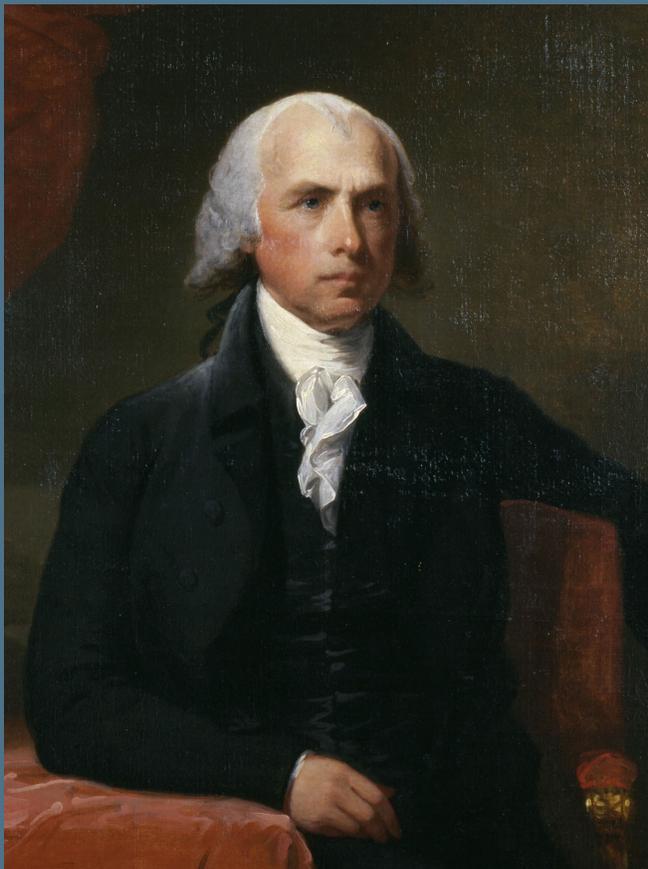


Wisconsin Institute for Law & Liberty
Center for Competitive Federalism

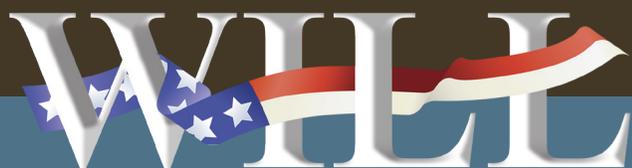


A Common Cause:
Uniting the States
against Federal
Overreach

Mario Loyola

Senior Fellow and Director, Center for Competitive Federalism

December, 2016



**A Common Cause:
Uniting the States against Federal Overreach**

Mario Loyola
Senior Fellow and Director, Center for Competitive Federalism
Wisconsin Institute for Law & Liberty

Of all James Madison's brilliant contributions to the Federalist Papers, the least prescient must be Federalist No. 46, in which Madison explains the reasons why the states would be richly protected from undue federal encroachments.

Madison dismisses as "chimerical fears" the idea that federal power would ever effect "a meditated and consequential annihilation of the state governments." As we now know, those fears proved all too founded.

For Yale law professor Heather Gerken, states are more important as "servants" of federal power than as autonomous governments with an independent sphere of authority. Columbia law professor Jessica Bulman-Pozen has written that "state and federal governance and interests are more integrated than separate." States are "component parts of the national administrative apparatus," and "a sort of second executive branch operating alongside the President and the D.C. bureaucracy."

During the ratification debates in the 13 colonies, voices such as Virginia delegate Patrick Henry warned this would happen. "To all the common purposes of Legislation it is a great consolidation of Government," he said, adding:

Such a Government is incompatible with the genius of republicanism: There will be no checks, no real balances, in this Government: What can avail your specious imaginary balances, your rope-dancing, chain-rattling, ridiculous ideal checks and contrivances?

Had such voices been more widely believed, the Constitution would never have been ratified.

Instead, however, James Madison's view prevailed. Madison cited a number of reasons why the federal power would not be able to invade the state's proper sphere of authority. Most important of these was the fact that the federal government was given only limited and enumerated powers: "[I]t is only within a certain sphere, that the federal power can, in the nature of things, be advantageously administered."

