

RESPONSE TO HEATHER GERKEN’S *FEDERALISM AND NATIONALISM: TIME FOR A DÉTENTE?*

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I. INTRODUCTION

I want to start by offering my great thanks to the members of the *St. Louis University Law Journal* for this wonderful gathering; it is such a pleasure to be part of the Childress program this year. And on behalf of all of us, I want to share thanks as well with Heather Gerken, for giving us these wonderful ideas to collectively chew on. While some of the particulars are chewier for me than others, I strongly support the central thrust of her proposal—that federalism theory has come to the point at which it no longer makes sense, if it ever did, to characterize the grand theoretical debate as one between “federalism” and “nationalism.”¹

Heather’s work represents a critical component of an emerging consensus among contemporary federalism theorists that the old frameworks for thinking about interjurisdictional governance are broken.² Among her many outstanding contributions to the field is scholarship that draws together the energy of so many sub-disciplinarians from within the greater federalism discourse. In her work, she brings together perspectives from election law, administrative law, health law, immigration law, environmental law, and others—including those from many of us here today.³ Often following independent paths, many of us have arrived in similar theoretical territory, including our recognition that the federal system depends as much on interjurisdictional integration as it does on jurisdictional separation (and in some respects, more so).⁴ Heather is right: it is time for those on both sides of the state-federal turf war to consider détente. For me, the important question is what the terms of that détente should look like, and that is what I’d like to talk about today.

Heather credits environmental federalism scholars, in particular, as early movers in this direction.⁵ So in my remarks today, I want to start with a few comments about the significance of environmental law’s position at the vanguard of this more dynamic understanding of federalism. I’ll note the increasing importance of “applied federalism” in the literature, and the special features of environmental governance that make it a wellspring of federalism controversy. Then I’ll share some important points in support of Heather’s call

1. Heather Gerken, *Federalism and Nationalism: Time for a Détente?*, 59 ST. LOUIS U. L.J. 997, 997–99 (2015).

2. See ERIN RYAN, *FEDERALISM AND THE TUG OF WAR WITHIN xxvi–xxvii & nn.71–72* and accompanying text (Oxford, 2014) (contrasting the canonical federalism literature and the challenge from dynamic federalism scholars).

3. Gerken, *supra* note 1, at 1002–07.

4. Heather K. Gerken, *Federalism as the New Nationalism: An Overview*, 123 YALE L.J. 1889, 1890 (2014); See Erin Ryan, *Negotiating Federalism and the Structural Constitution: Navigating the Separation of Powers both Vertically and Horizontally*, COLUM. L. REV. SIDEBAR (Mar. 2015) [hereinafter Ryan, *Navigating the Separation of Powers*] (reviewing the emerging literature on negotiated structural governance).

5. Gerken, *supra* note 1, at 1004.

for détente, emphasizing the centrality of state-federal integration in American federalism and the defining importance of federalism's ends in relation to its means. I'll close with a few points of constructive disagreement, addressing the relationship between federalism process and principle, the meaning of federalism and nationalism, and the principal-agent metaphor of state-federal relations.

A. *Lessons in Ambition and Humility*

Before I do that, though, I also want to recognize another important part of Heather's contribution to the discourse, to the profession in general, and certainly to me personally—which is the great generosity of her mentoring. Her support and encouragement of other scholars to think creatively and ambitiously against the grain has pushed the discourse forward as much as anything else, and I am especially grateful for that. And with that in mind, I thought I'd contextualize my remarks with a Heather Gerken mentoring anecdote that helps set up my more substantive comments about the relationship between environmental and constitutional law within the overall federalism discourse. The story bridges two separate vignettes in which Heather alternatively inspired me to be ambitious and reminded me to be humble (both lessons that I doubtlessly needed, and each in good time!).

My lesson in humility took place at an earlier federalism symposium that, like this one, honored Heather's work. At the cocktails afterward, she shared an early version of the ideas that have come to fruition in her lecture today, because they harmonized with the insights of my own work. And indeed, I was very supportive of them—but perhaps insufficiently surprised. I recall thinking: yes, I agree that the zero-sum boxing match⁶ between the proponents of local and national power is a tired and ineffective way of understanding federalism (and I'll say more about that later in my remarks). And yes, I thought; to push the discourse forward, we should focus on the ends of federalism rather than its means, where the ends represent the purposes of federalism, or the work that we want federalism to do for us in governance (and I'll say more about that later, too).

And yes—this feels very much like what I've been arguing for some time,⁷ along with others from the dynamic federalism school that was already well-

6. See Gerken, *supra* note 1, at 997 (“I came to the debate late in the game, when it had reached that point that Robert McCloskey so vividly described in constitutional law—when everyone seems like aging boxing club members who have fought so long that they know each other's moves and fight mostly to tire the other out.”); see also ROBERT G. MCCLOSKEY, *THE MODERN SUPREME COURT* 291 (1972).

7. See RYAN, *supra* note 2 (analyzing federalism controversy as a “tug of war” between competing federalism principles, describing an “interjurisdictional gray area” in which state-federal integration is both inevitable and appropriate, recognizing the unique contributions of

developed in environmental law⁸ . . . so why is it suddenly news? And it was in that moment, as she looked at me puzzled but patiently, that I suddenly understood that precious few in the pure constitutional law discourse (other than Heather Gerken!) had paid much attention to anything we had been saying. Thinking we had changed the field, perhaps we had just been echo-chambering within our own silo.

different branch actors in managing federalism, and proposing a theory of Balanced Federalism incorporating these insights).

