The United States of America

G. Alan Tarr

G. Alan Tarr : Professor, Rutgers University

DOI: 10.25518/1374-3864.1707

Résumé :

Cet article met en lumière le fonctionnement du fédéralisme judiciaire aux Etats-Unis et la contribution des Cours au développement du fédéralisme américain. Plus précisément, il détaille la distribution des pouvoirs entre les systèmes judiciaires fédéraux, étatiques et tribaux ; l'interaction entre ceux-ci et l'évolution de la jurisprudence de la Cour suprême américaine.

Abstract :

This article highlights the operation of judicial federalism in the United States and the contribution that courts have made to the development of American federalism. More specifically, it details the distribution of power among federal, state, and tribal court systems, the interaction among these courts, and the U.S. Supreme Court's evolving federalism jurisprudence.

1. AMERICAN FEDERALISM

The United States includes fifty states, a federal district (the District of Columbia) that serves as the nation's capital, eleven island territories, and more than 600 federally recognized Native American tribes or nations1. Of these component units the most important are the states. Article I of the U.S. Constitution guarantees each state equal representation in the federal Senate, and Article V prohibits any state from being deprived of that equal representation without its consent. Initially, state legislatures selected the state's two senators, further enhancing state influence on the federal government; but since the adoption of the Seventeenth Amendment in 1917, popular election has been the mode of selection.

The powers of the federal government are enumerated in the United States Constitution, while residual powers remain with the states. The Tenth Amendment confirms this: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Even some powers granted to the federal government, such as the power to tax, are concurrent and others are partially concurrent rather than exclusive, so these grants of power do not circumscribe state authority as long as state laws do not conflict with federal law. Yet over time federal power has expanded dramatically. In part this is the result of constitutional amendments augmenting federal power, most notably, the Thirteenth, Fourteenth, Fifteenth, and Sixteenth Amendments. In part too, as will be discussed later, some Supreme Court rulings have interpreted the constitutional grants of power to the federal government expansively. And in part economic and societal changes, as well as the United States' greater involvement internationally, have enhanced the importance of powers that the Constitution grants to the federal government. As a result, today there are few policy domains in which the states exercise exclusive

authority.

Nevertheless, the states' powers remain substantial. Among these is the states' power to draft their own constitutions and to revise or amend them without seeking congressional approval[2]. The Constitution imposes a few limits on state constitutions, but it accords the states considerable "constitutional space" for structuring their own governmental institutions and for distributing power among them[3].

In contrast, the status of the other component units of the United States rests largely in the hands of Congress. Article I of the Constitution authorizes Congress "to exercise exclusive Legislation in all Cases whatsoever" over the federal district, so the District of Columbia's local government exercises only those powers delegated to it by Congress, and Congress can veto any actions it takes. This does not please District residents, who have campaigned for statehood for the District and have made "Taxation without Representation" the slogan on the District's license plates. However, residents of the District do vote in presidential elections, and the Twenty-Third Amendment to the Constitution grants to the District three electoral votes, the same number awarded to the least populous state.

Article IV of the Constitution authorizes Congress "to make all needful Rules and Regulations respecting the Territory belonging to the United States." Prior to the American Civil War, there was dispute as to whether Congress could outlaw slavery in the territories, with the Supreme Court in the infamous Dred Scott case ruling that it could not[4]. But since the Civil war, the Supreme Court has confirmed that Congress' authority over federal territories is "general and plenary" and that Congress has "full and complete legislative authority over the people of the territories and all the departments of the territorial government"[5]. For those territories within the continental United States, the expectation was that they would become states once they had a sufficient population to qualify for statehood. Thus, the asymmetry implicit in their non-state status was viewed as a temporary disability, to be cured with admission to the Union, and Congress allowed such territories broad power of self-government even before they became states. Congress's plenary power also extends non-contiguous territories that are not candidates for statehood. The relations between these territories and the federal government vary considerably, as does the legal status of those residing in them. None of these island territories has representation in Congress, and their residents cannot vote in American elections. Congress has granted American citizenship to the residents of some territories – for example, those in Puerto Rico and the U.S. Virgin Island – but not to those in other territories – for example, the Northern Marianas Islands and Samoa. Some territories – for example, Puerto Rico and Samoa –. Have been given the power to draft constitutions, but most others have not. These anomalies reflect the vagaries of congressional policy in the absence of clear constitutional guidelines for the continuing government of these territories.