But the idea that federal power would be effectively cabined proved

wishful thinking: The 20th century, with its administrative state, New Deal, and Great Society programs, demolished the framework of limited and enumerated powers, and, under a patently incorrect reading of the Commerce Clause, replaced it with unlimited power to regulate all economic activity. Federal power quickly intruded into every minute aspect of our lives.

The result has been, as the anti-Federalists who opposed the Constitution originally feared, a great consolidation of power at the federal level. In addition, the national government has become increasingly arbitrary and uncontrollable as policy has been consolidated in the executive and in an a permanent "fourth branch," the administrative state. Just as Patrick Henry predicted, checks-and-balances are failing.

Madison suggested that, as a last resort to prevent the rise of a federal tyranny, the state militias would be able to overwhelm the national army. To avoid such a worst-case scenario, he thought it crucial to rein federal power back by peaceful political means. In Federalist No. 46, Madison foresaw how this could be done:

[S]hould an unwarrantable measure of the federal government be unpopular in particular States, which would seldom fail to be the case, or even a warrantable measure be so, which may sometimes be the case, the means of opposition to it are powerful and at hand. The disquietude of the people; their repugnance and, perhaps, refusal to co-operate with the officers of the Union; the frowns of the executive magistracy of the State; the embarrassments created by legislative devices, which would often be added on such occasions, would oppose, in any State, difficulties not to be despised; would form, in a large State, very serious impediments; and where the sentiments of several adjoining States happened to be in unison, would present obstructions which the federal government would hardly be willing to encounter.

But ambitious encroachments of the federal government, on the authority of the State governments, would not excite the opposition of a single State, or of a few States only. They would be signals of general alarm. Every government would espouse the common cause. A correspondence would be opened. Plans of resistance would be concerted. One spirit would animate and conduct the whole.

There are at present two main avenues for the states to fight back against federal overreach: First, through the federal courts; and second, by legislative action. It took quite a while for opposing states to "espouse the common cause" through the federal courts. Meanwhile, in the domain of legislation they still have not started to

act in unison, and state legislative action remains largely untried.

This report examines the progressive federal takeover of state governments. It looks at how the expansion of the federal spending and commerce powers led directly to the coercion of “cooperative federalism” arrangements. It then looks the particular problems of executive federalism. It examines the prospects for strategic litigation. And finally, this report considers a variety of state policy responses that could prove particularly effective in rolling back, or at least halting, the federal takeover of states.

We urge state officials to begin the “correspondence” that James Madison hoped would happen in the case of looming federal tyranny. One starting point, we suggest, would be the negotiation and coordination of a short agreed text that sets for the principles that unite the states in defense of the Constitution, and the actions they pledge to undertake in their common cause. The principles that such a text might espouse can be found in [Appendix A](#).

From Competitive Federalism to Coercive Federalism

The expansion of federal power began with two constitutional transformations that would reshape American democracy. The first was the 16th Amendment, which allowed Congress to institute a direct income tax without having to meet the requirement of apportionment according to population, a regressive scheme that had previously made it politically impossible to enact a direct income tax. This dramatically expanded the federal revenue base, and federal spending went from three percent of GDP to nearly 20 percent of GDP in a generation. The second constitutional transformation was the New Deal, which sought to protect the union labor and agricultural interests of Franklin D. Roosevelt’s political coalition through government-created cartels and other national programs that brought federal power to bear on purely intra-state economic activities, which had always been considered to lie outside Congress’s interstate commerce power. The Supreme Court at first ruled these programs unconstitutional, but after FDR’s landslide reelection in 1936, and his menacing “court-packing plan,” the Court backed down, and became a rubber stamp for the New Deal.

A major driver of these constitutional transformations was the progressive’s desire to eliminate interstate regulatory competition, a structural feature of the original Constitution that modern scholars describe as “competitive federalism.” Where conservatives see in competitive federalism a healthy scheme that pushes states to optimize their levels of regulation and taxation in order to attract capital and labor, progressives see a damaging “race to the bottom.” Where conservatives see competitive advantage in keeping regulation and taxation low, progressives see the undesirable penalty of competitive losses imposed on states with high levels of regulation and taxes.