8. See ROBIN KUNDIS CRAIG, *THE CLEAN WATER ACT AND THE CONSTITUTION: LEGAL STRUCTURE AND THE PUBLIC'S RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT* 9–10 (2d ed. 2009) (discussing the cooperative federalism inherent in Congress's passage of the Clean Water Act); THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS (Kalyani Robbins ed., forthcoming 2015) (manuscript at 3) (on file with author) (collecting the work of leading environmental federalism scholars on governance strategies and dilemmas throughout the field); David E. Adelman & Kirsten H. Engel, *Adaptive Federalism: The Case Against Reallocating Environmental Regulatory Authority*, 92 MINN. L. REV. 1796, 1798 (2008) (rejecting “the traditional static optimization model” of federalism in favor of an adaptive one); William W. Buzbee, *Interaction's Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 148 n.4 (2007) (discussing the prevalence of cooperative federalism schemes in environmental federalism); Ann E. Carlson, *Iterative Federalism and Climate Change*, 103 NW. U. L. REV. 1097, 1099 (2009) (arguing that iterative exchange between state and federal actors within environmental federalism programs encourages regulatory innovation); Kirsten H. Engel, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 161 (2006) (arguing that jurisdictional overlap in environmental federalism is preferable to static allocations of authority to either state or federal actors); Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 571 (1996) (arguing for a “multitier regulatory structure that tracks the complexity and diversity of environmental problems”); Robert L. Glicksman & Richard E. Levy, *A Collective Action Perspective on Ceiling Preemption by Federal Environmental Regulation: The Case of Global Climate Change*, 102 NW. U. L. REV. 579, 579–80 (2008) (developing “a framework for analyzing environmental ceiling preemption” and applying it to the regulation of greenhouse gases); Blake Hudson, *Dynamic Forest Federalism*, 71 WASH. & LEE L. REV. 1643, 1650 (2014) (providing an analysis of dual federalism control over subnational forests and arguing for a “greater dynamism” in U.S. forest policy); Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 VA. ENVTL. L.J. 189, 190 (2002) (discussing the emergence of collaborative ecosystem governance); Alice Kaswan, *A Cooperative Federalism Proposal for Climate Legislation: The Value of State Autonomy in a Federal System*, 85 DENVER U. L. REV. 791 (2008) (arguing for a cooperative federalism approach for climate change regulation); Alexandra B. Klass, *Common Law and Federalism in the Age of the Regulatory State*, 92 IA. L. REV. 545 (2007) (arguing for the integration of state common law with existing federal and state statutes to facilitate coherence within environmental law); Hari M. Osofsky, *Diagonal Federalism and Climate Change: Implications for the Obama Administration*, 62 ALA. L. REV. 237 (2011) (introducing a “diagonal federalism” framework for understanding multilevel climate governance); Hannah Wiseman & Hari M. Osofsky, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 778 (2013) (discussing the federalism-related challenges for energy governance).

Months later, after sharing a paper with Heather's Federalism Seminar, we found ourselves again discussing the marginalization of environmental perspectives within the overall constitutional discourse. At that point, I wondered aloud if I should just stop writing in federalism altogether, and start talking to environmental scholars more likely to be interested in what I had to say. But in fully animated Gerken form, Heather insisted that I take the fight to constitutional law instead. She urged me to take on as my next article: "*What Con Law Can Learn from Environmental Law*," modeled after her early efforts to school "con law" from the perspective of election law.⁹ And since it is wise to do what Heather Gerken advises, I thought I'd take the opportunity here to share a few preliminary thoughts about what constitutional law can indeed learn from environmental law—at least when it comes to federalism.

II. "WHAT CAN CON LAW LEARN FROM ENVIRONMENTAL LAW"

In preparing these remarks, I thought long and hard about what con law can learn from environmental law in general, and I actually came up with a pretty long list. Up at the top: more comfortable clothing! Especially footwear (and especially for women). Teamwork, too—since environmental law is interdisciplinary by nature, forcing its experts to consult other sources of understanding to solve "super wicked" regulatory problems.¹⁰ Etiquette may be a contender (at least if one compares the contrasting tones of the environmental and constitutional law professor list serves). But in all seriousness, if I were to choose one thing that constitutional law could truly learn from environmental law to make the federalism discourse more meaningful, there is a clear and simple choice—facts. Simple facts: simple, complicated, rich, contextualizing facts.

A. *Federalism As Applied*

Facts: substantive knowledge about a specific field of law and governance. How statutes actually work, and the way specific regulations actually fill in the gaps left over after statutes are enacted. And who it is that actually does everything to fit these pieces together and make them function in the real world of regulatory governance. What con law can learn from environmental law—and alternatively, health law and immigration law, and election law and so

9. Heather K. Gerken, *Keynote Address: What Election Law Has to Say to Constitutional Law*, 44 IND. L. REV. 7 (2010).

10. See Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1157–59 (2009) (describing climate change as an exemplar "super wicked" regulatory problem and discussing the asymmetric design features necessary for functional climate change governance).

on—are the actual mechanics of federalism-sensitive governance.¹¹ It's from these realms that we understand what federalism really looks and feels like at the ground level. This is where we meet real American federalism—when we get out of the abstract plane of pure theory that Heather's "aging boxing club members" have been operating in,¹² and into the hurly burly of sweaty, sleeves-rolled-up efforts to manage interjurisdictional conflict and overlap.

Had constitutional law done this before environmental law (and now other disciplines) had forced it to, it would have noticed long ago that its predominant model of state-federal relations—at least among aging boxers—is bankrupt. I've previously identified this failed metaphor as the mythology of "zero-sum federalism," a traditional view of the relationship between state and federal power that sees the two sides as locked in a bitter and antagonistic struggle over the line between them, where every victory for one side represents a loss for the other.¹³ (And in the traditional zero-sum model, it's just these two sides; the relationship doesn't go, as Heather has provocatively described, "all the way down!"¹⁴)

But those engaged with the facts know that this is not what American federalism looks like at all.¹⁵ Federalism does, in fact, go "all the way down," involving parallel, embedded, and diagonal relationships among local, regional, and even international actors.¹⁶ And that line between state and federal power, if there is one, is more of an interface—a site of negotiation and interchange between local and national actors over how to allocate contested authority in contexts of legitimate jurisdictional overlap.¹⁷

Indeed, the growing gap between the zero-sum model and the messy reality of interjurisdictional governance reveals just how far the aging boxers' discourse has drifted from a meaningful relationship with the regulatory world we are all presumably trying to improve. In my own work on negotiated federalism, I've tried to help close the gap by exploring the complex dynamics

11. See, e.g., Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1, 24–73 (2011) [hereinafter Ryan, *Negotiating Federalism*]; RYAN, *supra* note 2, at 271–314 (both describing the mechanics of negotiated federalism in a variety of regulatory fields, including environmental law).

