

2-1-2015

The Future of Federalism, from the Bottom Up

Anthony Johnstone

Alexander Blewett III School of Law at the University of Montana, anthony.johnstone@umontana.edu

Follow this and additional works at: <http://scholarship.law.umt.edu/mlr>



Part of the [Constitutional Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Anthony Johnstone, *The Future of Federalism, from the Bottom Up*, 76 Mont. L. Rev. 1 (2015).

Available at: <http://scholarship.law.umt.edu/mlr/vol76/iss1/1>

This Foreword is brought to you for free and open access by The Scholarly Forum @ Montana Law. It has been accepted for inclusion in Montana Law Review by an authorized administrator of The Scholarly Forum @ Montana Law.

FOREWORD

THE FUTURE OF FEDERALISM, FROM THE BOTTOM UP

Anthony Johnstone*

I. INTRODUCTION

This issue records the *Montana Law Review*'s 2014 Hon. James R. Browning Symposium, *The Future of Federalism: What Will Be Retained, and What Surrendered?*¹ The Symposium takes its title from then-Justice Harlan Fiske Stone's opinion for the Supreme Court in *United States v. Darby*,² in which he writes the Tenth Amendment "states but a truism that all is retained which has not been surrendered."³ At first glance, this is an odd inspiration for a discussion about the *future* of federalism. After all, of those powers retained and surrendered, most of them were retained and surrendered formally with the ratification of the Constitution around 1789, 150 years before the *Darby* case and more than 220 years before this Symposium.⁴ On closer consideration, however, the exchange implicit in the quo-

* Associate Professor, The University of Montana School of Law. Thanks to the *Montana Law Review* editors for organizing an excellent symposium, to the panelists for their thoughtful presentations, and to my family for their support.

1. Symposium, *The Future of Federalism: What Will be Retained, and What Surrendered?* 76 *Mont. L. Rev.* (2015).

2. 312 U.S. 100 (1940).

3. *Id.* at 124. This reading of the Tenth Amendment persists in the Supreme Court's more recent federalism cases. *N.Y. v. U.S.*, 505 U.S. 144, 156 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress. It is in this sense that the Tenth Amendment 'states but a truism that all is retained which has not been surrendered.'" (citations and internal quotation marks omitted)).

4. The exceptions are the subsequent constitutional amendments that surrendered additional powers to the federal government. *See e.g.* U.S. Const. amend. XIV (granting Congress, and by implication the federal courts, the power to enforce the civil rights guarantees of the Fourteenth Amendment); U.S.

tation continues today, and is sufficiently dynamic to merit the title's use of the future tense. In the practice of federalism, what is retained or reserved by the states and what is surrendered or delegated to the federal government is subject to constant renegotiation. The *Darby* case itself marked what some commentators consider a "surrender" in the primary sense of that word as the Supreme Court acquiesced in the New Deal's expansion of central power.⁵ Other commentators view *Darby* as one constitutional revolution eventually countered by a more recent constitutional revolution, still occurring, that is retaking some of the federalist ground that was surrendered.⁶ The future of federalism is, indeed, an open question.

This foreword considers the Symposium participants' contributions in three groups before making concluding points. Part I begins theoretically, with Professor Ilya Somin's reframing of federalism's primary value as political freedom actualized by "foot voting" and Professor Roderick Hills's proposed method of allocating rights and powers between jurisdictions. It then turns to three case studies of federalism in action at the state and tribal level: Professor Michelle Bryan's examination of hotly contested federal land use decisions; Assistant United States Attorney Danna Jackson's report on the implementation of federally restored tribal criminal jurisdiction over domestic violence cases; and Professor Matthew Fletcher's study of tribal disruption as a strategy for negotiating with—and possibly a sovereignty-vindicating model for—state and local governments. It concludes with two state responses to the federal government and their consequences, Professor Robert Mikos's proposal for state indemnification of federal criminal defense costs, and Professor Abigail Moncrieff's and Jonathan Dinerstein's prediction that states' victory over conditional spending might lose them more autonomy than they won. Part II draws on these contributions to develop a tentative model of states as more complicated than often portrayed in federalism discussions. Each state is a "they," not an "it," at least as much and probably more than the federal government,⁷ and future analysis of federalism might more accurately account for this. This foreword con-

Const. amend. XVI (granting Congress the power to lay and collect income taxes); U.S. Const. amends. XV, XIX, XXIII, XXIV, XXVI (granting Congress, and by implication the federal courts, the power to enforce voting rights).

5. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 Va. L. Rev. 1387, 1449 (1987) ("What failed in *Darby* was not the language of the Constitution, but the willingness of the Justices to accept the theory of limited government upon which it rested.").

6. Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 Va. L. Rev. 1045, 1051 (2001).

7. See e.g., Kenneth A. Shepsle, *Congress Is a "They," Not an "It": Legislative Intent As Oxymoron*, 12 Intl. Rev. L. & Econ. 239 (1992); Adrian Vermeule, *The Judiciary Is a They, Not an It: Interpretive Theory and the Fallacy of Division*, 14 J. Contemp. Leg. Issues 549 (2005); Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a "They," Not an "It"*, 96 Minn. L. Rev. 194 (2011).

cludes that whatever is retained or surrendered, the future of federalism will be more complicated and more durable than either side of current debates anticipates.

II. FEDERALISM SEEN FROM THE BOTTOM UP

The distinctive contributions made by the following authors are not *what* questions they ask about federalism, but *where* and *to whom* they ask them. Yet more of the discourse about federalism has centered on the federal government than on the states. The great federalism battles commonly play out between the Supreme Court and Congress as represented by the federal executive.⁸ While it usually takes a state or local official, and occasionally a private citizen, to get a case going, by the time a federalism question is argued and decided the state itself recedes into abstraction. The writings in this issue bring the states, and the Indian tribes as separate sovereigns in our federal system, back into the foreground.