The progressives’ solution was to nationalize the uncompetitive

states’ levels of regulation and spending. Because the Constitution’s original limits on federal power made it virtually impossible to do that, those limits – on federal taxation and on the federal commerce power – had to be swept away, so that Congress in both domains could overwhelm state government and absorb their powers. In that sense, the two constitutional transformations had the intended effect. Competitive federalism was largely replaced by “cooperative federalism”: the integration of state and federal governments under an umbrella of de facto federal control.

Through hundreds of separate “assistance” programs, the federal government transfers to the states an amount equal to about three percent of GDP (on average since 1980), amounting to 30 or 40 percent of the typical state’s budget. This is no mere charity. By inflating state budgets well beyond the level that states would be able to sustain if they had to tax their people directly, and by attaching conditions to the funds, Congress can effectively seize control of state budgets and programs. Federal fiscal assistance to the states thus allows the federal government to influence the composition of state spending, thereby giving the federal government de facto control over an additional 15 to 25 percent of GDP in government spending, in addition to giving the federal government powerful levers over collateral state policies. Describing this arrangement as federal assistance to the states is window dressing: the reality is one of forced state assistance to the federal government. Medicaid is the paradigmatic example: Styled as a federal match for state healthcare programs, it is in fact a forced state match (and state administration) of a federal healthcare program, and a lever used to shape each state’s health-care policy generally.

On the regulatory side, the federal government passes laws that require enormous administrative resources to implement. Rather than having to raise the revenue to do the implementation itself, the federal government essentially deputizes state agencies and makes them do the legwork. States are confronted with a choice: either implement the federal regulation themselves, or pave the way for the federal government to come in and implement the regulation itself. The Environmental Protection Agency’s “SIP/FIP calls” under Section 110 of the Clean Air Act are the prime example: EPA issues a call for State Implementation Plans (SIP) to be submitted for its approval by a certain deadline, failing which a Federal Implementation Plan (FIP) will be imposed.

States must choose one or the other, and agencies having various methods of making it clear that the second alternative could be considerably more painful than the first. Incredibly, these methods include not implementing the regulation, as happened in Texas when the state government refused to issue new greenhouse gas emissions permits to implement new EPA regulations under the Clean Air Act. EPA charged its Region 6 office in Dallas with processing the permit applications for new facilities and modifications of existing facilities subject to the new regulations (e.g., refineries). As in Hitchhiker’s Guide to the Galaxy, what happened next was --

nothing. Region 6 sat on the permit applications. Many companies in Texas's heavy industries were left without necessary permits and forced to defer urgently needed work on their facilities, in the middle of a historic boom in oil production. After a year of this, the state had no choice but to back down and issue the permits on EPA's behalf, though it considered the permits unconstitutional and ultra vires.

More recently, the EPA's Clean Power Plan has demonstrated the pure coercion behind this arrangement: EPA does not (as in the normal SIP/FIP situation) have any authority to regulate a state's electricity mix, the subject matter of the Clean Power Plan. The Federal Power Act leaves that to the states and to FERC. But EPA can shut down coal-fired power plants by regulating their emissions out of existence. So the Clean Power Plan says to the states, in essence, adopt California's green (and disastrously expensive) electrical power mix, or face the loss of up to a third of your state's electrical generating capacity. The Supreme Court has referred to far milder coercion than this as a "gun to the head," as recently as *NFIB v. Sebelius* (2013). Here EPA is threatening to shut down a significant fraction of electricity – literally a threat to health and safety.

In both the spending and regulatory contexts, the Supreme Court has ruled that the federal government cannot commandeer state agencies or compel them to do anything – in *South Dakota v. Dole* (1987) on the spending side, and *New York v. United States* (1992) and *Printz v. United States* (1997) on the regulatory side. But in all these cases, unfortunately, the Supreme Court has clung to the fiction that because "cooperative federalism" always gives states a choice, the federal government is not compelling the states to do anything. But the offer is too often one that states cannot refuse. Their citizens will be taxed by the national government whether or not a state accepts the conditions tied to a return of their money. A state can refuse to bear the burden of implementing federal regulations, but this will not protect its citizens from the federal government implementing its regulations in punitive fashion.