12. See Gerken, *supra* note 1, at 997–99.

13. RYAN, *supra* note 2, at 267–68; Ryan, *Negotiating Federalism*, *supra* note 11, at 4–5; Erin Ryan, *Negotiating Federalism Past the Zero Sum Game*, 38 ADMIN. & REG. L. NEWS 4, 4 (2012).

14. Heather Gerken, *Federalism All the Way Down*, 124 HARV. L. REV. 4, 8 (2010).

15. See RYAN, *supra* note 2, at 315–38; Ryan, *Negotiating Federalism*, *supra* note 11, at 74–102 (both reporting on the perspectives of practitioners of federalism-sensitive governance).

16. Osofsky, *supra* note 8, at 242–43; Judith Resnik et al., *Ratifying Kyoto at the Local Level: Sovereignism, Federalism, and Translocal Organizations of Government Actors (TOGAs)*, 50 ARIZ. L. REV. 709, 711–12 (2008).

17. See RYAN, *supra* note 2, at 265–367; Ryan, *Negotiating Federalism*, *supra* note 11, at 24–73 (both describing the full enterprise of negotiated federalism).

of intergovernmental relations that more fully approximate the depth and complexity of American federalism.¹⁸ I've identified an array of means by which state and federal actors compete and collaborate through different forms of intergovernmental bargaining that belie the bright line of separation and the zero-sum game.¹⁹ But to understand these regulatory dynamics, one has to keep abreast of the way regulatory systems actually work. At some point, it seems, a few too many armchair federalism theorists forgot the importance of doing that.

Federalism is an as-applied science. It's not enough to think in terms of pure theory; governance theory is tested and made meaningful only through its application in real contexts. Federalism theorists threaten our own relevance if we become too divorced from the mechanics of how federalism operates in specific contexts of governance. And so it is no accident that I came to my federalism work from a perspective grounded in the particulars of environmental law, and that Heather Gerken came to hers from election law, and Abbe Gluck from health law, and so on.²⁰ We came to our various insights

18. For a model of Balanced Federalism in which the allocation of contested constitutional authority is mediated through various forms of balancing, compromise, and negotiation among all branches and levels of government, see RYAN, *supra* note 2, and the previous scholarship it draws from: Ryan, *Negotiating Federalism*, *supra* note 11 (analyzing how state and federal actors negotiate to resolve jurisdictional uncertainty and arguing that some of this bargaining may qualify as legitimate constitutional interpretation); Erin Ryan, *Federalism at the Cathedral: Property Rules, Liability Rules, and Inalienability Rules in Tenth Amendment Infrastructure*, 81 U. COLO. L. REV. 1 (2010) [hereinafter Ryan, *Federalism at the Cathedral*] (analyzing the negotiation of structural entitlements in assessing the Supreme Court's invalidation of intergovernmental bargaining); Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 507–08 (2007) [hereinafter Ryan, *Interjurisdictional Gray Area*] (exploring inevitable jurisdictional overlap and uncertainty between clearer realms of state and federal authority). See also Erin Ryan, *The Spending Power and Environmental Law after Sebelius*, 85 U. COLO. L. REV. 1003, 1008 (2014) (analyzing the impacts of the Supreme Court's new spending power constraint on state-federal bargaining in programs of cooperative federalism); Erin Ryan, *Environmental Federalism's Tug of War Within*, in *THE LAW AND POLICY OF ENVIRONMENTAL FEDERALISM: A COMPARATIVE ANALYSIS* (Kalyani Robbins ed., forthcoming 2015) (on file with author) [hereinafter Ryan, *Environmental Federalism's Tug of War Within*] (analyzing how environmental law showcases the wider conflicts in federalism theory and the structures of governance it has evolved to manage them); Erin Ryan, *The Once and Future Challenges of American Federalism*, in 1 *THE WAYS OF FEDERALISM IN WESTERN COUNTRIES AND THE HORIZONS OF TERRITORIAL AUTONOMY IN SPAIN* 267, 268–69 (Alberto López Basaguren & Leire Escajedo San-Epifanio eds., Springer 2013) (analyzing developments in state-federal intergovernmental bargaining).

19. See RYAN, *supra* note 2, at 265–367; Ryan, *Negotiating Federalism*, *supra* note 11, at 24–73 (both articulating a taxonomy of ten different ways that state and federal actors negotiate with one another, including conventional forms of bargaining, negotiations to reallocate authority, and joint policymaking bargaining).

20. Gerken, *supra* note 9, at 17; Abbe R. Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE

about interjurisdictional governance based on our rich experiences with the way it operates in holistic regulatory fields. In fixating on the zero-sum game, the aging boxers' debate lost touch with the ever-evolving textures of federalism-sensitive governance in specific points of application. Federalism theory needs content to be meaningful. The days of armchair federalism theory are over because armchair federalism theory is sterile.

B. The Canary in Federalism's Coal Mine

Notably, when I started writing about federalism, I didn't know that I was writing in "environmental federalism;" I thought it was just "federalism." But I was propelled here by some provocative environmental federalism dilemmas, and it's worth considering why environmental law so regularly provides them. As Heather recognizes, environmental law has been at the forefront of both federalism controversy and innovation, although other fields of law—marriage, marijuana, immigration, and health law, among others—are close on its heels.²¹ Still, many of the Supreme Court's most famously divisive federalism cases are actually environmental cases.²² The *New York v. United States*²³ anti-commandeering doctrine decision that commenced the Rehnquist Court's New Federalism revival was actually an environmental case about interstate radioactive waste management.²⁴ The same is true of many of the Court's standing cases.²⁵ So in trying to ascertain what con law can learn from environmental law, it may help to ask why environmental law is so often the canary-in-the-coal-mine of wider constitutional controversy?²⁶

L.J., 534, 539 (2011); Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 13.

21. Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 1 & nn.1–11 (listing current federalism controversies in different areas of law).

22. *Id.* manuscript at 16–20 (discussing Supreme Court environmental cases that intersect with federalism, including *Massachusetts v. EPA*, 549 U.S. 497 (2007), *Rapanos v. United States*, 547 U.S. 715 (2006), and *New York v. United States*, 505 U.S. 144 (1992)).

23. 505 U.S. 144 (1992).

24. See RYAN, *supra* note 2, at 215–64; Ryan, *Federalism at the Cathedral*, *supra* note 18, 25–64 (both discussing *New York v. United States*).

25. See *Sierra Club v. Morton*, 405 U.S. 727 (1972) (in a case about National Forest management, holding that standing under the Administrative Procedure Act is available only for individualized injuries); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990) (in a case about mining on public lands, holding that a plaintiff must show an individualized injury within the specific "zone of interests" protected by the relevant environmental laws); *Friends of the Earth, Inc., v. Laidlaw Envtl. Servs.*, 528 U.S. 167 (2000) (allowing standing to sue a polluter even after the initial suit was mooted by the voluntary cessation of the polluting activity, unless the defendant proves that the allegedly wrong behavior could not reasonably be expected to recur.).

26. See Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 4 (noting that environmental federalism decisions often prove to be the "canary in federalism's coal mine").

After pondering this question for so many years, it seems to me that the reason environmental law has been both a wellspring for creative interjurisdictional governance and a hotbed of federalism controversy is because it engages problems in which opposing claims to preeminently local or preemptively national authority are both, simultaneously, at their strongest.²⁷ For example, environmental problems often involve some kind of a land use, and we all know that the regulation of land use is one of the most classically local forms of governing authority.²⁸ There are good reasons for that.²⁹ But environmental problems also involve boundary crossing, spillover harms that are the classic basis for centralized regulatory authority, to protect those at risk for harm who are outside the local jurisdiction and unrepresented in relevant governance decisions.³⁰ In this respect, these opposing claims for exclusively local or national supremacy in environmental federalism dilemmas break down because everybody is so *right*. (And as a corollary, when everybody is so right, the other side seems especially wrong—accounting for the extreme controversy that attends environmental federalism dilemmas.) But when everyone is equally right and wrong, what does federalism tell us to do?³¹

III. POINTS OF CONVERGENCE: OF MEANS AND ENDS

This brings me to my most important point of agreement with Heather's détente proposal, which is her rightful admonition that we shift our focus from the *means* of federalism (how things should work) to the *ends* of federalism (what we are working for)³²—because it is federalism's ends that will ultimately tell us how things should work in these circumstances. Indeed, this is the very point that I have been trying to make, though less eloquently and successfully than Heather, since my very first federalism law review article, which became the basis for my later book, *Federalism and the Tug of War Within*.³³ In a nutshell, my argument has been that the only way to figure out how to allocate contested authority in a federal system is to figure out what

27. *Id.* manuscript at 11–20.

28. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 80 (1976) (Powell, J., concurring) (identifying zoning among “the most essential functions” of local government); RYAN, *supra* note 2, at xii (noting that states administer local zoning laws).

29. See RYAN, *supra* note 2, at 50–59 (discussing the benefits of local autonomy in governance).

30. See *id.* at 145–80; Ryan, *Interjurisdictional Gray Area*, *supra* note 18, at 567–70 (both discussing interjurisdictional regulatory problems).

31. See Gerken, *supra* note 1, at 1030 (noting that no one among the opposing interpretive camps has a monopoly on truth).

32. *Id.* at 998.

33. RYAN, *supra* note 2, at xi–xii (drawing on Ryan, *Interjurisdictional Gray Area*, *supra* note 18).

will best advance the underlying values of federalism.³⁴ These underlying good governance values tell us what federalism is for. Protecting and enhancing these values in governance is the purpose of federalism—the work we ask federalism to do for us in channeling actual government toward our governance ideals.³⁵ They are, in other words, the *ends* of federalism.

A. *The Ends of Federalism*

In *Federalism and the Tug of War Within*, I draw from the federalism literature and jurisprudence to extrapolate a set of four or five core values, some familiar and some less so.³⁶ There is the value of checks and balances between local and national authority, which protects individuals against government overreaching or abdication by either level.³⁷ Ideally, federalism helps foster accountability and transparency in governance, enhancing democratic participation at all points along the jurisdictional spectrum.³⁸ Federalism fosters diversity, innovation, and interjurisdictional competition by protecting local autonomy³⁹ while affirming central authority to resolve collective action problems, police spillover harms, and vindicate core constitutional promises of individual rights.⁴⁰ And last but not least, though perhaps least recognized, is the problem-solving synergy that federalism enables us to harness between the distinctive capacities of different governmental actors—the kind of governance that can only happen, or that happens best, at the local, regional, state, or federal level, and among the various branches of government—for getting at the different parts of complex, interjurisdictional problems that can't be resolved at any one level or by any one actor alone.⁴¹ Environmental law has lots of problems like this, which has surely shepherded my thinking along these lines.⁴²

So these values are the ends of federalism—the purposes to which federalism should aspire, and the touchstone for constitutional interpreters

34. *Id.*

35. *Id.*

36. *Id.* at 34–67 (identifying four values, in which the value of central authority is partnered with problem-solving synergy); Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 6–9 (adding more explicit consideration of the value of centralized oversight as a fifth, independent value).

37. RYAN, *supra* note 2, at 39–44.

38. *Id.* at 44–50.

39. *Id.* at 50–59.

40. *Id.* at 59–66; See Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 6–7 (discussing the value of centralized oversight).

