and

*Maureen*

who exemplify the first principles of good governance

# PREFACE

"The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; and these may in a particular manner be expected to flow from the establishment of a constitution founded upon the total or partial incorporation of a number of distinct sovereignties."

Alexander Hamilton  
THE FEDERALIST No. 82

Hamilton was right. More than two hundred years after he wrote these words, judges and other public officials continue to struggle with "questions of intricacy and nicety" stemming from "the total or partial incorporation of a number of distinct sovereignties." Indeed, they still debate the nature of incorporation and its consequences for governance in the United States.

The Constitution of the United States establishes a federal government of limited and enumerated powers. Articles I, II, and III define federal legislative, executive, and judicial powers, respectively. The Tenth Amendment, in turn, provides that "[t]he 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." The Supreme Court of the United States has long insisted that, in these provisions, the Constitution recognizes a system of "dual sovereignty." In 1819, in *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 410 (1819), Chief Justice John Marshall wrote, "In America, the powers of sovereignty are divided between the government of the Union, and those of the States. They are each sovereign, with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other."

In concept, this principle is straightforward. In application, it is complex and contested. Hamilton was not the only prominent member of the Founding generation to foresee that the Constitution would long generate complex questions regarding the relationship between the federal government and the states. James Madison "brought with him into the [Federal] Convention [of 1787] a strong bias in favor of an enumeration and definition of the powers necessary to be exercised by the national Legislature; but [he] . . . also brought

doubts concerning its practicability.” 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 53 (Max Farrand ed., rev. ed. 1966) (Notes of James Madison). In *McCullough*, Chief Justice Marshall observed that the federal “government is acknowledged by all, to be one of enumerated powers. . . . But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, so long as our system shall exist.” 17 U.S. (4 Wheat.) at 405.

Since the Founding, public officials in the United States have struggled to understand and define the relationship between the national government and the states. Constitutional questions involving that relationship have arisen from the earliest days of the Union — and foundational questions surrounding that relationship remain contested today. Such questions involve not only the relative constitutional powers of the federal government and the states, but also the constitutional responsibilities of various institutions to resolve disputes about those powers.

I wrote this book because U.S. federalism is a subject that deserves its own book-length treatment. Several law school courses consider aspects of federalism — courses such as constitutional law, civil procedure, and federal courts. But given the breadth of other topics that these courses must cover, certain federalism-related topics may fall through the cracks or receive only cursory treatment. These topics include important recurring practical questions, such as the scope of federal preemption. They include defining moments in American constitutional development, such as the nineteenth-century contest over slavery or the rejection of federal general common law in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). They include questions of U.S. federalism intensely debated among academics, such as the place of customary international law in the federal system. This book considers federalism-related topics that students may not encounter or may encounter only piecemeal across various courses. Its purpose is to enable students to understand better the nature of U.S. federalism and to analyze critically various premises underlying constitutional discourse about federalism.

This book provides ample materials for a stand-alone course on U.S. federalism. It also provides a base of materials for use in courses in constitutional law, or more specialized courses in federalism, such as the history of federalism, the theory of federalism, topics in federalism, comparative federalism, and judicial federalism, to name just some. The book’s website — [www.aspenlawschool.com-books-bellia\\_federalism](http://www.aspenlawschool.com-books-bellia_federalism) — contains additional materials that might prove useful supplements in a variety of courses.

In addressing questions of federalism, courts, other public officials, and scholars have relied heavily on historical practice, constitutional structure, and political theory. Accordingly, this book is designed to enable students to study constitutional doctrine in light of the events, practices, and principles that continue to shape it.

Part I — Framing American Federalism — lays the foundation for serious engagement with constitutional doctrine surrounding the relationship between the federal government and the states. It explores Founding-era conceptions of federalism, antebellum and Reconstruction contests over federalism, normative political theories of federalism, and the political safeguards of



federalism. The materials address the relationship between federal and state power under the Constitution and how disputes over that power should be resolved. The Supreme Court has relied on various sources presented in Part I in resolving federalism questions throughout U.S. history. By reading these primary materials, students will be better equipped to understand and critique present-day judicial analyses of federalism.

Part II—National and State Power to Regulate—considers constitutional doctrines surrounding the relative powers of the federal government and the states. It addresses several enumerated powers of Congress, including its powers under the Commerce Clause, the General Welfare Clause, and §5 of the Fourteenth Amendment. Additionally, it considers doctrines of state sovereignty that have operated as limits on some or all of these powers. Finally, it considers federal limits on state power, including implied constitutional limits under the Commerce Clause and foreign relations powers, and preemption of state law by federal regulatory schemes.

Part III—Judicial Federalism and Rules of Decision—examines the relationship between judicial rules of decision and the federal constitutional structure. It traces jurisprudential shifts in the sources of law that federal courts have applied from the Founding era to the present, exploring questions of federalism that different sources of law have generated along the way. In particular, it considers the relationship between the federal constitutional structure and federal common law, customary international law, and general law as rules of decision in federal courts.