The logical fallacy should be apparent: The fact that a robbery victim is given a "choice" between his money or his life does not make the arrangement "voluntary." In any case, there is nothing the federal government could want to accomplish through direct commandeering that it cannot accomplish with just as much compulsion through the devices of "cooperative federalism." The incentives and the penalties are virtually irresistible. That is why every state has a Medicaid program, even though large majorities in those states might prefer something else. That is why federal and state governments are now more integrated than separate. "Cooperative federalism" is a misnomer. A more apt term would be "coercive federalism."

The Dangers of Executive Federalism

The dangers of coercive federalism are dramatically exacerbated by the loss of separation of powers at the federal level among the branches of the federal government, and the concomitant consolidation of legislative, executive, and judicial power in the hands of the president. That process began in earnest with Woodrow Wilson and the birth of the modern administrative state, which was marked from the start by sweeping delegations of legislative (and to a lesser extent, judicial) power to the executive branch – delegations that seemed to violate the ancient Roman principle, *delegatus non potest delegare* ("the delegate," in this case Congress, "cannot delegate").

Not able to reverse the creation of powerful new executive agencies or the sweeping delegation of power to them, a conservative Supreme Court foolishly cut many of those agencies free from formal presidential control, in the case of *Humphrey's Executor vs. United States* (1935). In that case, the Court announced the principle that if an agency exercises purely executive functions, then the president can fire the head of the agency, and thereby control the agency, but if the agency exercises quasi-legislative or quasi-judicial functions in addition to executive functions, then the president can be prohibited from firing the agency head, and – apparently – nobody controls the agency. Thus was born the headless "fourth branch" of government, which conservative scholars such as Edwin Meese III have argued should not exist in a constitutional system that presupposes a "unitary executive."

Even with respect to the executive agencies the president does control, however, there are grave separation of powers problems. The Supreme Court has adopted canons of extreme deference to agency interpretations in two crucial contexts. Agency interpretations of their enabling statutes are given extreme deference under *Chevron v. NRDC* (1984), and agency interpretations of their own regulations are given similar deference under *Auer v. Robbins* (1997). Both *Chevron* and *Auer* deference have crucial implications for federalism. These decisions further consolidate power within the national government while simultaneously making this concentrated power less susceptible to political control. This further frustrates the ability of states – and of the public generally – to limit or channel federal power.

The case of *Garcia v. San Antonio Metropolitan Transit Authority* (1985) decided that courts needn't worry about the extent to which a federal law regulates core governmental functions of the states, because states are protected in the federal political process itself. Garcia thus embraced the doctrine of "process federalism" first articulated by Prof. Herbert Wechsler in his 1954 paper, "The Political Safeguards of Federalism." Wechsler had argued that because the states participate in Congress and in the Electoral College, they are adequately protected from federal encroachment.

But as scholars across the political spectrum have noted, state governments are not instrumental in Congress or the Electoral College. “In other words,” writes Bulman-Pozen, “Wechsler’s process federalism failed to protect federalism.” Regional interests may be protected in the political process, but not the states as states. The distinction is important for several reasons.

As the Court pointed out in *New York*, there is a difference between laws of general applicability that apply incidentally to the states (the case of the Fair Labor Standards Act in *Garcia*), on the one hand, and laws that seek to regulate the states as states, on the other. *New York* and *Printz* both pronounced categorically that federal regulation of the states as states is prohibited by the anti-commandeering principle. *New York* ruled that that Congress can’t command state governments to regulate, and *Printz* ruled that Congress can’t command state officials to do anything. Both *New York* and *Printz* carved out exceptions for “cooperative federalism” programs, embracing the logical fallacy of *South Dakota v. Dole*. To that extent, a version of *Garcia*’s process federalism runs through both cases.