A. *Why Federalism, and When?*

Two keynote contributors bookended the Symposium's proceedings. The opening keynote by Professor Somin sets the agenda by proposing a new way to understand a primary value of federalism as sustaining the conditions necessary for the effective exercise of political freedom through "foot voting."⁹ The conventional account of voting as the core component of political freedom neglects its inefficacy. A voter has less than a one-in-sixty-million chance of deciding a presidential election, odds that do not improve much in other elections. Even then, the choice is almost always between two candidates who each represent a particular aggregation of preferences that the party system produces for that election cycle, and in ideal circumstances those preferences only roughly align with a single hypothetical median voter.¹⁰ Professor Somin observes such long odds would be intolerable for the meaningful exercise of other basic constitutional rights such as religious freedom.

This is all the more troubling because voting long has been "regarded as a fundamental political right, because preservative of all rights."¹¹ Worse, due in part to the low stakes for any particular vote, actual voters are rationally ignorant about politics—that is, they persistently lack infor-

8. See e.g. *Nat'l Fed'n of Indep. Bus. v. Sebelius (NFIB)*, 132 S. Ct. 2566, 2659 (2012).

9. Ilya Somin, *Democracy, Foot Voting, and the Case for Limiting Federal Power*, 76 *Mont. L. Rev.* 21 (2015).

10. See generally Nicholas O. Stephanopoulos, *Elections and Alignment*, 114 *Colum. L. Rev.* 283 (2014).

11. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886).

mation to make sufficiently informed political decisions. Consequently, Professor Somin argues, “Your chances of exercising genuinely meaningful freedom are much greater when you vote with your feet than when you vote at the ballot box.”¹² If “foot voting” is a more effective means than ballot box voting to valuable ends of political freedom, “we should decentralize political power to lower levels of government” through stronger judicial enforcement of constitutional federalism.¹³

How far this decentralization should proceed, and for which issues, is an open question. Professor Hills proposes a tentative answer. He introduces what he calls a “universal field theory” for structuring the relationship between private rights and federalism, and suggests some considerations for determining when federalism does and does not respect private rights.¹⁴ He challenges the conventional understanding that federalism is inversely related to private rights. That understanding is rooted in James Madison’s concern that majority factions can more easily capture state governments to entrench their interests at the expense of their fellow citizens’ liberties, while an enlarged national republic affords “greater security . . . by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest.”¹⁵ Drawing on Madison’s essays opposing the First Bank of the United States, Professor Hills balances Madison’s concern with majority capture and oppression at the state level with Madison’s equally important concern with minority capture and oppression at the federal level. The federal government’s enabling of slavery is a particularly terrible example of minority factional capture at the national level despite state resistance, and a historical counterpoint to Reconstruction’s still-halting national effort to overcome majority factional capture at the state level.¹⁶

Rather than adopting the Supreme Court’s simple thesis that “federalism protects the liberty of the individual from arbitrary power,”¹⁷ however, Professor Hills asks “which liberty?” and “whose power?” Some public rights enable oppression by the privately powerful, and some public powers enable vindication of private rights. He looks to the relative competency, deliberation, and exit-and-voice constraints of state legislatures and Con-

12. Somin, *supra* n. 9, at 24.

13. *Id.* at 25.

14. Roderick Hills Jr., *Towards a Universal Field Theory of Private Rights and Federalism*, 76 *Mont. L. Rev.* 41, 55–56 (2015).

15. James Madison, *The Federalist No. 10*, in *The Federalist*, 64 (Jacob E. Cooke ed., Wesleyan U. Press 1961).

16. Hills, *supra* n. 14, at 47–48. *See also* Somin, *supra* n. 9, at 36 (“Before the Civil War, the federal government did a lot more to promote slavery than to restrict it,” and “also tended to do more to promote racial segregation than to restrict it.”).

17. *Bond v. U.S.*, 131 S. Ct. 2355, 2364 (2011).

gress, and is guided by Madison’s insights into the dual tyrannies of the majority and the minority. He then tentatively concludes that federalism best promotes liberty when national rights protect against majority factionalism in the states (such as moralizing legislation), and when federalism protects against minority factionalism in the federal government (such as monopolizing legislation). While Professor Hills’s theory may or may not explain the current state of federalism and rights doctrine as a descriptive matter, it provides a powerful set of normative arguments—with an impeccable Madisonian pedigree—to clarify the stakes for the continued development of federalism doctrine as a safeguard of liberty.

B. *Where, and How, Federalism Matters*

While there is more work to be done with the theory of federalism, the practice of federalism deserves much more attention than it has received. This is all the more true of federalism as it is practiced outside the misleading dualism of federal and state governments. Nearly two decades ago, Philip Frickey corrected the conventional understanding of dual sovereignty, noting that “although sovereignty created by the United States Constitution is indeed dual, sovereignty within the United States is triadic: American Indian tribes have sovereignty as well.”¹⁸ This Symposium issue covers all three sides of the triangle: state-federal relations, tribal-federal relations, and tribal-state relations. The state stories add a further dimension of local governments, where overlapping jurisdictional conflicts are most concrete.

Some of today’s most heated debates over federalism occur on the ground, literally. Professor Bryan investigates the underexplored relationship between federal and local land use planners.¹⁹ At a time of increasingly vocal calls for state and local control of federal lands, Professor Bryan proposes that federal agencies and local governments “learn both directions” about more collaborative land management decision making. Public land use management presents challenging federalism questions that recently have generated more heat than light. It is easy to see why, given the close links between sovereignty and territoriality. There are few more concrete manifestations of federal power than its control over and around federal lands, where “Congress exercises the powers both of a proprietor and of a legislature”²⁰ Yet a federal role in land use planning also raises recur-

18. Philip P. Frickey, *Domesticating Federal Indian Law*, 81 Minn. L. Rev. 31, 31 (1996).

19. Michelle Bryan, *Learning Both Directions: How Better Federal-Local Land Use Collaboration Can Quiet the Call for Federal Lands Transfers*, 76 Mont. L. Rev. 147 (2015).

20. *Kleppe v. N.M.*, 426 U.S. 529, 540 (1976).

ring questions about the limits of federal power in areas of traditional state concern such as land use regulation.²¹

In a recent planning process for the C. M. Russell Wildlife Refuge, a place comprising more than a million acres of federal land sited along the Missouri River in North Central Montana amidst more than a dozen federal, state, and local jurisdictions, Professor Bryan finds missteps on both sides of the federal–local fence. They range from tone-deaf federal agents who neglect to find a seat at the table for the people who must live with the federal decisions, to quixotic local officeholders who try through county resolutions to resurrect issues decided by the Supreme Court a century²² or two²³ ago. Her collaborative response embraces the territoriality of these disputes, turning the participants away from political abstractions as players in divisive national debates and toward personal interactions as neighbors on shared Montana landscapes.