41. RYAN, *supra* note 2, at 59–66.

42. See Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 11–20 (discussing the unique collision of federalism values in environmental law and the resulting interjurisdictional challenges for environmental governance).

when making federalism-sensitive governance decisions. The problem for federalism-sensitive governance, of course, is that while these are all individually wonderful values in and of themselves, it can be very hard to always satisfy all of them, all together, at the same time.⁴³ There are inherent, inevitable tensions among them, which the jurisprudence has not always recognized. Some are quite obvious—for example, the open tension between localism and nationalism values that, in large part, animates the aging boxers' debate that Heather is trying here to disband.⁴⁴ But the network of federalism values are suffused with other, less obvious tensions as well—for example, between checks and accountability. After all, if we only cared about accountability, we'd do better with a single sovereign controlling a fully centralized system (rather than our confusing system of dual state and federal sovereignty), because it's easy to know who is responsible for bad policy if there is only one policymaker! But we reject that model because it would entirely foreclose the checks and balances (and interjurisdictional synergy) for which we are willing to make tradeoffs against accountability values.⁴⁵

B. *The Tug of War Within*

The problem for federalism-sensitive governance is that figuring out how to work through all this tension can be really, really hard. Protecting one value imposes costs on another, but adjusting for that creates problems for still another. That's why federalism dilemmas generate so much controversy—there are multiple, sometimes equally compelling considerations, all operating at once.⁴⁶ That's why the Supreme Court's federalism jurisprudence has vacillated so much over time—as the Court alternatively picks out one value to privilege and then shifts to another that the previous approach has left vulnerable.⁴⁷ And for what it's worth, this is why federalism theory is so important. At the end of the day, it's all we've got to help us conceptualize our way through this particularly complex constitutional maze—which is about so much more than just states' rights versus nationalism.⁴⁸

43. *Id.* at 6–9; *See RYAN, supra* note 2, at 34–67 (discussing the fundamental federalism values and the inevitable tensions between them).

44. *See Gerken, supra* note 1, at 999–1001.

45. *See RYAN, supra* note 2, at 47–48 (discussing the conflict between the accountability value and other core federalism values).

46. *See id.* at 66–67 (discussing the conflicting federalism values of checks and balances, accountability and participation, local innovation and competition, and state-federal problem-solving synergy).

47. *See id.* at 68–104 (discussing the historical pendulum swing amongst the competing values).

48. *See id.* at 368–72 (discussing the values competition within good federalism-sensitive governance and the need for federalism theory that is more sensitive to these dynamics).

For this reason, I have encouraged us to think about federalism less as a matter of the contest between states' rights and federal power, or that between judicial or political safeguards, or even dueling conceptions of original intent—and to think about it more as our ongoing response to the inevitable conflicts that play out among federalism's core principles.⁴⁹ As noted, my own federalism scholarship identifies that response as one heavily mediated by mechanisms of governance that enable structured forms of consultation, competition, compromise, and other forms of joint decision-making across jurisdictional lines. These examples of “negotiated federalism”—some obvious, some less so—engage perspectives from up and down the jurisdictional spectrum and across the different branches of government, ideally to enable federalism-sensitive governance to benefit from the unique competency that each brings to the decision-making table.⁵⁰

C. *Balanced Federalism*

If I had more time, I would sketch out how my own theory of Balanced Federalism facilitates this dynamic allocation of responsibility, capitalizing on the different kinds of substantive expertise, legal authority, governing competency, and other forms of regulatory capacity that attach to executive, legislative, and judicial actors at the local, state, and federal levels.⁵¹ The Balanced Federalism model splits some of the differences that provoke conflict in the traditional federalism debate. It is not pre-committed to preferring regulatory authority at either the state or the federal level, nor is it fully committed to either judicial or political safeguards.⁵² In arbitrating between these camps, the Balanced Federalism approach takes as its touchstone the good governance values at the heart of federalism.⁵³ The right direction is the one that keeps us most faithful to our ability to delivery holistically on these values. Everything else in the administration of federalism is just the means to these ends.

The details of Balanced Federalism are supportive of Heather's vision here—I emphasize the value of procedural consensus in the absence of substantive consensus, relying on bilaterally negotiated political safeguards subject to limited judicial review for bargaining abuses—but they are well

49. *Id.* at xi.

50. See RYAN, *supra* note 2, at 265–367; see, e.g., Ryan, *Negotiating Federalism*, *supra* note 11 (both discussing various types of intergovernmental bargaining and the different ways they capitalize on expertise within different levels and branches of governance).

51. See RYAN, *supra* note 2, at xxvi–xxix, 181–83, 368–72 (discussing the theoretical and practical implications of Balanced Federalism).

52. *Id.* at xxvi–xxvii.

53. *Id.* at 368–72.

developed in my book,⁵⁴ so I'll spend the rest of my time sharing the points on which she and I disagree.

IV. POINTS OF DIVERGENCE: FALSE DICHOTOMIES

As is probably clear by now, there is a lot of harmony between our approaches. In fact, the biggest difference between the vision Heather articulates here and the approach I've taken in my own scholarship is that I may take it even further than she does—as evidenced by the three points that I raise for critique. To be fair, some of these are more quibbles than conflicts, and some may come down to semantics—but the vocabulary we use to talk about these things is important. So with that in mind, I offer these three suggestions for the ideas going forward.

A. *Process and Principle*

As an initial matter, the draft on which my comments were originally premised had asserted that this new conception of state-federal relations is premised on “practice, not presumptions” and “processes, not principle”⁵⁵—and there is clear truth in the statement. As poetic as it is, however, it may have been a little too glib—eliding the complex relationship between process and principle in federalism theory. To her credit, Heather later modified the relevant phrase to “practice as well as presumptions; processes as well as principles.”⁵⁶ Yet because others make a similar point, I preserve my original observation that the “process, not principle” view of federalism threatens to miss a critical part of the fuller story we are all telling.

The new wave of scholarship supporting *détente* is, indeed, cognizant of the importance of process in American federalism, especially process that facilitates the integration of local and national perspective in federalism-sensitive governance.⁵⁷ My scholarly interest in intergovernmental bargaining as a source of procedural safeguards places my own work squarely in the camp of process-oriented federalism theory.⁵⁸ But as much as I believe that American federalism is largely about fluidity and exchange and process, I also

54. *Id.* at 339–67 (discussing the interpretative potential of qualifying intergovernmental bargaining).