But in all these case, there is a crucial point to make. Whatever protections the states are offered by the federal political process go only so far as acts of Congress itself is expanding or exercising federal power. But where there is a separation of powers problem between Congress and the executive branch – where executive or independent agencies undertake actions that Congress never contemplated as part of any delegation of legislative or judicial authority, and which it is (except in cases of a concerted supermajority) powerless to stop, states clearly have no protection whatsoever.

Recent examples of the grave problems that unrestrained executive actions pose in the era of *Chevron* and *Auer* deference abound, from conditional waivers under the Affordable Care Act to the EPA’s Clean Power Plan, to the recent controversy over the Title IX “dear colleague” letters. In none of these actions is there the slightest protection for the “reserved sovereignty” of the states, or for their ability to remain “independent and autonomous within their proper sphere of authority,” as the Supreme Court insisted in *Printz*.

Simply put, the federal courts have no doctrine for how the federal structure of the Constitution is to be protected from the potential abuses of executive actions. The dissolving separation of powers among the branches of the federal government, and the dissolving separation of powers between the federal and state governments, are thus mutually reinforcing processes that are transforming the United States from a federal system into a unified, consolidated national government – something the federal courts have insisted cannot happen. The fact that it is happening despite the courts’ insistence highlights a doctrinal failure, and an opportunity to fill the void.

Strategic Litigation

Both the spending and regulation sides of “cooperative federalism” allow the federal government to expand its control of state governments while escaping accountability. The Supreme Court has thus far permitted this kind of commandeering, in *Dole*, *New York* and *Printz*. All three cases contain the same twin logical fallacies, first, that because coercion still offers the coerced party a choice, the whole arrangement is voluntary, and second, that states are adequately protected in the federal political process. To varying degrees, academic critics on both left and right rapidly are reaching consensus that the first of these doctrines is problematic, and the second thoroughly bankrupt.

On the executive federalism side, there is an increasing appreciation that both *Chevron* and *Auer* deference are not sustainable, and that judicial review of agency action must be both robust and truly independent.

Both of these developments point to potential opportunities in strategic litigation, from amicus briefs that serve to develop the more compelling doctrines that courts are badly in need of, to cases that drive major controversies up to decision in the Supreme Court.

The recent election raises the promise of maintaining a bare majority of the Supreme Court in the hands of Justices who insist on federalism principles. Nonetheless, opportunities for strategic litigation should be carefully coordinated with State attorneys general, and carefully considered, given the leftward and nationalist bent of the federal judiciary at the current time and for years to come even in the best of circumstances.

State Policy Alternatives

The most promising area for saving federalism is probably in the realm of state policy, capitalizing on the fact that a majority of state governors and legislatures are proponents of federalism and opponents of federal overreach.

The first thing states should do is call on their congressional delegations to be more mindful of the coercive impact of “cooperative federalism” programs. Congress should either provide exclusively federal means of implementing federal programs, or leave such programs entirely within the states’ proper sphere of authority.

States should also facilitate strategic litigation by their attorneys general, including with the creation of a solicitor general where necessary. The dearth of convincing federalism principles in the federal courts, along with favorable pronouncements in cases like *NFIB v. Sebelius* (2013), suggest that programs such as the Affordable Care Act, EPA greenhouse gas regulations under the Clean Air Act, Title IX “dear colleague” letters imposing new

requirements on schools, and similar transgressions against the states' "reserved sovereignty" are more vulnerable to federal court challenge than may appear.

It would also be valuable to enact transparency measures to raise awareness of the conditions attached to major sources of federal funds in our states' budgets, so that the citizens of the states are aware of how the federal government is directing states budget decisions and state policies in areas unrelated to the purposes of the federal funding programs, including all conditions attached to such programs. (See WILL's report, [Shining a Light on Coercion in Federal "Assistance" to States A Model Policy for Resisting Federal Coercion](#)).

On the regulatory side, states should enact similar transparency measures to raise awareness of the ways in which state and local agencies and officials are engaged in implementing federal regulatory programs.

To prevent the federal government from manipulating individual state agencies and local governments, states should implement measures requiring the approval of the state legislature before a state agency may enact a regulation pursuant to federal directives, and prohibiting state and local officials from cooperating with new federal programs in certain areas of concern.