Ms. Jackson offers another timely lesson about collaboration on tribal–federal negotiations in the notoriously complicated area of tribal criminal jurisdiction.²⁴ There are many policy areas in which federalism tolerates vast and occasionally arbitrary variation among jurisdictions, even in areas with high stakes for life, liberty, and property like criminal law and sentencing.²⁵ As Ms. Jackson explains, however, such variation may become intolerable when the jurisdictions involved overlap, and the criminal laws at issue protect the same class of victims in Indian Country against domestic violence at the hands of two different classes of perpetrators. At this late point in tribal–federal relations, it would be difficult to characterize these criminal jurisdictional variations on reservations as reflecting any coherent

21. Compare *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 284–285 (1981) (reversing a district court's opinion that the Surface Mining Control and Reclamation Act of 1997 “contravenes the Tenth Amendment because it interferes with the States’ ‘traditional governmental function’ of regulating land use”) with *Solid Waste Agency of N. Cook Co. v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173 (2001) (rejecting an agency interpretation of the Clean Water Act where it would “permit encroachment upon a traditional state power” of land use regulation).

22. See *Camfield v. U.S.*, 167 U.S. 518, 525–526 (1897) (“The general government doubtless has a power over its own property analogous to the police power of the several states A different rule would place the public domain of the United States completely at the mercy of state legislation.”).

23. See *M’Culloch v. Md.*, 17 U.S. 316, 429 (1819) (“The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not. Those powers are not given by the people of a single state. They are given by the people of the United States, to a government whose laws, made in pursuance of the constitution, are declared to be supreme. Consequently, the people of a single state cannot confer a sovereignty which will extend over them.”).

24. Danna R. Jackson, *Cooperative (and Uncooperative) Federalism at Tribal, State, and Local Levels: A Case for Cooperative Charging Decisions in Indian Country*, 76 Mont. L. Rev. 127 (2015).

25. See Robert A. Mikos, *Indemnification as an Alternative to Interposition*, 76 Mont. L. Rev. 57, 59–68 (2015) (explaining how state variations in criminal law and procedure depart from the uniformity of federal criminal laws, but better express the policy preferences of each state jurisdiction).

set of federalism values, whether framed as liberty, accountability, autonomy, or experimentation.²⁶ In the sphere of Indian law, as Philip Frickey put it: “‘Our Federalism’ came about through our colonialism.”²⁷ Thus developed through a long history of Congressional, judicial, and executive (including military) interactions with Indian nations, “[f]ederal Indian law is . . . rooted in the fundamental contradiction between the historical fact and continuing realities of colonization, on the one hand, and the constitutional themes of limited government, democracy, inclusion, and fairness.”²⁸

Congress recently resolved one contradiction into slightly more coherence with the restoration of tribal jurisdiction over domestic violence crimes in the Violence Against Women Reauthorization Act of 2013.²⁹ With dual overlapping criminal jurisdiction over a critical set of cases, coordination between federal and tribal prosecutors is essential to the Act’s efficacy. The United States Attorney’s Office for the District of Montana has a plan to communicate with tribal officials and assess relevant law enforcement resources; though as Ms. Jackson’s title contemplates, it remains to be seen whether the relationship between these two sovereigns will model cooperative or uncooperative federalism. Notwithstanding this opportunity for cooperation among the federal and tribal legislative and executive branches, the Supreme Court may also render its own judgment for or against this new federalism.³⁰

In contrast to these collaborative approaches to federalism, Professor Fletcher documents discord, albeit a constructive form of discord, in the fraught triangle of relationships among Indian nations and the federal government and the states.³¹ Indian tribes are “domestic dependent nations”³² with distinct constitutional status that rely on the United States as trustee, but also reserve from the federal government their pre-constitutional “inher-

26. See Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 Mont. L. Rev. 97, 123–124 (2015) (listing among “the well-established values of federalism: (1) checks and balances against actual tyranny; (2) democratic participation and accountability; (3) local autonomy; and (4) problem-solving capacity.”).

27. Frickey, *supra* n. 18, at 31 (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

28. Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 384 (1993).

29. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013) (codified in scattered sections of the U.S. Code).

30. *Cf. Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552, 2565 (2013) (Thomas, J., concurring) (arguing that regulation of “domestic relations,” a traditional area of state concern, is beyond the scope of the Indian Commerce Clause); see also *U.S. v. Morrison*, 529 U.S. 598, 617 (2000) (partially invalidating the Violence Against Women Act of 1994, and “reject[ing] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct’s aggregate effect on interstate commerce.”).

31. Fletcher, *supra* n. 26.

32. *Cherokee Nation v. Ga.*, 30 U.S. 1, 17 (1831).

ent sovereign authority over their members and territories.”³³ States also are separate sovereigns that preceded the Constitution and rely on the United States government for their “common Defence” and “general Welfare,”³⁴ but also reserve powers over “all the objects, which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the State.”³⁵ Despite these similarities between tribes and states, and their parallel struggles to negotiate spheres of sovereignty with respect to the federal government, for centuries they have opposed each other in fundamental and sometimes tragic jurisdictional conflicts.³⁶

Professor Fletcher considers some of these more recent conflicts to discover what states, long assumed to be the “deadliest enemies” of Indian nations, might learn about federalism from peoples who “lived through federal tyranny of a kind contemporary Americans would not believe.”³⁷ Reorienting the Indian-federal-state triangle, he describes how tribal disruption through the assertion of historically just but contemporarily disruptive federal legal claims can sometimes succeed in vindicating Indian sovereign interests against states, or at least facilitate fairer negotiations over those interests with states. The tribal disruption strategy resembles what Jessica Bulman-Pozen and Heather Gerken call “uncooperative federalism,” the way states resist federal power from within by leveraging interdependence in policy implementation, rather than by delineating bright lines between sovereign spheres.³⁸ Treaties and the Tenth Amendment recognize that Indian tribes and states, respectively, are formally sovereign in the constitutional order, yet due to a variety of centripetal forces both are functionally dependent on the central government.³⁹ Professor Fletcher’s disruption the-

33. *Okl. Tax Comm’n v. Citizen Band of Potawatomie Tribe*, 498 U.S. 505, 509 (1991).