55. Heather Gerken, *Federalism and Nationalism: Time for a Détente?* 3 (Oct. 5, 2014) (unpublished manuscript) (on file with author).

56. Gerken, *supra* note 1, at 999 (“It is premised on practice as well as presumptions; processes as well as principles; routines as well as regulations.”).

57. *See* Gerken, *supra* note 4, at 1893, 1895 (discussing the importance of the interaction between the state and federal governments); *see also* Ryan, *Navigating the Separation of Powers*, *supra* note 4, at 22–23 (describing new federalism scholarship better probing the relationship between process and principle).

58. *See* RYAN, *supra* note 2, at 339–67 (discussing the use of governance processes as interpretive criteria).

think that it's more than just an empty vessel.⁵⁹ The purpose of all this process is to advance the ends of federalism, which I view as the principles of good governance that federalism is designed to yield—the federalism values I've been describing here.

And so—as Heather's final draft affirms—I don't think we can divorce process from principles, even in the context of process-sensitive federalism theory. These are probably a different set of principles than the ones the aging boxers have been battling over (which may explain the passing assertion in the original draft). But in my view, we can only evaluate whether the process is successful by the degree to which it helps us accomplish these principles in governance. In the end, the job of federalism theory is to help us ensure that the governance processes we employ accomplish the principles we are aiming for in that governance.

It may be that when this issue arises, the real sticking point is simply the presentation of the process-principle question as an either/or dichotomy—when in fact, the most interesting thing about process and principle in federalism is the under-appreciated association between them. As I've shown in previous work, many of the federalism principles that matter most to us—checks and balances, accountability and transparency, synergy, and so on—are, themselves, procedural values.⁶⁰ For example, we often think of checks and balances as yielding a substantive value—the protection of individuals at the mercy of regulatory whim—but checks and balances inherently imply the process of counterbalancing political power by which that protection is conferred.⁶¹

The same is true for the accountability value, which is essentially a procedural constraint for ensuring democratic participation—which is, itself, a process.⁶² Even local autonomy is a process value: it describes how decision-making should take place (at the local level), rather than what the content of those decisions should be.⁶³ And we like local autonomy, because we hope it will foster the additional process-principles of innovation and competition. We may casually think of these federalism values as substantive principles, but in fact, they can only be actualized procedurally. It is in this sense that observers are sometimes right to assert that federalism is more about process than principle. My friendly amendment is to point out that an even better way of looking at this is to understand that they are often one and the same thing.

59. See Ryan, *Navigating the Separation of Powers*, *supra* note 4, at 22–23 (arguing that principle, not just process, is essential to federalism).

60. See RYAN, *supra* note 2, at 347–49; Ryan, *Negotiating Federalism*, *supra* note 11, at 110–13 (both discussing the procedural constraints implied by federalism values).

61. RYAN, *supra* note 2, at 347; Ryan, *Negotiating Federalism*, *supra* note 11, at 111.

62. RYAN, *supra* note 2, at xxx.

63. *Id.*

Indeed, the federalism discourse has overemphasized “political” safeguards at the expense of the more important feature distinguishing them, at least in the federalism context, which is the fact that they are really functioning as “procedural” safeguards.⁶⁴ To this end, in *Federalism and the Tug of War Within*, and a precursor article, *Negotiating Federalism*, which Heather kindly credits for jumpstarting some of this discussion,⁶⁵ I propose additional theoretical support for political federalism constraints on grounds that political branch bargaining can sometimes better advance the underlying principles of federalism by engaging the parties of interest in processes of consultation and compromise that advance these process-oriented values better than unilateral judicial or statutory decree.⁶⁶ My proposal limits judicial review over the substance of negotiated federalism decisions, but it allows for judicial review to police for the kinds of procedural abuses that violates these principles—appropriately focusing constitutional intervention at the points that most reflect these procedural constitutional values.⁶⁷

B. *Federalism and Nationalism*

My second point of critique targets the seemingly mutually exclusive vocabulary of “federalism” vs. “nationalism” around which the *Détente* piece is centered.⁶⁸ I certainly understand its progeny in Heather’s earlier work,⁶⁹ but the dichotomy doesn’t resonate with me by the end of the piece. It inadvertently reinforces the zero-sum idea that the important divide within federalism theory is between advocates for states’ right and advocates for national power. While I understand that this is where the aging boxers’ debate begins, it’s important to end a piece calling for détente within the federalism debate with greater recognition that “federalism” is not—and never has been—synonymous with states’ rights.⁷⁰ And for that same reason, “federalism” in not

64. See *id.* at 347–56; Ryan, *Negotiating Federalism*, *supra* note 11, at 110–21 (both describing how federalism values can operate as procedural constraints in certain contexts).

65. Gerken, *supra* note 1, at 1004 n.22; Gerken, *Federalism All the Way Down*, *supra* note 14, at 20 n.50, 21 n.58.

66. See RYAN, *supra* note 2, at 339–67; see also Ryan, *Negotiating Federalism*, *supra* note 11, at 102–35.

67. RYAN, *supra* note 2, at xxx.

68. Gerken, *supra* note 1, at 1000–01 (distinguishing the “federalism” and “nationalism” camps).

69. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1258–59 (2009); Gerken, *supra* note 4, at 1917.