Native American tribes have the status of "domestic dependent nations" under the Constitution, that is, they are sovereign in some respects but in others subject to regulation by Congress[6]. The scope of tribal sovereignty has long been disputed.

It is perhaps most evident in Native American nations' exercise of self-government. Indian nations had instituted their own governments prior to European colonization of North America, and they surrendered their authority to create, revise, and staff their political institutions. They also have the power as nations to enter into treaties with the federal government, though not with foreign nations. Nonetheless, Congress exercises broad authority over the tribes, and it can – and at time

has – delegated its regulatory power to state governments, giving them some authority over the Native Americans within their borders.

This brief overview confirms the complexities of the American federal system. It is not surprising, therefore, that as Chief Justice John Marshall observed, "the question respecting the extent of the powers actually granted [to the federal government] is perpetually arising, and will probably continue to arise, as long as our system shall exist"7. Or as Woodrow Wilson noted a century later, "the question of the relation of the States to the federal government cannot be settled by one generation because it is a question of growth, and every successive stage of our political and economic development gives it a new aspect, makes it a new question."8. To a considerable extent, Americans have relied on the U.S. Supreme Court to maintain the appropriate distribution of power in the federal system. To understand the Court's effects on the development of American federalism, however, one must first consider the system of judicial federalism within which the Court operates.

2. AMERICAN JUDICIAL FEDERALISM

2.1 Federal Courts

Unlike many other federations, the United States has instituted full sets of courts, trial and appellate, at both the federal and state levels. The scope of the federal judicial power is defined in Article III of the U.S. Constitution, with the specific grants of authority in Article III serving four basic purposes. To vindicate the authority of the federal government, federal courts exercise jurisdiction over cases arising under the Constitution or laws of the United States or in which the federal government is a party. To secure the federal government's exclusive control over foreign affairs, federal courts have jurisdiction over cases arising under treaties, in admiralty and maritime cases, in cases affecting ambassadors or other officials of foreign countries, and in cases between states or the citizens thereof and foreign states, citizens, or subjects. To resolve interstate disputes, federal courts exercise jurisdiction over controversies between two or more states or controversies between a state and the citizen of another state. And to protect out-of-state litigants from the possible bias of local tribunals, federal courts have jurisdiction over controversies between citizens of different states ("diversity-of-citizenship cases"). Those cases not falling under the federal judicial power are reserved to the states, because the federal government is a government of enumerated judicial, as well as legislative, powers.

Article III of the U.S. Constitution also creates the U.S. Supreme Court, defining its original jurisdiction (those few cases in which the Court functions as a trial court) and conferring its appellate jurisdiction subject to "such Exceptions, and under such Regulations, as Congress shall make." Beyond that, the Constitution leaves to Congress the distribution of the federal judicial power by granting it the power to create federal courts and to define their jurisdiction. Congress has responded to this invitation by crafting a three-tiered federal court system. It includes: (1) ninety-four district courts, the trial courts of the federal judicial system, organized along geographic lines that do not overlap state boundaries; (2) thirteen first-level appellate courts, the courts of appeals, most of which are organized regionally with "circuits" made up of three or more states and territories; and (3) the Supreme Court9. The operating expenses of the federal court system, as well as the salaries of all federal judges, are paid by Congress.