34. U.S. Const. preamble; U.S. Const. art. I, § 8 (“The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States”).

35. James Madison, *The Federalist No. 45*, in *The Federalist*, *supra* n. 15, at 313.

36. Chief Justice John Marshall put the conflict starkly in *Cherokee Nation*, 30 U.S. at 15 (“[t]his bill is brought by the Cherokee nation, praying an injunction to restrain the state of Georgia from the execution of certain laws of that state, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the nation which have been assured to them by the United States in solemn treaties repeatedly made and still in force.”).

37. Fletcher, *supra* n. 26, at 125.

38. Jessica Bulman-Pozen & Heather Gerken, *Uncooperative Federalism*, 118 Yale L.J. 1256, 1258–1259 (2009).

39. As Professor Fletcher notes, some commentators point to the Sixteenth Amendment’s constitutional confirmation of the federal income tax, and the resulting increase in federal spending power with strings attached, as a leading force for centralization. The Supreme Court recently observed the same. *See NFIB*, 132 S. Ct. at 2659 (“The formidable [conditional spending] power, if not checked in any way, would present a grave threat to the system of federalism created by our Constitution.”). Professor Moncrieff and Mr. Dinerstein observe in this volume, “The national government has used its expanding spending power to touch every arena of modern law and policy, and its money comes with strings

ory, like uncooperative federalism, plays an increasingly important role for such second-best sovereigns as tribes and states.

C. *What Are the States' Next Moves?*

While there can be value in uniformity of criminal law within a single territory, the expansive reach of federal crimes nationally denies states opportunities to permit conduct in line with state policies (such as marijuana use), to provide enhanced criminal procedural protections consistent with more responsive state constitutions and laws (such as rights of privacy), and to punish crimes less harshly according to local values (such as abolition of the death penalty). A notable example of these concerns in Montana is *United States v. Rothacher*.⁴⁰ In that case, federal prosecutors charged the defendant as a felon in possession of firearms “even though,” according to the district court, the state had “seemingly dealt with the enormity of the crime,” including a probation violation based on the same possession of firearms.⁴¹ The federal district court explained, “Were the decision mine to make on first impression, I would dismiss the case because it is hard to make the Interstate Commerce Clause nexus in a principled way.”⁴² Conceding that existing precedent foreclosed such a resolution, the court still noted “the details of Rothacher’s dual prosecution, especially the general federalization of criminal law has structural appeal” on equitable grounds.⁴³ “[W]hat is the federal interest in this prosecution,” the court concluded, “other than one more statistic?”⁴⁴

Professor Mikos catalogs the harm done to federalism values by this vast federalization of criminal law.⁴⁵ In response to what he, and even some federal judges, consider federal overreach in criminal law, Professor Mikos proposes a novel form of what might be called disruption. Instead of futile attempts to nullify federal criminal law, Professor Mikos suggests states indemnify federal criminal defendants. He concedes the limitations of indemnification, but his proposal offers an important clarification of the fed-

attached.” Abigail R. Moncrieff & Jonathan Dinerstein, Student Author, *Will Uncooperative Federalism Survive NFIB?* 76 Mont. L. Rev. 75, 75 (2015). This is especially true of federal control over tribal governments. While federal funding is a substantial share of the average state budget, it accounts for a large majority of the average tribal budget. See Nat’l Cong. of Am. Indians, *A Call to Honor the Promises to Tribal Nations in the Federal Budget* (April 19, 2013) (available at <http://perma.cc/2MBY-36KG>) (comparing the 24.9% of state and local government revenue from federal support to the 61.2% of reservation government revenue from federal support).

40. *U.S. v. Rothacher*, 442 F. Supp. 2d 999 (D. Mont. 2006).

41. *Id.* at 1000.

42. *Id.*

43. *Id.* at 999 n. 5.

44. *Id.*

45. Mikos, *supra* n. 25.

eralism stakes involved for both defendants and the states who “make[] disingenuous attacks on federal law” and could benefit from “some skin in the game.”⁴⁶ Like his other work on novel forms of state resistance to federal criminal law, his proposal informs state-level discussions of the substantial costs of federalization and the real (although limited) benefits of possible state responses.⁴⁷

While the federalization of criminal law continues largely unchallenged by the courts,⁴⁸ the Patient Protection and Affordable Care Act of 2010 met a different fate. Professor Moncrieff and Mr. Dinerstein survey the federalism landscape after the Supreme Court limited the federal government’s conditional spending power in *National Federation of Independent Business v. Sebelius (NFIB)*.⁴⁹ Writing for a three-Justice plurality and joined in the judgment by four dissenters, Chief Justice Roberts held “Congress may offer the States grants and require the States to comply with accompanying conditions, but the States must have a genuine choice whether to accept the offer.”⁵⁰ This gives the states what Professor Moncrieff and Mr. Dinerstein call “an unusually large bargaining chip in uncooperative federalism negotiations,”⁵¹ while depriving “national bureaucrats . . . a significant amount of their bargaining power in federal administrative negotiations.”⁵²

46. *Id.*

47. See Anthony Johnstone, *Commandeering Information (and Informing the Commandeered)*, 161 U. Pa. L. Rev. Online 205 (2013) (responding to Robert A. Mikos, *Can the States Keep Secrets from the Federal Government?*, 161 U. Pa. L. Rev. 103 (2012)).

48. Compare *U.S. v. Lopez*, 514 U.S. 549, 561 (1995) (holding unconstitutional, as exceeding the reach of the interstate commerce power, the Gun Free School Zones Act of 1990 due in part to the lack of a “jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce”) with *U.S. v. Dorsey*, 418 F.3d 1038, 1045–1046 (9th Cir. 2005) (holding constitutional, as within the reach of the interstate commerce power, the Gun Free School Zones Act as amended in 1996 because “the addition of the jurisdictional element, which requires that the firearm ‘has moved in or [] otherwise affects interstate or foreign commerce’ repairs the constitutional shortfalls announced in *Lopez*”).