70. See RYAN, *supra* note 2, at xi (arguing that federalism is not best understood as a battle between federal power and states’ rights but rather as a balance between competing underlying values).

in opposition to “nationalism.” Using this dualistic opposition perpetuates the ideological fallacy that the dynamic federalism perspective has exploded.⁷¹

Of course, Heather is legitimately using this vocabulary, because it pre-exists the conversation we are having today. Though wrongheaded, it is already entrenched within the discourse, and so it may be useful to bridge the new scholarly conversation to the old. Especially at the beginning of the piece, she uses this terminology in the spirit of building common ground, in order to lead us away from the tired old boxing match between ideological opponents. But as the piece progresses, I’d encourage her to help push the discourse forward by reconceptualizing the relationship between local and national power within the federal system in more accurate terms. A better way of talking about it, after acknowledging the terminology of the old boxing match that she is trying to end, is to rely more heavily on the terminology of devolution and centralization that she uses elsewhere in the piece.⁷²

The dynamics of devolution and centralization seem to better capture what she means by federalism and nationalism. Each term emphasizes a location of primary decision-making authority within a federal system of dual sovereignty, rather than misaligning them with larger and sentimentally charged conceptions of the federal system or nationhood itself. A federal system anticipates both state and federal power, both local and national decision-making.⁷³ The United States is a federal nation. Proponents of “federalism,” by definition, favor centralized decision-making in many contexts; otherwise they would be proponents of a confederal system, such as the failed Articles of Confederation, or secessionists.⁷⁴ Indeed, federalism versus nationalism, while an accepted one, is a false dichotomy. Federalism isn’t about states’ rights or nationalism—it’s about good governance. Once again, it’s about the ends, the principles, the values of federalism that we’ve been talking about. And since Heather’s piece is so effective at drawing the discourse toward this new understanding, it would be worth further shifting away from the old, zero-sum vocabulary by the end of the piece, if not earlier.

C. *Principals and Agents*

My last point of critique also touches on semantics, but extends into deeper theoretical territory. For related reasons, the principal-agent vocabulary of the piece doesn’t work for me,⁷⁵ and I encourage Heather to reconsider how she deploys it in this piece. Of course, her use of the principal-agent metaphor

71. *Id.* at xxvi–xxvii.

72. *See* Gerken, *supra* note 1, at 1001–07 (discussing devolution and decentralization).

73. RYAN, *supra* note 2, at 7–11.

74. *Id.* at 58–59.

75. *See* Gerken, *supra* note 1, at 1010 (discussing state power as the “power of the servant” and describing it as stemming from “a principal-agent relationship”).

makes perfect sense in light of her previous work, including *Uncooperative Federalism*⁷⁶ and other landmark forays into the intricacies of local-state-federal relations. But there are considerable problems with its role in this particular piece, ranging from the strategic to the substantive.

As an initial matter, her reliance on principal-agent language here creates problems at the level of the communication strategy. Casting the states as agents of a national principal may not be the best selling point in an article trying to persuade the proponents of states' rights to lay down their arms. It has the potential to make her call for détente seem more like a Trojan Horse, at least from the perspective of the aging boxers on that side of the fight! To be fair, the metaphor holds some important truth, reflecting the role of many states operating in programs of cooperative federalism within the constitutional ether of federal supremacy.⁷⁷ But it may undermine Heather's credibility as the ambassador of a reasonable middle ground approach, because it seems to reinforce the old power dynamics that other parts of her argument are seemingly dismantling.

Moreover, while the metaphor accurately portrays some of the dynamics within cooperative federalism, it misses other elements of the relationship that are hugely important in the overall context of state-federal relations. For example, it elides one of the most important characteristics of American federalism more generally, which is the feature of "regulatory backstop" between local and national authority over history.⁷⁸ Regulatory backstop refers to the way that sovereign authority on both levels is used to "backstop" one another's failures in protecting individual rights or advancing overall societal welfare.⁷⁹ Most famously in the civil rights context, the federal government backstopped failures by the states to protect the rights of women and minorities during the 1960s. Today, state actors are backstopping regulatory failures by the federal government to protect the rights of the LGBT community.⁸⁰

Regulatory backstop has proved a crucial feature of environmental federalism as well. The federal government backstopped state failures to protect air and water quality during the 1970s, and today, state and local governments are backstopping federal failures to meaningfully grapple with climate policy.⁸¹ Similar examples have arisen in countless other contexts,

76. Bulman-Pozen & Gerken, *supra* note 69, at 1262–63, 1265.

77. See Ryan, *Negotiating Federalism*, *supra* note 11, at 20–37 (describing the mechanics of environmental programs of cooperative federalism).

78. See RYAN, *supra* note 2, at 42–43 (discussing the regulatory backstop features associated with checks and balances).

79. *Id.*

80. *Id.* at xxviii–xxix; see *id.* at 89–91 (discussing evolutions in federalism theory at the time of the Civil Rights Movement).

81. *Id.* at xxvii–xxviii; see *id.* at 167–76 (discussing regulatory backstop in the context of climate governance).

ranging from eminent domain reform to marijuana policy to species protection.⁸² In these situations, the states are emphatically not acting as agents of the federal principal; they are acting in direct competition. So there is a big theoretical problem in the principal-agent account of state-federal relations. It misses too much of the reality in the relationship to be useful, at least as it stands in the piece today.

V. CONCLUDING PROPOSAL: THE INVERTED PRINCIPAL-AGENT RELATIONSHIP

All that said, I'd like to close by proposing a way that the principal-agent vocabulary might still work—if we expand the lens. Specifically, we should consider how much more powerful the metaphor becomes if we include all applicable variations on the theme. To get closer to the reality of the state-federal relationship, we should account not only for the principal-agent relationships that Heather has already identified—in which the states acts as agents of the federal principal—but also those instances in which the federal government operates as an agent of the state principal.

Examples of this inverted principal-agent relationship may be fewer in number given the role of federal supremacy, but even within some programs of cooperative federalism, federal supremacy has been purposefully waived to approximate an inverted principal-agent relationship between state and federal actors.⁸³ In environmental law, for example, both the Coastal Zone Management Act and the Clean Water Act create circumstances in which the federal government must win state approval of federal plans in an area of law clearly governed by federal commerce authority.⁸⁴ Countless other statutes also carve out space for state leadership on issues that could have been subject to federal preemption, including those Abbe Gluck explained earlier today.⁸⁵

In other cases, federal agency to the state principle is a function of clear doctrinal principle. For example, under the *Erie* doctrine of federal civil procedure, federal courts apply state laws to resolve state-law based disputes

82. *Id.* at xxviii, 313 (eminent domain reform), 311–12 (marijuana policy), 292–94 (species protection).