2.2 State Courts

However, the vast majority of cases are resolved in state courts, not federal courts. In part, this is because the U.S. Constitution does not mandate that the federal judicial power be exercised only by federal courts, and historically Congress has allowed state trial courts to exercise concurrent jurisdiction with federal district courts in most civil cases arising under federal law. Beyond that, the fact is that the federal judicial power encompasses only a small proportion of all legal disputes: most American law is state law, not federal law. For example, more than ninety-nine percent of criminal cases are state cases, arising under state law. Family matters—divorce, child custody, and adoption—and contract disputes are regulated by state law and addressed in state courts. So too are most tort law cases. Most of these cases are not subject to review in federal court because they do not involve federal law or disputes between citizens of different states.10 Even when they do, the sheer number of state rulings means that only a miniscule percentage actually receives federal court scrutiny. In 2014, for example, federal district courts considered only 2620 *habeas corpus* petitions by state prisoners seeking review of criminal convictions. And in its 2015 term, for example, the U.S. Supreme Court heard only twenty appeals from state supreme courts.11 So in practice state courts render the final decision in almost all the cases they consider. Small wonder, then, that Justice William Brennan, who served on the New Jersey Supreme Court before his elevation to the U.S. Supreme Court, concluded that "the composite work of the courts in the fifty states probably has greater significance [than that of the U.S. Supreme Court] in measuring how well America attains the ideal of equal justice for all."12

Each state pays its own judges, funds its own courts, and determines their structure and operation.13 Some states have copied elements of the federal judicial system—for example, several have adopted in whole or in part the Federal Rules of Civil Procedure—but each court system retains its autonomy, so that such emulation has been a matter of choice, not obligation. Whereas the federal Constitution establishes the mode of selection and the tenure of federal judges, emphasizing judicial independence over judicial accountability, each state selects its own judges and decides how long they serve. In doing so the states have given greater weight to judicial accountability: the judges in forty-seven states serve limited terms of office, most have a fixed retirement age, and almost ninety percent of state judges at some point must stand for election either to gain or to retain office.

Although state court systems reflect the distinctive political development of each state, they share some features. First, forty-eight of the fifty states vest ultimate appellate authority in a single court, usually designated the supreme court. The sole exceptions, Oklahoma and Texas, each have established a Court of Criminal Appeals, which is the court of last resort in criminal appeals, and a Supreme Court, which has final responsibility for appeals in civil cases. Second, forty-one states have created intermediate courts of appeals—that is, first-level appellate courts below the state supreme court, whose main task is error correction, reviewing trial court rulings to ensure that judges did not make errors in procedure or in the interpretation of the law. The creation of these courts of appeal has reduced the caseloads of state supreme courts and, by relieving them of routine cases, has allowed state supreme courts to devote their attention to cases that raise important legal or policy questions and to assume a position of leadership in state legal development. Third, forty-six states divide responsibility between two sets of trial courts. Courts of limited jurisdiction handle less serious criminal cases and civil cases involving relatively small sums of money, whereas courts of general jurisdiction handle more serious matters.

2.3 Federal-State Interactions

The federal and state court systems operate largely independently of each other—few cases initiated in state courts end up in federal courts, and cases initiated in federal courts never end up in state courts. This underscores a key feature of American judicial federalism: autonomy in legal interpretation. Here three principles govern. The first is the supremacy of federal law. The Supremacy Clause of the U.S. Constitution (Article VI, section 2) mandates that when federal and state law conflict, federal law prevails and that "the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Thus, the federal Constitution, federal statutes, and federal administrative regulations all supersede state enactments, even state constitutions; and as the ultimate interpreter of federal law, the U.S. Supreme Court's rulings on such federal law are authoritative for all federal and state courts. So when the U.S. Supreme Court ruled in *Obergefell v. Hodges* (2015) that the federal Constitution protected a right to same-sex marriage, its ruling superseded state constitutional bans on such marriages in thirty-one states[14].

A second principle is the authority of each court system to expound its own body of law. State judges must not only give precedence to federal law over state law; they also must interpret federal law in line with the rulings of the U.S. Supreme Court. Conversely, in interpreting the law of a state, federal courts must accept as authoritative the interpretation of that law propounded by the highest court of that state. This is a distinctive feature of American judicial federalism—in most federal systems judges selected by the federal government have the final say in determining the meaning of state law.