States should begin the correspondence that James Madison contemplated in Federalist No. 46, by consulting with each other in formulating our response to new federal mandates that seek to compel states to implement a federal regulatory program.

Finally, states should pledge to call on Congress to convene a convention of the states under Article V of the Constitution, for the purpose of reviving some of the Constitution's limits on the federal power to spend and regulate.

These policy initiatives would receive a powerful impetus from public and systematic coordination among the states, so that they are seen across the country, in the halls of the Congress, and at the Supreme Court, to be acting in common case for the defense of our Constitution.

Appendix A

Principles for
a Declaration of States for the Protection of the Constitution

The “correspondence” that James Madison envisioned for pushing back against federal overreach could begin with a joint Declaration of States for the Protection of the Constitution. Such a declaration would have to be extensively coordinated among state officials at staff level, then signed by officials of all three branches of a large number of states. The Declaration could be unveiled at a press event. It should set forth the purposes for which the state officials have joined together, and their understanding of the problems to be addressed. It should then provide a series of commitments for action to be taken to address those problems.

The Declaration should affirm the following:

The continued consolidation of government power at the federal level is unconstitutional, and endangers our Constitution.

The continued disappearance of a separation of powers among the branches of the federal government, and the continued consolidation of government power in the hands of the federal executive branch, is unconstitutional, and endangers our Constitution.

The continued disappearance of a separation between federal and state governments is leading to a progressive federal takeover of state governments, which is unconstitutional, and endangers our Constitution.

The federal government’s practice of taxing residents of all the States, and transferring a portion of that federal revenue back to state and local governments on condition of compliance with federal mandates, is coercive, and compels the states to enact federal regulatory programs, in violation of our Constitution.

The federal government’s practice of imposing upon states a choice between federal implementation of federal regulatory programs, and state implementation of such programs on condition of compliance with federal mandates, is coercive, and compels the states to enact federal regulatory programs, in violation of our Constitution.

The States’ retained sovereignty under our Constitution is not adequately protected in the federal political process, and has no protection when the federal executive branch takes actions in violation of congressional prerogatives.

The separation of powers, both among the branches of the federal government, and among the federal and state governments, is vital the structure of our Constitution, and that its continuing erosion poses a grave peril to our Constitution and to the democratic form of government.

The Declaration should contain specific resolutions such as the following:

Call on Congress to reform programs that through coercion or other means compel states to enact federal regulatory programs. Call on Congress either to provide exclusively federal means of implementing federal programs, or leave such programs entirely within the states’ proper sphere of authority. Call on Congress to end the practice of “cooperative federalism,” which has proven ruinous to the ability of the States to remain independent and autonomous within their proper sphere of authority.

Pledge to challenge every coercive federal-state funding and regulatory program in federal court, and thereby seek relief from coercive conditions that may be a “gun to the head” of state and local governments under the US Supreme Court’s

ruling in *NFIB v. Sebelius* (2013). This includes programs such as the Affordable Care Act, EPA greenhouse gas regulations under the Clean Air Act, Title IX “dear colleague” letters imposing new requirements on schools, and similar transgressions against the states’ ability to remain in-dependent and autonomous within their proper sphere of authority.

Pledge to enact transparency measures to raise awareness of the conditions attached to major sources of federal funds in our states’ budgets, so that the citizens of our states are aware of how the federal government is directing states budget decisions and state policies in areas unrelated to the purposes of the federal funding programs, including all conditions attached to such programs.

Pledge to enact transparency measures to raise awareness of the ways in which state and local agencies and officials are engaged in implementing federal regulatory programs, including all conditions attached to such regulations.

Pledge to enact measures requiring the approval of the state legislature before a state agency may enact a regulation pursuant to federal directives.

Pledge to consult with each other in formulating our response to new federal mandates that seek to compel states to implement a federal regulatory program.

Pledge to call on Congress to call a convention of the states under Article V of our Constitution, for the purpose of addressing these continuing threats to our Constitution.

###