This book presents students with extensive historical, theoretical, and judicial materials involving the U.S. federal structure. It is not intended, however, to serve as a research compendium. Its goal is to engage students deeply in the materials presented rather than to offer a comprehensive synthesis of constitutional doctrine. Before each set of materials, the book poses a series of questions for the reader's consideration. Following each set, the book refers back to those questions with a series of "points for discussion." In crafting these points, I have attempted to avoid both overwhelming the reader with questions and leaving the reader with too little guidance as to which points warrant further consideration.

This book brings historical practice, structural principle, political theory, and contemporary doctrine to bear on many discrete questions involving the U.S. federal structure. The student who seriously engages these materials should achieve a deeper understanding of the structure of governance in the United States, and greater competence to resolve the problems of governance that are "perpetually arising, and will probably continue to arise, so long as our system shall exist."

A.J. Bellia  
November 2010

## ACKNOWLEDGMENTS

First and foremost, I am grateful to my wife, Tricia Bellia, without whose support I could not have written this book. She gave me the time — and, more than that, the peace of mind — to write it. Her substantive contributions pervade the book.

I also am grateful to many colleagues — too numerous to mention — whose comments and writings contributed to this book. In particular, however, I thank my friend and sometime co-author, Brad Clark, for countless insights and critiques that helped shape this book.

I also thank Carol McGeehan of Aspen Publishers for encouraging me to pursue this project and John Devins for advice and counsel that significantly improved it in many ways throughout the editorial process. In that process, several anonymous reviewers provided comments on various chapters. These comments were invaluable, inspiring revisions that dramatically improved the book. I am very grateful for the generosity of each of these reviewers.

In addition, I thank the Notre Dame Law School for generous research support — and for its commitment to the study of constitutional structure.

I received outstanding research assistance as I prepared this book. Notre Dame research librarian Patti Ogden provided exceptional research support. Having studied some of these materials with me in class, she also provided very helpful substantive suggestions. For all of her contributions, I thank her. I also thank Notre Dame law students Nick Curcio, Katie Hammond, J. D. Linder-muth, Jake Lombardo, Meghan Sweeney, and Carolyn Wendel, who provided excellent research assistance.

Finally, I thank the many Notre Dame law students who have studied federalism with me through the years. In many ways, this book reflects their insights and questions.

**A Note on Sources.** I have indicated omissions from excerpted materials with ellipses or brackets, except at the beginning of excerpts or sections within excerpts. I generally have not indicated the omission of citations or footnotes. Numbered footnotes are from original sources. In parts, I have joined portions of edited text into new paragraphs to improve readability.

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# THE CONSTITUTION OF THE UNITED STATES OF AMERICA

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

## ARTICLE I

**Section 1.** All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

**Section 2.** The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

[Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons.]<sup>\*</sup> The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made, the State of New Hampshire shall be entitled to chuse three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five and Georgia three.

When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of Election to fill such Vacancies.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

**Section 3.** The Senate of the United States shall be composed of two Senators from each State, chosen [by the Legislature thereof,]<sup>\*\*</sup> for six Years; and each Senator shall have one Vote.

Immediately after they shall be assembled in Consequence of the first Election, they shall be divided as equally as may be into three Classes. The

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<sup>\*</sup> Amended by §2 of the Fourteenth Amendment.

<sup>\*\*</sup> Amended by the Seventeenth Amendment.



Seats of the Senators of the first Class shall be vacated at the Expiration of the second Year, of the second Class at the Expiration of the fourth Year, and of the third Class at the Expiration of the sixth Year, so that one third may be chosen every second Year; [and if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next Meeting of the Legislature, which shall then fill such Vacancies.]\*

No person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.

The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.

The Senate shall chuse their other Officers, and also a President pro tempore, in the absence of the Vice President, or when he shall exercise the Office of President of the United States.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

**Section 4.** The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of chusing Senators.

The Congress shall assemble at least once in every Year, and such Meeting shall be [on the first Monday in December,]\*\* unless they shall by Law appoint a different Day.

**Section 5.** Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members, and a Majority of each shall constitute a Quorum to do Business; but a smaller number may adjourn from day to day, and may be authorized to compel the Attendance of absent Members, in such Manner, and under such Penalties as each House may provide.

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any

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\* Amended by the Seventeenth Amendment.

\*\* Amended by §2 of the Twentieth Amendment.

question shall, at the Desire of one fifth of those Present, be entered on the Journal.

Neither House, during the Session of Congress, shall, without the Consent of the other, adjourn for more than three days, nor to any other Place than that in which the two Houses shall be sitting.

**Section 6.** The Senators and Representatives shall receive a Compensation for their Services, to be ascertained by Law, and paid out of the Treasury of the United States. They shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

No Senator or Representative shall, during the Time for which he was elected, be appointed to any civil Office under the Authority of the United States which shall have been created, or the Emoluments whereof shall have been increased during such time; and no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office.

**Section 7.** All bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively. If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

**Section 8.** The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence

and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;

To borrow Money on the credit of the United States;

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;

To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;

To establish Post Offices and Post Roads;

To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;

To constitute Tribunals inferior to the supreme Court;

To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations;

To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;

To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;

To provide and maintain a Navy;

To make Rules for the Government and Regulation of the land and naval Forces;

To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;

To provide for organizing, arming, and disciplining the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings; And

To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

**Section 9.** The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person.