A third principle is that the U.S. Supreme Court—or any other federal court--cannot review a ruling grounded in state law unless that ruling is inconsistent with federal law. Thus, when a state ruling rests solely on what scholars call "adequate and independent state grounds," it is altogether immune from review in federal court. Since the 1970s, this has been particularly important in cases involving rights claims. Distressed by what they considered unduly narrow interpretations of the federal Bill of Rights, litigants claimed that state constitutions provided broader protection, often relying either on textual differences between the federal and state constitutions or on distinctive provisions found only in state constitutions. For example, whereas the federal Constitution contains no explicit right to privacy, several state constitutions expressly protect that right[15]. And whereas the federal First Amendment only prohibits laws "respecting an establishment of religion", many state constitutions also expressly ban state aid to parochial schools or other religious institutions[16]. This "new judicial federalism" has had dramatic effects: over the last four decades state courts have found broader protections under state guarantees than were available under federal law in more than 1500 cases[17]. This underscores the practical effects of lodging the power to announce final and authoritative interpretations of state law in the hands of state courts, staffed by judges chosen without any input by the federal government.

2.4 Native American Tribal Courts

The right of self-government includes the authority to administer criminal and civil justice, but for Indian tribes this power has been circumscribed over time. For most of the nineteenth century tribal courts exercised criminal and civil jurisdiction in cases exclusively involving Native Americans. But in 1885 Congress enacted the Major Crimes Act, which transferred to federal courts tribal jurisdiction over major crimes regardless of whether the victim and/or the alleged perpetrator

was an Indian. In 1953 Congress enacted Public Law 280, which authorized six states to enforce their criminal law on Indian reservations and granted them jurisdiction over civil suits arising on reservations. That law also empowered other states to assume criminal and civil jurisdiction if they so chose, and nine additional states did so. In the Indian Civil Rights Act of 1968 Congress also restricted the authority of tribes to develop their own standards of due process by extending various criminal-justice guarantees of the Bill of Rights to Indian country. Finally, in *Oliphant v. Squamish* (1978), the Supreme Court ruled that Indian nations had no general criminal jurisdiction over non-Indians even in Indian country18. Taken altogether, these actions reveal that Indian courts possess only that jurisdiction granted them by the federal government and that both Congress and the Supreme Court have read such grants narrowly, in ways that circumscribe tribal authority19.

3. THE UNITED STATES SUPREME COURT

3.1 The Justices

Article III directs that Supreme Court justices, like other federal judges, be appointed by the President with the "advice and consent" of the Senate. Although the states play no direct role in the selection of Supreme Court justices, region was a vital consideration in Supreme Court appointments well into the twentieth century. From the founding until 1971, except in the immediate aftermath of the Civil War, there was in practice a Southern seat on the Court and, until the 1930s, a New England seat as well. However, this concern for regional balance has largely disappeared: five of the nine current justices on the Court are from either New York or California. Of greater importance today is the requirement that a president's judicial appointees be approved by the Senate, the chamber of Congress in which the states are equally represented. Since the adoption of the Constitution, the Senate has rejected twelve Supreme Court nominees, and seventeen others either withdrew from consideration or were never considered because of opposition in the Senate. From 1968 to 2016, seven of the twenty-four nominees were either rejected by the Senate or withdrew from consideration. Partisan conflict, not state loyalties, explains these failed nominations: nominees have most often fared badly when the presidency and the Senate are controlled by different political parties20. For example, when President Barrack Obama nominated Merrick Garland in 2016 to fill the seat vacant because of the death of Justice Antonin Scalia, the Republican-controlled Senate refused even to hold hearings on the nomination, hoping that a Republican victory in the forthcoming presidential election would lead to a nominee more to their liking. The tactic paid off when Donald Trump was elected president and in 2017 appointed conservative jurist Neil Gorsuch to fill the Scalia vacancy. The Senate confirmed the Gorsuch appointment by a 54-45 vote, with only three Democrats joining all the Republican senators in supporting Gorsuch.

