THE UPSIDE-DOWN CONSTITUTION

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To my parents

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Contents

Introduction

Constitutional Inversion

Constitutions aim to establish workable, enduring frameworks of government and to reduce the vagaries of politics. Yet, uncomfortable though the thought may be, constitutional government also implies the certainty of constitutional change, as well as the distinct possibility of constitutional error. The constitutional enterprise may get away from its founders' expectations and intentions because well-constructed constitutions do not try to settle too much. In Chief Justice Marshall's view, they must be sufficiently open-ended to be "adapted to the various crises of human affairs."[1] More disturbingly, a constitutional order may fall victim to the very political passions and interests that it is meant to contain.

Lately, "Constitutional Development" has emerged as a subfield of political science and constitutional law. But of course, the question of constitutional change and stability is older and more familiar than this academic boomlet. For many decades, it has been the stuff of a very public and, at times, polemical debate. One camp exalts a Constitution that "grows" in response to changing social norms and conditions—in a word, a Constitution that "lives." Another camp takes a dim view of constitutional change. After much change (of the wrong kind), they say, the Founding Fathers' Constitution must be "restored," much like

one would rehab deceased parents' crumbling home by shoring up its foundations and removing the accumulated clutter. Still others reject the notion of a Constitution that can be said to grow or deteriorate in any meaningful, directional sense. The drafters of the United States Constitution, they observe, papered over deep disagreements that could not be resolved in a single foundational act. Because the unresolved conflicts carried forward, our politics, institutional arrangements, and constitutional understanding have oscillated—sometimes wildly and violently—between poorly marked, infinitely contestable constitutional boundaries. Finally, there is the dramatic picture of discontinuous change and "constitutional revolutions"—the "revolution" of 1800, for example, which by some lights substituted Thomas Jefferson's Constitution for the one that had been enacted; more clearly and familiarly, the New Deal "revolution" of 1937.[2]

The Upside-Down Constitution presents yet a different picture and argument. Its subject is federalism, that "oldest question of American constitutional law." So far as federalism is concerned, the book argues, the constitutional order has not just grown, deteriorated, or swung too far. Rather, it has been revolutionized in the very specific sense of having been stood on its head. The inversion (we shall see) is readily apparent in particular clauses of the Constitution that have come to assume the opposite of their reasonable meaning, however construed. Those clauses, however, are merely the proverbial canaries. They have croaked on account of a profound atmospheric change—an inversion of the principles and premises on which the constitutional order rests.

Those principles and premises cannot be found *in* the Constitution. Rather, they form its bedrock. Assume them away, and the constitutional structure—as a whole and in its particulars—is rendered pointless and incoherent. The federalism of the United States Constitution presupposes and rests on a handful of such principles and premises. It reflects the long-term calculus of citizens of the United States. It aims to discipline government at all levels, and it aims to curb factional politics and, in that fashion, to produce political and institutional stability. "Our Federalism" (as the Supreme Court likes to call it) embodies just the opposite principles and premises. It serves the interests of politicians, not citizens. It empowers government at all levels. And it unleashes interest group politics and produces a mutable government. Because those orientations are antithetical to the constitutional plan and unattractive in their own right, they are rarely stated forthrightly. But they are the quicksand on which our inverted federalism has come to rest.

Federalism Problems

The notion of federalism's "inversion" departs from conventional wisdom about federalism. Federalism's central, perennial problem, on the standard view, is to preserve a federal "balance" between the states and the nation. At one extreme, the equilibrium is endangered by dissolution; at the other, by wholesale centralization. Political dissolution was indeed once a real danger, which ended only after the Civil War. A total collapse into the center—"consolidation," as the Anti-Federalists called it—was never a real prospect. From the outset, however, apprehensions over an overbearing national government have been a constant theme of our politics. Over the past century, periods of ambitious federal law making—the New Deal, the civil rights revolution, the innovations of the Great Society, the regulatory and fiscal initiatives of the Obama administration—have regularly prompted calls to return power to the states and to restore federalism's balance. Paralleling the political debate, the Supreme Court and constitutional scholars have argued over how much the Supreme Court could and should do to protect the "states as states," the better to preserve federalism's perceived advantages and the states' role in the constitutional system.

