UVU Center for CONSTITUTIONAL STUDIES

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Beyond Sovereignty, Beyond Autonomy: A Nationalist's View of Federalism's Future by Heather Gerken

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Federalism cases have always posed a dilemma for judges. The federal government is supposed to be a government of limited powers. But whenever the Supreme Court tries to cabin Congress's reach, the odds are that the analysis in the dissent will be sounder than that in the majority opinion. If the Justices don't act, on the other hand, they end up ignoring what most agree to be true — the federal government isn't supposed to be able to do anything it wants. As every law student learns, facts on the ground have outpaced the Founders' vision, as our interconnected system now leaves room for the federal government to regulate virtually everything the states can. That's why the Court's Commerce Clause decisions, in particular, are so easy to dismantle. It's a commonplace among lawyers that those decisions are trying to limit the limitless. Legal doctrine, in sharp contrast, has its limits, and it has failed the Court time and time again. So therein lies the tragic choice of federalism doctrine: do nothing or do something . . . silly.

In their efforts to limit federal power the Rehnquist and Roberts Courts have offered us two kinds of federalism decisions. Some start with the states. They mark where Congress's power ends by identifying where state power begins, using sovereignty as a touchstone. It might seem odd for the Court to begin with the states in describing the limits of federal power. But the Court does so for a reason. It designates the outer limits of federal authority by marking the bounds of state power, much the way an artist designates a shape using negative space.

Other federalism opinions — including most of the decisions of the Roberts Court — start with Congress and delineate the bounds of its power in isolation. Rather than trace the (state) boundaries that federal power cannot cross, the Court demarcates federal power without looking to the states. The Court itself has acknowledged this difference (see New York v. United States (1992)), and scholars often orient their teaching and writing around the difference between external/sovereignty-based limits on congressional power and those derived internally.

While it is conventional to note that federalism cases come in these two flavors, the mistake scholars make is to treat both lines of doctrine as if they are equally flawed. They are not. The cases that rely on state sovereignty to limit federal power are misguided, but we should give the devil its due. These decisions have managed to generate doctrine that is more manageable, more comprehensible, and therefore more likely to endure. The cases that define federal power in isolation have been a failure on almost any measure. When the Court addresses Congress's power in isolation, it creates a challenge for itself: how to bound the boundless. Deprived of the handy stopping point that the sovereignty account provides, the Court must decide how far to follow a chain of reasoning in a world where the market touches virtually everything and interconnected regulatory regimes can sweep almost anything into Article I's ambit. Because these opinions attempt to identify limits through sheer force of logic, the doctrine they generate amounts to little more than logic

games, which can be played by both sides of any issue. This doctrine is unlikely to endure, and there will be little reason to mourn its passing.

Federalism opinions that begin with the states have chosen the right starting point but headed in the wrong direction because they've followed the trail marked by the sovereigntists. As John Hart Ely quipped about the "one person, one vote" doctrine, manageability is sovereignty's long suit, but it's not clear what else it has going for it. See John Hart Ely, Democracy and Distrust 121 (1980). The Court is correct to define federal power in relational terms, but it's missed how that relationship actually works. The states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space. Just think about how the Affordable Care Act has been implemented. Read just about anything written in environmental law these days. Take a look at telecom, the AFDC, Medicaid, drug enforcement, workplace safety, health care, immigration, even national security law. In these integrated regulatory regimes, the states and federal government have forged vibrant, interactive relationships that involve both cooperation and conflict. If the Court is going to generate doctrine that is not only enduring but worth preserving, the case law must reflect these realities.

So where should the Court go from here? Returning to a sovereignty-centered federalism isn't a solution. While the Court is much more likely to generate enduring legal doctrine if it begins with something manageable, the point is to build doctrine that's worth keeping around. And while a sovereignty account is admirably concrete and manageable, it's also wrongheaded and out of date. The Court may have chosen the right starting point for its analysis, but it's still got the wrong map.

The Court needs a relational account. It needs to think hard about how the states and the federal government interact. But it should think about those interactions differently. As intuitively appealing as the sovereignty argument is, it can't possibly survive 21st century realities. It can't survive in a world where sovereignty is not to be had, where regulatory overlap is the rule, where states' most important form of power lies not in presiding over their own empires but in administering the federal empire.

If the Court is hunting for a new path, it should retain the central insight of the sovereignty cases — that federal power must be defined in relation to the states — but take it in a different direction. The problem with the Court's relational account of federal power is that it's not sufficiently relational. It fails to capture the deeply integrated, highly interactive relationship that exists between the states and federal government in so many regulatory arenas. The states and federal government have forged vibrant working relationships. They are not engaged in the governance equivalent of parallel play.

Further Reading:

For more about the dilemma that federalism cases pose for federal judges, see Heather K. Gerken, Slipping the Bonds of Federalism, 128 Harv. L. Rev. 85 (2014), from which this essay is adapted.

For a more thorough description of the shortcomings of the sovereignty account in federalism, see Heather K. Gerken, The Supreme Court, 2009 Term — Foreword: Federalism All the Way Down, 124 Harv. L. Rev. 4 (2010).