The Constitution does not specify the number of Supreme Court justices—originally there were six, but today there are nine. During the nineteenth century Congress several times increased or reduced the size of the Court, sometimes for political purposes. But in 1937 when President Franklin Roosevelt proposed to "pack the Court" because it had struck down laws he favored, Congress refused to go along. The Constitution also does not set fixed terms for justices; rather, like other federal judges, they serve "during good behavior". In theory, justices can be impeached and removed from office upon conviction, but this has never occurred; and so if health permits, justices can serve as long as they wish. Thus, of the eight justices on the Supreme Court in 2016, three were seventy-eight years of age or older, and four had served for more than twenty years. As one might expect, the infrequency of vacancies on the Court has made appointments highly contentious.

Thus when President Barrack Obama nominated Sonia Sotomayor and Elena Kagan to the Supreme Court, Democratic senators overwhelmingly supported the nominees, while Republican senators almost unanimously opposed them.

3.2 Judicial Review

The U.S. Constitution does not expressly recognize the power of judicial review, that is, the power of federal courts to invalidate laws or other actions of the federal and state governments that are contrary to the Constitution. However, judicial authority to strike down acts of Congress has been recognized since *Marbury v. Madison* (1803) and to invalidate state laws since *Fletcher v. Peck* (1810), *Martin v. Hunter's Lessee* (1816), and *Cohens v. Virginia* (1821)21. Under Article III the federal judicial power extends to "cases" and "controversies", and Chief Justice John Marshall seized upon this language in his argument in *Marbury* for judicial review. Marshall argued that courts must "say what the law is" in order to resolve disputes between litigants, and this includes determining whether a law enacted by Congress is valid or is void as inconsistent with the Constitution. Should a federal or state statute be declared unconstitutional, it no longer has any effect. In addition, if other states have laws similar to a state law invalidated by the Supreme Court, these likewise are invalidated. For example, when the Supreme Court ruled in *Brown v. Board of Education* (1954) that a Kansas law mandating racial segregation in the state's public schools was unconstitutional, its ruling also meant that the segregation statutes in other states were likewise unconstitutional and could no longer be enforced.

This argument highlights what is distinctive about federal judicial review. First, dispute resolution is the duty of all courts, not just the Supreme Court, and so the power of judicial review is not concentrated in a single constitutional court but can be exercised by all federal courts. Second, the task of constitutional interpretation arises in the course of ordinary litigation, and thus the Supreme Court (and other federal courts) can address constitutional issues only if they are raised in a concrete legal dispute. More specifically, for a party to bring a case in federal court, the party must have standing to sue, that is, "must allege a personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief."22 Thus the emphasis is on dispute resolution, not vindicating constitutional values, and on concrete litigation, not abstract review of constitutional issues. There is no procedure whereby constitutional issues can be referred to the Supreme Court by another branch of government, so if no litigant raises a constitutional issue, the Court cannot rule on it. Also, laws cannot engender legal disputes until they are enacted, so the Court has no power to issue advisory rulings on the constitutionality of prospective legislation23. And the Court itself may decline to hear some cases—for example, cases dealing with foreign affairs, the process of impeachment, or the ratification of constitutional amendments—arguing that they raise "political questions" that are not appropriate for judicial resolution. Finally, the Supreme Court's involvement in "saying what the law is" extends beyond the Constitution to other federal law. The Supreme Court is not exclusively a constitutional court, and in fact many cases it decides do not involve the Constitution at all but rather the interpretation of federal statutory or administrative law. Indeed, in its 2014 Term, the justices decided seventy-four cases, but only twenty-four of those involved constitutional issues24.