Difficult though it is to escape the balance catechism, political scientists and economists who study federalism have come to take a broader view.[3] They have come to recognize that stable federal systems that escape the twin threats of disintegration and nationalization may yet experience serious institutional pathologies. Prominently, painful experience suggests that a mix of centralized tax authority and decentralized spending authority—a common arrangement in many federal systems, including the United States—produces chronic overspending and, in some cases, fiscal ruin.[4] Moreover, well short of disintegration, federal systems can suffer excessive decentralization—a proliferation of virtually autonomous power centers that impose multiple compounding or conflicting burdens on a nation's economy. Excessive centralization and decentralization can occur at the same time, as overlaps of public authority produce thickets of intergovernmental bureaucracies that seem impervious to public accountability, let alone political reform.

A second, related point of scholarly consensus is that federalism is a "they," not an "it." As just suggested, federalism (in its broadest sense) is a mixed blessing. It can promote civic engagement or rank exploitation, innovation or financial and political instability. It can promote political transparency and accountability or compromise it, protect against

the ravages of factional politics or amplify them. Salutary and baneful effects often come in bundles. Their mix and overall tendency do not depend on some global balance but on complex institutional and legal arrangements. Depending on those arrangements as well as social and economic background conditions, (de)centralization can make matters better or worse. Federalism can be a promise or a pathology, a blessing or a curse. But the central question is not *how much* federalism; it is *what kind* of federalism.[5]

The Upside-Down Constitution pursues just that question. The inquiry, I hope to show, is far superior to the perennial search for an ill-defined "balance" in allowing us to understand American federalism's historical trajectory and present condition—and most important for my purposes, its *constitutional* contours, logic, and development.

The analysis rests on a simple, binary distinction between two ideal types of federalism. I derive it not from any phenomenological classification but rather from a calculus that might inform a choice for or against federalism, or for or against a particular kind of federalism, *before* a constitution is in place. In that preconstitutional context, one can think of federalism as the constitutional choice of individual prospective citizens of a single polity or, what amounts to the same thing, of a single sovereign "We the people." If those individuals opt for federalism (as opposed to a unitary government), they will choose federalism *of a certain form* and for a certain purpose—to discipline government at all levels. That form of federalism I call "constitutional" or "competitive" federalism. Alternatively, one can think of federalism as a bargain among state governments or local elites.[6] That perspective is perfectly plausible (especially in the formative stages of a political union), but it will generate a very different federalism. The junior governments will yield to central authority only if the move promises to enhance their surplus capacity—very roughly, their ability to tax citizens in excess of the cost of providing public services.[7] This form of federalism I call "cartel" federalism or (in its advanced, contemporary state) "consociational" federalism.

Needless to say, the dichotomy just sketched fails to capture many of the rich nuances and facets of federalism in America, not to mention other countries. Federal systems, including ours, typically combine competitive and cartel arrangements. The notion of states as revenue maximizers is a modeling assumption, not an empirical generalization (let alone an observation). And the idea of an authentic constitutional "choice" seems to correspond with no country's actual experience. For all its simplicity and artifice, however, I hope to show that the heuristic yields important insights into the nature and development of American federalism. The

citizens' competitive federalism is, or was, that of the Constitution. The states' federalism of cartels and consociation is ours.

I make no bones about my normative priors: A competitive federalism that disciplines government is worth having. A cartel federalism that empowers government at all levels is pathological, and quite probably worse than wholesale nationalization. However, I shall make no serious effort to defend those intuitions. My central point is to demonstrate that our federalism of cartels and consociation is disconnected from, and indeed antithetical to, the Constitution's competitive structure and logic. Yet nothing in our institutional politics constrains it, and periodic efforts to restore federalism's "balance"—bouts of "devolution" and judicial forays into protecting "states as states"—only reinforce a federalism that, by constitutional design, we were never meant to have. The concluding chapters will take a stab at rehabilitating a modern federalism closer to the Constitution's "genius" (as John Marshall used to say). But the first step is to understand what happened and why. To that end, one has to dig deep, all the way to the foundations.

Constitutional Choices

The Founders, nineteenth-century jurists, and classical and contemporary contractarians all started, or start, with a "dualist" constitutional perspective.[8] They set aside the calculations that citizens, interest groups, or politicians make under already-existing rules and instead ask what the world might look like in a "constitutional moment"—from an "ex ante" position in which the parties choose the rules that will govern their future, "in-period," options and actions. Does federalism make sense from that perspective? And if so, what kind of federalism makes sense? The answer depends on who makes the choice—prospective citizens or states.