49. Moncrieff & Dinerstein, *supra* n. 39.

50. *NFIB*, 132 S. Ct. at 2608 (plurality).

51. Moncrieff & Dinerstein, *supra* n. 39, at 88.

52. *Id.* at 59 (Professor Moncrieff and Mr. Dinerstein understate the importance of fiscal constraints when they call the Court’s distinction between the commerce and spending powers “nonsensical.” Even with relatively lax constraints on the federal fiscal budget due to deficit spending, the exercise of the spending power exacts a definite cost on the federal government relative to direct regulation. They acknowledge this when they describe the federal move from conditional spending to conditional preemption, when agencies “will find the resources they need to implement national programs (or will decrease national regulation to conserve resources).” *Id.* at 93. The *NFIB* dissent elaborates on these constraints, noting “[t]he principal practical obstacle that prevents Congress from using the tax-and-spend power to assume all the general-welfare responsibilities traditionally exercised by the States is the sheer impossibility of managing a Federal Government large enough to administer such a system.” *NFIB*, 132 S. Ct. at 2643 (Scalia, Kennedy, Thomas & Alito, JJ., dissenting). In the dissent’s discussion of the taxing power, they also note the related constraint that spending must (eventually) be supported by taxes, which “have never been popular.” *Id.* at 2655. It is an accurate observation, at least in the

Yet the confluence of this ruling with two “sleeper” cases suggesting enforceability of spending conditions against the federal government under the Administrative Procedure Act,⁵³ and barring the enforceability, absent clear statutory provisions, of spending conditions against the states,⁵⁴ may challenge federal agencies administering conditional spending programs on two fronts. If the federal agency is too flexible when negotiating Congressional spending conditions with states, it may face administrative litigation from private beneficiaries of those conditions, but if the federal agency is too rigid in its enforcement of Congressional spending conditions on the private beneficiaries’ behalf, it may face constitutional litigation from the states. The number of federal programs that might need to navigate this dilemma is uncertain since administrative challenges to spending conditions are untested and the Supreme Court has not “‘fix[ed] the outermost line’ where persuasion gives way to coercion” in conditional spending.⁵⁵ Between the dilemma’s horns, Professor Moncrieff and Mr. Dinerstein argue *NFIB* gives Congress a powerful new incentive to substitute its general conditional spending power under the General Welfare clause with its nearly-as-broad conditional preemption power under the Commerce and Supremacy clauses. Given how federalism values motivated the Court in *NFIB*, this is a perverse result in which “[t]he New Federalism era . . . creates an incentive for the national government to flex its own muscles more, not less.”⁵⁶

III. A STATE IS A “THEY,” NOT AN “IT.”

The contributors to this issue offer multiple perspectives on federalism as it operates from the bottom up. Interactions of the federal and state gov-

contemporary political environment, that “legislators must weigh the need for the tax against the terrible price they might pay at their next election” *Id.* at 2655.).

53. *Gonzaga U. v. Doe*, 536 U.S. 273, 290 (2002) (holding “if Congress wishes to create new rights enforceable under § 1983, it must do so in clear and unambiguous terms—no less and no more than what is required for Congress to create new rights enforceable under an implied private right of action.”).

54. *Douglas v. Indep. Living Ctr. of S. Cal.*, 132 S. Ct. 1204, 1210 (2012) (suggesting “the [Administrative Procedure Act] would likely permit respondents to obtain an authoritative judicial determination of the merits of their legal claim” that the federal agency’s approval of state implementation violates federal spending conditions).

55. *NFIB*, 132 S. Ct. at 2606 (plurality). In a recent amicus brief on behalf of several professors and advocacy groups, Professor Moncrieff attempts to clarify the anti-coercion line in a pending case that once again considers the Affordable Care Act. See Amici Curiae Br. of the Jewish Alliance for Law & Social Action et al., *King v. Burwell*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/14-114_amicus_resp_jalsa.authcheckdam.pdf at i–ii (No. 14-114, 135 S. Ct. 475 (2015)) (arguing a reading of insurance exchange tax subsidy provisions that threatens states with “Establish an exchange, or the federal government will destroy your individual insurance market . . . plausibly violates both the principle of equal sovereignty and the anti-coercion constraint”).

56. Moncrieff & Dinerstein, *supra* n. 39, at 96.

ernment in their overlapping jurisdictions create a dynamic Robert Schapiro calls “polyphonic federalism.”⁵⁷ Extended to the local level, where communities may enjoy even more solidarity and engage in even more effective dissent than at the state level, this dynamic becomes what Heather Gerken calls “federalism all the way down.”⁵⁸ Recognition of these interactions among the federal government, states, and localities spurred a more sophisticated analysis of cooperative federalism, uncooperative federalism, and the earlier convention of competitive federalism. These broader accounts and the more specific accounts presented in this issue will play a central role in the development of federalism’s future. Yet they play out mainly along a vertical axis, from cities to county seats to state capitols and tribal headquarters to Washington, D.C. and back, each level portrayed atomically as an indivisible locality, state, tribe, or (less often) a monolithic federal government. The model has the virtue of simplicity, but it is incomplete.

A major underappreciated distinction between the federal government and the states (and to a lesser extent localities) is the diversity in state political structures.⁵⁹ State legislatures serve shorter terms and are arguably more responsive to their electorates than Congress.⁶⁰ State executives are divided rather than unitary like the Presidency.⁶¹ Most state courts are elected.⁶² These structural distinctions can lead to substantive differences in how states choose to negotiate or resist federal policies. These structural distinctions also complicate, and perhaps undermine, some of the “accountability” rationales in federalism doctrine. Examples arise in the states’ varied responses to the Supreme Court’s partial invalidation of the Medicaid Expansion in *NFIB*.

A. Accountability and Choice in *NFIB*

Relatively early in the history of our federalism, in *M’Culloch v. Maryland*,⁶³ Chief Justice John Marshall provided a lasting reminder of the

57. Robert A. Schapiro, *Polyphonic Federalism* (U. Chi. Press 2009).

58. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 Harv. L. Rev. 4 (2010).

59. *But see* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L. J. 2446 (2006) (contrasting the state model of the divided executive with the federal model of the unitary executive).