4. THE U.S. SUPREME COURT'S FEDERALISM JURISPRUDENCE

Supreme Court rulings have contributed to the growth of federal power, although they are hardly

the only factor contributing to this shift, and the Court's approach to federalism issues has fluctuated. At times the justices have expansively interpreted constitutional grants of power to the federal government, but at other times they have interpreted those powers narrowly in order to safeguard state authority. In recent years the Court has divided sharply in interpreting the division of power between state and nation. Underlying these divergent interpretations are fundamental disagreements about the character of American federalism. Thus the sharp divisions on the Court in *National Federation of Independent Business v. Sibelius* (2012), the Supreme Court's most noteworthy federalism case of the twenty-first century, recapitulate a long-standing dispute about how to interpret the constitutional division of power between nation and state.

One view, best elaborated by Chief Justice John Marshall in *McCulloch v. Maryland* (1819), emphasizes that the Constitution should be understood as a purposive document in that powers are granted to the federal government in order to achieve certain objectives25. From this it follows that "the power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means."26. Even if those means involve intrusion on traditional state powers or require shifts in the distribution of power between nation and state, this poses no problem because the Constitution was designed to promote the accomplishment of national objectives, not to preserve particular structural arrangements or some balance between federal and state authority. As Marshall famously put it: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."27. Thus the grants of power to the federal government should be read broadly in order that the aims for which they were given may be achieved, even if that affects the balance of power between nation and state. The Constitution may recognize a division of powers between nation and state, but the protection of a particular division of authority was never a fundamental aim of the document. Rather, the primary safeguards for state interests and prerogatives are political, not jurisprudential. The states' role in the composition of the national government and the selection of national officials would serve to protect them against federal overreaching. As Marshall put it in *Gibbons v. Ogden* (1824): "The wisdom and discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are the restraints on which the people must often rely solely, in representative governments."28.

When Congress began in the late nineteenth century to exercise the broad powers outlined in *McCulloch*, the Supreme Court developed a more restrictive interpretation of federal power, usually referred to as "dual federalism". According to this view, the Constitution not only granted powers to the federal government but also reserved powers to the states. Therefore in exercising their powers, neither the federal nor state governments should invade the other's sphere, and in particular the federal government should not use the pretext of its delegated powers to usurp those powers reserved to the states. Therefore, the Supreme Court should interpret the grants of power to the federal government in such a way that the Founders' dual aims of adequate federal power and a federal balance were both achieved.

This dual federalist perspective dominated the Supreme Court's jurisprudence from the late nineteenth century until 1937, leading to the invalidation of numerous acts of Congress. The clash between Court and Congress reached crisis proportions in the early 1930s, when the justices struck down important New Deal measures championed by President Franklin Roosevelt

to combat the Great Depression and did so in language that presaged the invalidation of further New Deal measures. In response, following his landslide reelection in 1937, Roosevelt proposed a plan to expand the membership of the Supreme Court, giving him a chance to appoint justices more sympathetic to his view of federal authority. Although this plan failed, in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* (1937), the Court reversed course, adopting Marshall's position in upholding a key New Deal law. This jurisprudential shift, together with the appointment of justices more sympathetic to expansive federal authority, led to the abandonment of dual federalism and consistent judicial endorsement of congressional laws against challenges based on federalism.

Since the early 1990s, however, the Court under Chief Justices William Rehnquist and John Roberts has launched a controversial "new federalism," seeking to demarcate mutually exclusive spheres of federal and state authority29. This revival of dual federalism has affected the Court's rulings on the scope of federal power under the Commerce and Necessary-and-Proper Clauses; on the scope of congressional power under the post-Civil-War amendments; on congressional power to require state legislative and executive action; and on the scope of state sovereign immunity. Yet these rulings have been hotly contested by some justices, who continue to champion the Court's post-1937 federalism jurisprudence.