The Citizens' Federalism. Suppose that preconstitutional individuals hailing from different polities have decided that they are one nation and that the benefits of establishing a single central government outweigh the costs. To what extent and for what purposes should subordinate governments retain any authority to tax and regulate? Less abstractly: in the *United* States, what good are the states? The question turns out to be very close. Although federalism may make sense under some conditions and on some assumptions, equally plausible assumptions may render a centralized, state-less system a superior choice.[9] For better or worse, though, the first-order choice (federalism, yea or nay) is often foreclosed, and it was

foreclosed to the American Founders: if there was to be a union at all, some form of federalism was a foregone conclusion. The constitutional problem was, and is, what *kind* of federalism. That question turns out to have a tolerably clear answer.

Individuals' constitutional choice depends on their expectations about government. They could put their trust in a benevolent government, but that is a high-risk assumption; if it proves wrong, the losses will mount very quickly. It is safer, then, to assume that government will be prone to abuse. "The great difficulty" in forming "a government which is to be administered by men over men," James Madison wrote, is that "you must first enable the government to control the governed; and in the next place oblige it to control itself."[10] For the purpose of controlling the governed, a single central government will do. The point of entrusting a second set of junior governments with authority over the same citizens and territory, therefore, is to oblige government to control itself. *For a single "We the People,"* federalism is worth having if and insofar as it helps to alleviate the government monopoly problem.[11]

Federalism can serve that purpose in two ways. First, federalism limits the central government to procuring public goods that can be provided only at that level, such as national defense. Local public goods are to be provided locally. That arrangement helps to reduce central decision costs, which is worthwhile even if politicians at every level are perfectly benevolent.[12] On any set of less charitable assumptions, however, the central provision of local public goods will result in a level of spending and taxing in excess of *any* jurisdiction's preference, or the level of spending that would obtain if jurisdictions had to tax themselves for the benefit.[13] In short, to the extent that the central government's taxing and spending authority can be limited to goods that are national in scale, federalism can serve as a protection against government error and exploitation.

Second, federalism looks attractive if one assumes that citizens and firms are mobile. In that universe, federalism will enable citizens to choose among varying bundles of public services and the taxes that come with them, and it will force the junior governments to compete for productive citizens and firms. Competition in this sense has many potential advantages. It may allow citizens with heterogeneous preferences to sort themselves into different jurisdictions that offer different bundles of public services (and accompanying tax payments). It may help to disclose information both about what policies work and about citizens' preferences, and it may foster policy innovation. Its principal constitutional advantage, however, is to discipline governments. Citizens will be willing to pay for public services at levels that will vary among jurisdictions. In contrast,

states' attempts to collect surplus will induce exploited citizens to exit—to "vote with their feet." This "Tiebout competition" will discipline the junior governments in the same way in which market competition disciplines private producers.[14]

The conventional term for this arrangement is "competitive federalism." Of course, the Founders were unfamiliar with the modern-day economic and public choice theories that sail under that banner, and one has to be careful in projecting those theories backwards and especially in mobilizing them for normative constitutional purposes.[15] Even so, contemporary theory illuminates the elementary calculus of the United States Constitution. If there is to be federalism, it should be a means of reducing decision costs and the dangers of government monopoly and exploitation. That is so because the Constitution, including its federalism, must embody the ex ante preferences of prospective citizens, *to the complete exclusion of the preferences of "states as states."* Examine the Constitution from this vantage: for all the wheeling and dealing that went into it, the Founders managed to protect that central premise. For that reason, they got all the pieces of a competitive federalism architecture almost exactly right—perhaps as right as one can get them.

The States' Federalism. Now invert the perspective, and consider federalism as a bargain among states—that is to say, state officials or political elites. What is their ex ante choice? Unlike individuals, states will embrace federalism as a first-order choice. (They will hardly opt for their own demise.) But they will also have a second-order preference with respect to federalism's form. Prospective citizens will embrace competitive federalism because it promises to reduce government abuse and exploitation all levels. States, in diametrical contrast, will embrace union only if, and to the extent that, it promises to improve their position—the "power, emolument and consequence of the[ir] offices," in Hamilton's words; their "surplus," in the parlance of public choice economists.[16] Much like private producers in economic markets, states "as states" seek supracompetitive returns. To that end, they need a central government that stands ready to *prevent* competition among states and to cartelize the political market. At the same time, a central government that is sufficiently strong to protect the states' surplus may also be sufficiently strong to confiscate it, and states will want to guard against that eventuality.[17]