60. *See e.g.*, Mont. Const. art. V, § 3 (“A member of the house of representatives shall be elected for a term of two years and a member of the senate for a term of four years each to begin on a date provided by law.”).

61. *See e.g., id.* at art. VI, § 1 (“The executive branch includes a governor, lieutenant governor, secretary of state, attorney general, superintendent of public instruction, and auditor . . . Each holds office for a term of four years which begins on the first Monday of January next succeeding election, and until a successor is elected and qualified.”).

62. *See e.g., id.* at art. VII, § 8 (“Supreme court justices and district court judges shall be elected by the qualified electors as provided by law.”).

63. 17 U.S. 316.

multiple sources of popular sovereignty in a federal system. When the people act at the federal level, “they act in their states,” but “the measures they adopt do not, on that account, cease to be the measures of the people themselves.”⁶⁴ Chief Justice Marshall spoke of the constitutional ratification process, but he could just as well be describing how the people act in their states, and even through the mediation of state laws,⁶⁵ to choose Congressional delegations⁶⁶ and presidential electors.⁶⁷ Similarly, the people express their sovereignty through several distinct channels at the state level by electing and empowering multiple state officials with competing duties to legislate, execute, and adjudicate state policies. In federalism doctrine the usual attention is on the vertical separation of the people’s “two political capacities, one state and one federal, each protected from incursion by the other.”⁶⁸ Federalism doctrine also should attend to the horizontal separation of the people’s political capacities within the states.

The Court’s lack of attention to the states’ distinct political structures weakens conventional rationales for certain federalism-promoting rules. According to the Court’s federalism doctrine, for example, the genius of dual sovereignty also presents a danger of misplaced accountability. In order for citizens to exercise their two political capacities properly, they must know which government is acting on their behalf.⁶⁹ When both government jurisdictions overlap, as they often do in the post-New Deal constitutional regime, bright lines such as the anti-commandeering rule need to be drawn to preserve accountability. Maintaining accountability within these separate spheres is a central theme of *New York v. United States*: “[W]here the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral

64. *Id.* at 403.

65. See U.S. Const. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . .”).

66. See *id.* at art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States . . .”); U.S. Const. amend. XVII (“The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years . . .”).

67. See *id.* at art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress . . .”).

68. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring) (“Federalism was our Nation’s own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”).

69. Professor Somin shows this is a dubious assumption given political ignorance, but it is an assumption that motivates the Court’s federalism doctrine nonetheless. Somin, *supra* n. 9, at 38–39.

ramifications of their decision.”⁷⁰ The translation of this accountability principle from an anti-commandeering rule to a more general anti-coercion rule supported the crucial move in *NFIB* to invalidate the Medicaid expansion. “Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system . . . when the State has no choice, the Federal Government can achieve its objectives without accountability.”⁷¹ The solution to the accountability problem is to give states a choice: “States may now choose to reject the expansion; that is the whole point.”⁷²

B. Choice and Accountability after NFIB

Now that the states have a choice to expand Medicaid, what did they choose? Did their choices vindicate the accountability principle? The Court considered the possibilities. “Some States may indeed decline to participate, either because they are unsure they will be able to afford their share of the new funding obligations, or because they are unwilling to commit the administrative resources necessary to support the expansion.”⁷³ Notably, the Court did not consider the justification commonly offered that states are unsure the *federal government* will be able to afford *its* share of the new funding obligations. “Other States, however, may voluntarily sign up, finding the idea of expanding Medicaid coverage attractive, particularly given the level of federal funding the Act offers at the outset.”⁷⁴ What is striking about this discussion, and the Court’s federalism rhetoric more generally, is the monolithic “state” that is the subject of its analysis. A “state” sued to vindicate its sovereignty, a “state” won a choice to opt out of the Medicaid expansion, a “state” either did or did not do so, and (thanks to the Court) a “state” was accountable to the people for its choice. Despite the shorthand commonly employed in federalism arguments, within a “state” these are all different political actors, independently elected and accountable to the state’s citizens in ways the Court does not consider.

70. 505 U.S. at 169. This accountability concern can be overstated in the anti-commandeering context, as demonstrated by *Printz v. U.S.*, 521 U.S. 898 (1997). Sheriff Jay Printz, himself an elected official, did not need the Supreme Court to tell the gun buyers of his Ravalli County, Montana, who were behind the Brady Act’s background checks. In 1994, the year after the Brady Act’s passage, Ravalli County’s electorate voted by more than a 2-to-1 margin for Sen. Conrad Burns, who opposed the Brady Act. See Mont. Sec. of St., *1994 Statewide General Canvass* 3, <http://perma.cc/5HL4-2UYV> (<http://sos.mt.gov/elections/archives/1990s/1994/94GEN/1994gen.pdf>) (updated Dec. 10, 1999). In 1996, President Bill Clinton, who signed the Brady Act, went on to win only 31% of the vote in Ravalli County. See Mont. Sec. of St., *1996 Statewide General Canvass* 3, <http://perma.cc/8KEY-LJBZ> (<http://sos.mt.gov/elections/archives/1990s/1996/96GEN/1996gen.pdf>) (updated Dec. 10, 1999).

71. *NFIB*, 132 S. Ct. at 2602–2603.

72. *Id.* at 2608.

73. *Id.*

74. *Id.*

At times some justices are more sensitive to the various political offices and interests that each lay claim to the title of “state.” In *New York*, where the (separately elected) state Attorney General sued notwithstanding the fact “[a] Deputy Commissioner of the State’s Energy Office testified in favor of the Act” and “Senator Moynihan of New York spoke in support of the Act on the floor of the Senate,” the Court held a “departure from the constitutional plan cannot be ratified by the ‘consent’ of state officials.”⁷⁵ In *United States v. Comstock*,⁷⁶ 29 states appeared as amici to support the federal civil commitment law at issue, which not coincidentally assumed the financial burden of civil commitment from the states.⁷⁷ In dissent, Justice Thomas reiterated that federal power “does not expand merely to suit the States’ policy preferences, or to allow State officials to avoid difficult choices regarding the allocation of state funds.”⁷⁸

In both of these cases the analysis would have benefitted from an acknowledgement that it was not simply “state officials” who consented due to their policy preferences, but a polyphony of separately elected state executive and legislative officials whose views of “the [s]tates’ policy preferences” might just work at cross-purposes.⁷⁹ The Court’s neglect of the choices the states themselves have made in structuring their governments (that is, the people speaking through the state offices they have constituted and filled through elections) is at least disrespectful, and at most a self-defeating form of dual sovereignty that refuses to hear the voices of the state through which its own citizens chose to speak on particular issues.