83. See Ryan, *Environmental Federalism's Tug of War Within*, *supra* note 18, manuscript at 29–31 (discussing structural privileging of state choices in the context of water allocation, the Coastal Zone Management Act, and Clean Water Act). See also RYAN, *supra* note 2, at 295–96 (discussing inverted federal supremacy in hydroelectric and offshore drilling licensing); *id.* at 302–08 (discussing the Coastal Zone Management Act's limited waiver of federal supremacy). See also Ryan, *Negotiating Federalism*, *supra* note 11, at 48–50 (discussing federal licensing decisions); *id.* at 59–62 (discussing the Coastal Zone Management Act).

84. *Id.*

85. Abbe Gluck, *Nationalism as the New Federalism (and Federalism as the New Nationalism): A Complementary Account (and Some Challenges) to the Nationalist School*, 59 ST. LOUIS U. L.J. 1045 (2015).

that are in federal court on diversity jurisdiction.⁸⁶ The federal government may also act as an agent of state law when collaborating in criminal law enforcement, disaster relief, and the ratification and enforcement of interstate compacts.⁸⁷ Many areas of federal law implicitly rely on state law to be intelligible—for example, federal tax and bankruptcy laws that rely on state law definitions of property and family relations.⁸⁸ The implementation and administration of those laws puts federal actors in the position of faithfully carrying out policy decisions made by separately acting state actors, wielding power only as the servant of the state master.

Finally, if we move beyond the doctrinal sphere to the political, we see the federal government acting as an agent of state interests all the time. This happens whenever the states use available channels within the political process to persuade Congress to pass federal laws that are tailored to state interests, such as federal block grants, stimulus packages, and financial services legislation.⁸⁹ It happens whenever they persuade federal agencies to implement statutes in ways that address state concerns, as took place during different iterations of the REAL ID Act.⁹⁰ It happens within programs of cooperative federalism that are redesigned to allow states to compete directly with federal standards, such as the Clean Air Act's mechanism for setting motor vehicle emissions.⁹¹ It happens whenever state and federal agents work together in the contexts where both sides have overlapping regulatory interests and obligations, in all sorts of less formal ways that nevertheless make up the fabric of the “hurly burly” of federalism-sensitive governance.

86. *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 78 (1938).

87. See RYAN, *supra* note 2, at 17–33 (discussing disaster relief and the federal response to Hurricane Katrina); *id.* at 215–25 (discussing state-led legislative bargaining over the Low Level Radioactive Waste Policy Act in detail); *id.* at 286–87 (discussing criminal law enforcement); *id.* at 290–92 (discussing the federal ratification of interstate water and radioactive waste compacts). See also Ryan, *Negotiating Federalism*, *supra* note 11, at 31–33 (adding more detail on state-federal relations in criminal law enforcement).

88. See RYAN, *supra* note 2, at 111 (discussing definitional overlap between federal bankruptcy and state property law).

89. *Id.* at 283–84 (discussing federal stimulus and financial services reform legislation); *id.* at 289 (discussing energy independence block grants). See also Ryan, *Negotiating Federalism*, *supra* note 11, at 29–31 (adding more detail on stimulus and financial services); *id.* at 39 (energy independence block grants).

90. See RYAN, *supra* note 2, at 301–02; Ryan, *Negotiating Federalism*, *supra* note 11, at 56–58 (both discussing the REAL ID Act).

91. See RYAN, *supra* note 2, at 308–10; Ryan, *Negotiating Federalism*, *supra* note 11, at 65–69 (both discussing the Clean Air Act's iterative federalism mechanism for setting motor vehicle emissions).

Much of the scholarly work that Heather engages looks at exactly the way federal lawmaking becomes a tool or agent of state priorities.⁹² Indeed, one political scientist recently offered a compelling account of how surprisingly successful states are at wielding their influence over federal lawmaking within the political process.⁹³ If Heather expands the principle-agent metaphor to encompass this additional dimension, I think that would be a compelling addition to an already compelling body of work.

Either way, the field is better for her work, and we should all be grateful for her efforts to bring this much-needed détente to the discourse.

92. See ROBERT A. SCHAPIRO, POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS 151–63 (2009) (proposing a model of “polyphonic federalism” that emphasizes the beneficial interaction of state and federal law); Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in THE HEALTH CARE CASE: THE SUPREME COURT’S DECISION AND ITS IMPLICATIONS (Nathaniel Persily et al. eds., 2013) (discussing states’ bargaining advantages upon waiver of a federal spending condition); Jessica Bulman-Pozen, *From Sovereignty and Process to Administration and Politics: The Afterlife of American Federalism*, 123 YALE L.J. 1920, 1922 (2014) (describing state actors’ successful use of their political connections with federal actors to safeguard state autonomy); William W. Buzbee, *Interaction’s Promise: Preemption Policy Shifts, Risk Regulation, and Experimentalism Lessons*, 57 EMORY L.J. 145, 146 (2007) (discussing how multilayered regulatory federalism empowers state autonomy within federal programs to incentivize regulatory innovation); Abbe Gluck, *Intrastatutory Federalism and Statutory Interpretation: State Implementation of Federal Law in Health Reform and Beyond*, 121 YALE L.J. 534, 537 (2011) (arguing that state actors are increasingly implementing and interpreting federal statutory law); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 MICH. L. REV. 813, 822–23 (1998) (discussing the discretion of state governments to implement or refuse federal legislation according to state priorities); Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States’ Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1481 (2009) (arguing that states can legalize behavior criminalized under federal law, and that state lawmakers ultimately hold more power than their federal counterparts by establishing the norms on which actual law enforcement depends); Cristina M. Rodríguez, *Negotiating Conflict Through Federalism: Institutional and Popular Perspectives*, 123 YALE L.J. 2094, 2099–2100 (2014) (discussing the dialectic of influence between sub-federal and federal actors upon national issues).

93. JOHN NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING 116–18 (2009).