This clash of views was on display in *National Federation of Independent Business v. Sibelius* (2012), in which the Court considered the constitutionality of the "individual mandate" provision of the landmark Patient Protection and Affordable Care Act ("Obamacare"), which imposed a financial penalty on persons who failed to obtain health insurance. Speaking for a five-member majority that included the Court's liberal justices, Chief Justice Roberts upheld the individual mandate through a strained interpretation of the federal taxing power. But speaking for a different five-member majority that included the Court's conservative justices, he ruled that the individual mandate did not pass muster under the Commerce Clause. Roberts acknowledged that the Constitution grants Congress broad power to "regulate Commerce", but insisted that this grant "presupposes the existence of commercial activity to be regulated" and that the individual mandate did not regulate "existing commercial activity." Rather, he argued that the individual mandate compelled individuals "to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." For the Court to construe the Commerce Clause to allow Congress to regulate individuals "precisely because they are doing nothing would open a new and potentially vast domain to congressional authority." Further, to uphold the individual mandate under the Necessary and Proper Clause would "undermine the structure of government established by the Constitution." Finally, Roberts noted that the statute at issue in *Sibelius* also substantially expanded eligibility under Medicaid, a cooperative program under which the federal and state governments jointly provide health insurance for indigents. Although states could choose whether or not to participate in this Medicaid expansion, the law made clear that a state's failure to do so would result in the termination of all its federal Medicaid funds. This provision was so punitive, the Court reasoned, that it "passed the point at which pressure turns into compulsion" and in effect coerced state participation. Although the Court did not attempt to define the distinction between pressure and compulsion, thus leaving unresolved how closely it would scrutinize the conditions imposed in other grant programs, it hinted at a new basis for judicial intervention to protect state autonomy. As might be expected, the dissenting justices vehemently objected to the Chief Justice's analysis.

5. CONCLUSION

The divisions on the Supreme Court in *Sibelius* confirm that the debate over American constitutional federalism has lost neither its intensity nor its topicality. Scholars disagree about the meaning of federalism, the aims of the Founders in creating a federal system, and the extent to which those aims can—and should—guide contemporary interpretation of the Constitution. Justices too debate whether the Constitution was meant to secure a federal "balance" and what role judges should play in safeguarding federal arrangements. As one scholar has lamented, there is "virtually no important issue of federalism on which a particular point of view command[s] a clear consensus."30.

Yet despite such fundamental disagreements, American federalism flourishes, revealing that judicial doctrine may not be decisive in shaping the character of American federalism. The expansion of federal authority may have limited the scope of exclusive state authority, but the need for intergovernmental cooperation in policy development and implementation has encouraged a new cooperative federalism. The lines of federal and state authority are blurred, but the dynamics of intergovernmental interaction ensure that both state and federal viewpoints and interests are respected. This may be sufficient: as Justice Sandra Day O'Connor observed in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), "the true essence of federalism is respect, and state officials have acted to safeguard those interests."31. There is considerable evidence that they have32.

Notes

1 In this study, as in common discourse, we use the terms "nation" and "tribe", as well as "Native American" and "Indian", interchangeably.

2 When prospective states sought admission to the Union, Congress could impose requirements on the constitutions they devised as conditions for admission. But once admitted, states were free to amend their constitutions as they desired. See *Coyle v. Smith*, 221 U.S. 559 (1911).

3 Article IV of the U.S. Constitution empowers the federal government to ensure that states have a "republican form of government," and various constitutional amendments forbid states from discriminating on the basis of race, gender, age, and wealth in awarding the vote. See TARR (A.), *Understanding state constitutions*, Princeton, Princeton University Press, 1998, pp. 41-46, and TARR (A.), « Explaining Sub-national Constitutional Space », Penn State Law Review, vol. 115, 2011, pp. 1133-1149.

4 *Scott v. Sandford*, 60 U.S. 383 (1857).

5 *Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S.1,1890, p. 42* and *National Bank v. County of Yankton*, 101 U.S. 129, 1880, p. 133.

6 *Cherokee Nation v. Georgia*, 30 U.S. 1, 1831, p. 17.

7 *McCulloch v. Maryland*, 17 U.S. 316, 1819, p. 405.