Most federal constitutions enshrine this federalism-as-a-cartel model. For example, they may grant the central government a de facto tax monopoly (thus suppressing tax competition among states) and guarantee the junior governments a share of the proceeds.[18] The United States

Constitution contains no "fiscal constitution" of this sort. This silence is a first illustration of the Constitution's fiercely competitive structure (and, we shall see, a very important feature). As a matter of institutional practice, however, our federalism has come to approximate the states' cartel ideal. For example, hundreds of federal "conditional funding" programs support, from general taxes, services that states could not hope to provide under competitive conditions for fear that taxed citizens or firms might head for the exits. Federal workplace, employment, and safety standards suppress state competition for mobile labor and capital. And so on. By most measures, American federalism is still among the most competitive in the world; for example, it tolerates a comparatively high level of state tax competition. But there is no mistaking the general tendency.

By all appearances, the cartelization of American federalism confronts no serious constitutional obstacle. The Supreme Court has contributed its share to the process by prohibiting state competition on contentious moral questions, from abortion to the death penalty. And far from viewing the cartelization of American federalism as a constitutional problem, the Court asks whether the system is in "balance"—that is, whether the "states as states," meaning their political institutions and officials, are having a sufficiently good time. That question, we shall see, has no correct or even intelligible answer. It is not part of our constitutional calculus.

Constitutional Change

The central point of the constitutional choice heuristic is to drive the federalism analysis back to a genuinely constitutional perspective and to show that the crucial question, normatively as well as analytically, is not *how much* federalism but *what kind* of federalism. But the perspective also helps to explain federalism's migration from competition to cartel. The explanation emerges if one recasts the ex ante heuristic into an analytic narrative that clarifies the institutional actors' "in-period" incentives.

Once states find themselves operating under a competitive federal order, their dominant strategy is to do in-period what they could not achieve ex ante: organize cartels. To prevent defections and chiseling by procompetitive states, states will require the assistance of a central, coercive agency—that is, the national government.[19] This demand for cartelization is a constant in all federal systems. It is reinforced by potent political and functional demands, and it has been the dominant—though not unbroken—tendency of American federalism. Our constitutional history illustrates both the basic dynamic and the forces that have at times impeded it.

Inversion. State demand for central, cartelizing intervention, I just noted, is a constant. Its *intensity*, however, depends on factor mobility and the scale of economic production. In a world of low factor mobility and limited scale, states collect surplus from local producers and consumers. Under conditions of high factor mobility, national scale of production, and global low-cost financial intermediation, in contrast, ready exit will deplete the states' surplus. To forestall that outcome, states will demand central, "harmonizing" intervention. This dynamic began to unfold in the 1870s and accelerated thereafter. Large-scale industrialization entailed a formidable increase in factor mobility, scale of production, and national financial intermediation, with the expected result: states demanded the harmonization of labor conditions, product standards, and much more. The first demands for systematic federal transfer programs date to the same period.

Although both Congress and the Supreme Court sought to accommodate the demand, bargaining problems—such as state rivalries and defections and disagreements over the distribution of the available surplus—often blocked the creation of state cartels and a systemwide move to "cooperative federalism" (as it would come to be called). However, players who get to play the game often enough will eventually figure out cooperative solutions.[20] Under the added pressure of an exogenous shock (the Depression) and conditions of unusually high political consensus (the landslide election of 1936), political institutions found a way to shift from competition to cartel.[21] Constitutional rules proved inadequate to arrest that joint defection. The Supreme Court abandoned the competitive rules and instead embraced a constitutional order that facilitates the formation of state cartels, usually under national auspices. The cartel federalism of the New Deal Constitution has been "our" federalism ever since.

Later chapters will describe the constitutional dimensions of federalism's complicated renegotiation during the industrial era and the New Deal in some detail. Here, I emphasize two crucial implications. One of them concerns the common notion, dating back to the Founding era and alive to this day, that "states as states" will manfully resist federal encroachments; if they don't, that must be because the central government has corrupted or overwhelmed them. That account has it backwards. One can debate the role of states as relatively autonomous actors in federalism's transformation, but there is no doubt about the direction of their demand *in favor of* central intervention. State resistance to that tendency—that is to say, insistence on competitive conditions—has materialized only under unusual conditions, about which more anon.