Take, for example, the Medicaid expansion in the aftermath of the Supreme Court’s *NFIB* decision. Scholars, including the contributors to this issue, debate which mode of federalism is or ought to be dominant in our constitutional system. Heather Gerken helpfully classifies them: “the de jure autonomy associated with the sovereignty account; the de facto autonomy associated with process federalism; and the power of the servant, which is the best way to conceptualize state power in cooperative federal regimes.”⁸⁰ In the legal and political debate over Medicaid expansion, all three modes play out in every state. On the campaign trail, process (or political safeguards) federalism dominates as federal and state officials position themselves for or against the federal policy. This positioning includes both

75. *N.Y.*, 505 U.S. at 181–182.

76. *U.S. v. Comstock*, 560 U.S. 126 (2010).

77. *Id.* at 179 (Thomas, J., dissenting).

78. *Id.* (Thomas, J., dissenting).

79. *But see N.Y.*, 505 U.S. at 200 (White, J., dissenting in part) (noting “to say, as the Court does, that the incursion on state sovereignty ‘cannot be ratified by the “consent” of state officials,’ is flatly wrong,” and arguing that the State should be estopped from challenging a federal law from which it derived substantial advantages).

80. Heather K. Gerken, *Our Federalism(s)*, 53 *Wm. & Mary L. Rev.* 1549, 1552 (2012).

Attorneys General (because they are empowered to challenge the federal policy in court) and state legislators and Governors (because they might be empowered to reject the federal policy in the statehouse). At the courthouse, dual sovereignty claims dominate as the challenging states ask the Supreme Court to police the federal government's trespass beyond its delegated powers into the state sphere of reserved powers. In the wake of the split decision on the Affordable Care Act, states revert (with the Court's blessing) to a cooperative federalism model of negotiation and implementation of federal policy on the states' terms.

The diverse configurations of policy choices within states on the issue make it difficult to discern a "state's" choice in anything more than a formal sense. Take the vast differences in political dynamics that frame states' choices whether or not to expand Medicaid in the aftermath of *NFIB*, summarized in Figure 1. Seventeen states are "winners": their executive⁸¹ sued for the right to avoid the Medicaid expansion, and their legislature opted out; still, three of those states elected Congressional delegations that supported the Affordable Care Act in one or both houses. Eighteen states were "losers": their executive did not sue, and their legislature opted in; of course, these states were losers only in the litigation, because only one of their Congressional delegations opposed the Affordable Care Act, and prob-

81. Reinforcing the status of each state as a "they" not an "it," most states acted through their Attorney General, typically the independently elected constitutional officer with "a significant degree of autonomy" and "wide discretion in making the determination as to the public interest" in representing the State. See *State of Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 268-269 (5th Cir. 1976) (recounting the broad common law powers of the state attorney general). Iowa, Mississippi, and Nevada were represented by their Governors despite the Attorneys' General independent legal status and duties under state law. See Iowa Const. art. V, § 12; Miss. Const. art. 6, § 173; Nev. Const. art. 5, § 19. Wyoming's Governor also appeared in the case on behalf of his state instead of its Attorney General, who is appointed by the Governor and serves at his pleasure. See Wyo. Stat. Ann. § 9-1-601 (2015); Wyo. Stat. Ann. § 9-1-202 (2015). The Supreme Court took no note of this distinction. See *NFIB*, 132 S. Ct. at 2576 (listing each state representative who appeared in the case). The only mention of state Attorney General standing in the *Health Care Cases* arose in Florida's challenge to the individual mandate, when the district court held "[t]he States of Idaho and Utah, through plaintiff Attorneys General Lawrence G. Wasden and Mark L. Shurtleff, have standing to prosecute this case based on statutes duly passed by their legislatures, and signed into law by their Governors." *Florida ex rel. Bondi v. U.S. Dept. of Health & Human Servs.*, 780 F. Supp. 2d 1256, 1272 (N.D. Fla.). Therefore it was unnecessary to consider the standing of other state plaintiffs (including those represented by their governors). See *id.*; but see *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253 (4th Cir. 2011) (holding that not even a state Attorney General had standing to challenge the individual mandate). On the other side of the case, Iowa's Attorney General actually represented Iowa (already purportedly a party on the opposing side) in an amicus brief supporting Medicaid expansion, in which Washington's governor appeared instead of that state's Attorney General. See Amici Curiae Br. of the States of Oregon et al., *State of Fla. v. Dept. Health & Human Servs.*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-400_respondents_amcu_states.authcheckdam.pdf (Nos. 11-393, 11-398, 11-400, 132 S. Ct. 2566 (2012)). Notably the state Attorneys General recognized the state separation of powers issue and listed Washington's Governor as appearing in her official capacity as Governor, but not a representative capacity as the state itself. See *id.* at 1.

2015

THE FUTURE OF FEDERALISM

17

ably would not have dreamt of a result in which their states' Medicaid expansion was paid in part with tax dollars from other states that opted out. Ten states were "choosers": their executive sued, and their legislature opted in anyway; these states also enjoyed a sweet deal, spending their co-plaintiffs' tax dollars on the Medicaid expansion they once united to oppose, even though nearly every one of these states supported the Affordable Care Act in at least one house of Congress. Finally there were five states, including Montana, which sat out of both the challenge and (so far) the Medicaid expansion; their inactivity is misleading, however, since in these states the politics of the Affordable Care Act played a significant role in campaigns for state offices.⁸²

82. See, e.g., Erik C. Anderson, *Bucy, Fox trade jabs, ads in high-stakes AG race*, The Madisonian <http://perma.cc/Z2SF-MNTD> (<http://www.madisoniannews.com/bucy-fox-trade-jabs-ads-in-high-stakes-ag-race/>) (Oct. 11, 2012) (Montana Attorney General candidate Pam Bucy "blasted [candidate Tim] Fox's focus on the federal health care law, saying it has overshadowed discussion of the office's principal duties," while Fox "defends his focus on Obamacare" and would have joined the state Attorneys General in the challenge to the Act); Andy Sher, *GOP wants AG hopefuls quizzed on ACA support*, Chattanooga Times Free Press <http://perma.cc/PKG9-F65T> (<http://www.timesfreepress.com/news/local/story/2014/sep/07/gop-wants-ag-hopefuls-quizzed-on-aca-support/266513/>) (Sept. 7, 2014) (noting "conservative criticism of current [Tennessee] Attorney General Bob Cooper, a Democrat and Chattanooga native who did not join the anti-Obamacare lawsuit filed by mostly Republican state attorneys general.").