8 WILSON (W.), *Constitutional government in the United States*, New York: Columbia University Press, 1908,p. 173.

9 Congress has also created a few courts with subject-matter specialization, such as the U.S. Tax Court and the Foreign Intelligence Surveillance Court.

10 American judicial federalism is somewhat complicated here. Suppose a plaintiff chooses to initiate a civil case in state court. If the case is one that could have been brought in federal court—either because it raises a question of federal law or because the defendant and plaintiff are from different states—the defendant may "remove" the case to federal court.

11 For data on habeas petitions, see Table C-3, Statistics and Reports, United States Courts, at www.uscourts.gov/statistics . For data on sources of cases heard by the Supreme Court, see "The Supreme Court—The Statistics," *Harvard Law Review* vol. 129, 2015, p. 393-394.

12 BRENNAN (W.), "State Supreme Court Judge versus United States Supreme Court Justice: A Change in Function and Perspective," *University of Florida Law Review* vol. 19, 1966, p. 236.

13 Territorial courts are created and staffed by the federal government, but Native American tribes create and staff their own courts.

14 *Obergefell v. Hodges*, 576 U.S. (2015).

15 The U.S. Supreme Court has recognized a federal right to privacy as implicit in the U.S. Constitution and relied on it in issuing controversial rulings on abortion and other matters.

16 See, for example, Montana Constitution, art. 2, sec. 10 (right to privacy), and Washington Constitution, art. 1, sec. 11 (ban on public aid to religious institutions).

17 For an authoritative discussion of the new judicial federalism and the scholarly literature it has generated, see WILLIAMS (R.), *The law of American state constitutions*, New York: Oxford University Press, 2009, chapters 5-7.

18 *Oliphant v. Squamish*, 435 U.S. 191 (1978).

19 For critical treatments of these federal impingements on tribal sovereignty, see GOLDBERG-ARMSTRONG (W.), *Planting tail feathers: tribal survival and public law 280*, Los Angeles, American Indian Studies Center, 1998, and WILKINS (D.) and LOMAWAIMA (T.), *Uneven ground: American Indian sovereignty and federal law*, Norman, University of Oklahoma Press, 2001.

20 SILVERSTEIN (M.), *Judicious choices: the new politics of supreme court confirmations*, 2nd ed., New York, W.W. Norton, 2007.

21 *Marbury v. Madison*, 5 U.S. 137 (1803); *Fletcher v. Peck*, 10 U.S. 87 (1810); *Martin v. Hunter's Lessee*, 14 U.S. 1 (1816); *Cohens v. Virginia*, 19 U.S. 264 (1821).

22 *Allen v. Wright*, 468 U.S 737, 751 (1984).

23 The state judicial power is not similarly constrained—ten states have authorized their supreme courts to issue advisory opinions when requested to do so by the state legislature or the governor. See Note, "The State Advisory Opinion in Perspective," *Fordham Law Review*, no. 44, 1975, p. 81-113.

24 "The Supreme Court—The Statistics," *Harvard Law Review* vol. 129, 2015, p. 393-394.

25 *McCulloch v. Maryland*, 17 U.S. 316 (1819).

26 *McCulloch v. Maryland*, 17 U.S. 316, at 408.

27 *McCulloch v. Maryland*, 17 U.S. 316, at 421.

28 *Gibbons v. Ogden*, 22 U.S. 1, at 197 (1824).

29 Some scholars view this shift as beginning with the 5-4 decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), even though this decision was overruled nine years later, again by a 5-4 vote, in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

30 SHAPIRO (D.), *Federalism: a dialogue*, Evanston, Northwestern University Press, 1995, p. 6.

31 *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 at 546 (1985)..

32 On how this works in practice, see NUGENT (J.), *Safeguarding federalism: how states protect their interests in national policymaking*, Norman, University of Oklahoma Press, 2009, and RYAN (E.), *Federalism and the tug of war within*, New York, Oxford University Press, 2011.