FIGURE 1: THE VARIED VOICES OF THE STATES ON MEDICAID EXPANSION⁸³

	Legislature Does Not Support (22)	Legislature Supports (28)
Executive Challenges (28)	<p>“WINNERS” (18) Delegation Votes For Wisconsin Delegation Splits Maine Virginia Delegation Votes Against Alabama Alaska* Florida* Georgia Idaho Kansas Louisiana <i>Mississippi</i> Nebraska Oklahoma South Carolina South Dakota Texas Utah* <i>Wyoming</i></p>	<p>“CHOOSERS” (10) Delegation Votes For Colorado <i>Iowa</i> Michigan <i>Nevada</i> North Dakota Pennsylvania <u>Washington</u> Delegation Splits Arizona Ohio Indiana</p>
Executive Does Not Challenge (22)	<p>No Action (4) Delegation Splits Montana* Delegation Votes Against Missouri* North Carolina Tennessee*</p>	<p>“LOSERS” (18) Delegation Votes For <u>California</u> <u>Connecticut</u> <u>Hawaii</u> <u>Illinois</u> <u>Maryland</u> <u>Massachusetts</u> Minnesota New Hampshire New Jersey <u>New Mexico</u> <u>New York</u> <u>Oregon</u> Rhode Island <u>Vermont</u> West Virginia Delegation Splits Arkansas <u>Delaware</u> Delegation Votes Against Kentucky</p>

Across this wide variety of contradictory choices within each state, what kind of accountability could possibly emerge? Is there more accountability in the “chooser” states whose Attorneys General led the charge against the Affordable Care Act, after their Congressional delegations voted for the Act and before their statehouses gladly signed up under the Act once the constitutional dust settled? Or is there more accountability in the “loser” states whose Congressional delegations, Attorneys General, and statehouses all supported the Act even before *NFIB* brought them a windfall of subsidies from the opt-out states’ tax dollars. Can the “winner” states, those that have stood on principled opposition to the Act from the Capitol to the courthouse to the statehouse, and now are seeing their tax dollars go to their political and legal opponent states, really be considered winners at all? What about the apparently passive states that neither challenged the Act nor implemented its Medicaid expansion, states that like others were buffeted by aggressive campaigns that sought to hold state attorneys general, legislators, and governors “accountable” in state elections for what was originally a vote by their Congressional delegations for or against the Act? The Court’s decision in *NFIB* may be a victory for an anti-coercion rule of federalism, but any claim of another victory for accountability (the principle that supports the anti-coercion rule) is incoherent. Instead, the constitutional controversy over the Affordable Care Act presented one opportunity after another for state and federal officials to pass the buck back and forth from branch to branch.⁸⁴

83. “Delegation Votes For” (or “Against”) includes state delegations in which a majority of members of both the Senate and House delegations voted yea (or nay), or in cases of a tie in one delegation, a majority of members of the other delegation voted yea (or nay) on H.R. 3590 (111th Cong.). Delegation splits include state delegations in which a majority of members in the Senate and House delegations voted differently, or both delegations tied. “Executive Challenges” (and “Does Not Challenge”) includes those states that did (or did not) appear as petitioners challenging the Act in *NFIB*. See *NFIB*, 132 S. Ct. at 2576 (listing each state representative who appeared in the case). *Italics* denote the state’s governor was party to the challenge instead of the state’s attorney general (Wyoming’s attorney general serves at its governor’s pleasure). *Underline* denotes the state filed an *amicus curiae* brief opposing the challenge (every state appeared through its attorney general except Washington, whose governor appeared in her official capacity). See *Amici Curiae Br. of the States of Oregon et al., State of Fla. v. Dept. Health & Human Servs.*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/briefs/11-400_respondents_amcu_states.authcheckdam.pdf (Nos. 11-393, 11-398, 11-400, 132 S. Ct. 2566 (2012)). “Legislature Supports” (or “Does Not Support”) includes those states that have adopted (or not adopted as of March 6, 2015) the Medicaid Expansion. See Kaiser Family Foundation, *Status of State Action on the Medicaid Expansion Decision*, <http://perma.cc/8KVP-X8UN> (<http://kff.org/health-reform/state-indicator/state-activity-around-expanding-medicaid-under-the-affordable-care-act/>) (accessed Mar. 15, 2015). An asterisk (*) denotes states whose governors have proposed Medicaid expansion. See *id.*

84. See Roderick Hills, *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and “Dual Sovereignty” Doesn’t*, 96 Mich. L. Rev. 813, 828 (1998) (“The difficulty with such political accountability arguments is that they overlook the complexity inherent in any system of federalism that always has the potential to confuse voters and thereby undermine political accountability.”).

IV. CONCLUSION

Federalism looks different from the states' and tribes' perspectives. Long before and long after the Supreme Court expounds its view of the states' integrity, dignity, and sovereignty in any particular case,⁸⁵ the states themselves oppose, choose, and cooperate with federal policies from the statehouse all the way down to the county commission. These engagements with federalism arise from complex interactions within the states themselves, according to their own distinct governmental structures that are as much an expression of their sovereignty as anything they might do to resist federal policy. States, like the federal system itself, are polyphonic. It may be difficult for the federal government, including its courts, to discern any true voice of a state. As the contributions to this issue show, states typically do not speak with just one voice. To the contrary, many voices speak for each state. Within the political structures the state has chosen, each of those voices may be authoritative in its own way. Courts and constitutional analysts have much to learn from listening to each of the voices that speak for the states in federalism's continuing conversations.

85. See *e.g.* *Bond*, 131 S. Ct. at 2364.