

TURNING FEDERALISM RIGHT-SIDE UP

THE UPSIDE-DOWN CONSTITUTION. By Michael Greve.¹ Harvard University Press. 2012. 528 pp. Cloth, \$39.95.

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INTRODUCTION

Michael Greve's *The Upside-Down Constitution* is one of the most important works on constitutional federalism in years. It is the best exposition to date of the idea that the American Constitution establishes a federal system primarily devoted to promoting competition between state governments. It is also probably the most comprehensive critique of the traditional view that federalism is really about promoting the interests of state governments. As Greve recognizes, state governments rarely want to compete, often preferring to establish cartels among themselves (pp. 8–9, 189–94).

Much previous scholarship has explored the advantages of interstate competition,³ and the idea that the enforcement of fe-

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3. See, e.g., LARRY RIBSTEIN & ERIN O'HARA, *THE LAW MARKET* (2009), GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX* 173–86 (1980); ALBERT BRETON, *COMPETITIVE GOVERNMENTS* (1996); ALBERT BRETON & ANTHONY SCOTT, *THE DESIGN OF FEDERATIONS* 13–19 (1980); THOMAS DYE, *FEDERALISM: COMPETITION AMONG GOVERNMENTS* (1990); WALLACE E. OATES, *FISCAL FEDERALISM* (1972); James M. Buchanan, *Federalism as an Ideal Political Order and an Objective for Constitutional Reform*, 21 *PUBLIUS* 19 (1995); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 *U. CHI. L. REV.* 1484, 1497–1500 (1987); Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 *J. ECON. LITERATURE* 1120, 1134–37 (1999); Wallace E. Oates & Robert Schwab, *Economic Competition Among Jurisdictions: Efficiency Enhancing or Efficiency Distorting?* 35 *J. PUB. ECON.* 333 (1988); Ilya Somin, *Foot Voting, Political Ignorance, and Constitutional Design*, 28 *SOCIAL PHIL. & POL'Y*

deralism cannot be equated with promoting the interests of state governments.⁴ But Greve's book is by far the best and most comprehensive application of these ideas to constitutional interpretation.

Greve praises the original Constitution for creating an effective system of interstate competition (chs. 2–3) and the nineteenth and early twentieth century Supreme Court for enforcing it (chs. 4–7). But he warns that the system has broken down over the last eighty years, replacing competition with cartels and what he considers to be dysfunctional empowerment of state governments (chs. 8–11). He argues that American federalism has now reached a crisis point from which we must either restore some of its earlier, more competitive, structure, or face a decline similar to those that have beset several other federal systems (pp. 279–80, 380–97).

The post-New Deal “inversion” of priorities, from maintaining interstate competition to fostering cartels and cooperation, is what gives the book its provocative title. To turn the Constitution right side up, Greve contends, we will have to rediscover the virtues of competition.

In Part I, I describe Greve's argument, focusing especially on the ways in which it enhances our understanding of the history of constitutional federalism. Part II addresses a potential internal contradiction in Greve's position. While he emphasizes the need for the judiciary to enforce a competitive regime and recognizes that the federal government often has incentives to promote cartelization (pp. 8–9, 192–93), he endorses a broad interpretation of congressional authority under the Commerce Clause and the Spending Clause which effectively gives Congress a blank check to suppress competition in some of the ways he deplores (pp. 162–65, 250–58, 343–46).

Part III briefly considers a second tension in Greve's analysis. Greve pins his hopes on originalism as the best possible way to restore a competitive federalist Constitution (pp. 394–96),

202 (2011); Barry Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J.L. ECON. & ORG. 1 (1995); Ralph K. Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POL'Y 127 (1982). For an early forerunner of this literature, see F.A. Hayek, *The Economic Conditions of Interstate Federalism*, 5 NEW COMMONWEALTH Q. 131 (1939).

4. See, e.g., John McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89 (2004); Ilya Somin, *Closing the Pandora's Box of Federalism: The Case for Judicial Restriction of Federal Subsidies to State Governments*, 90 GEO. L.J. 461 (2002); Weingast, *supra* note 3.

though he suggests that it should be an originalism that views the Constitution as an integrated whole, rather than narrowly “clause-bound” (p. 393). While he argues that the original Constitution establishes a competitive structure (ch. 3), he also recognizes that the Founders paid little attention to interstate mobility and competition (pp. 56–61). These two positions are not completely irreconcilable. But they are more difficult to square than Greve sometimes allows.

I. A COMPETITIVE CONSTITUTION

A. THE ORIGINAL CONSTITUTION

Greve’s central argument is that “the commitment to competitiveness is hardwired into our Constitution’s structure” (p. 389), indeed that “[t]he United States has the single most pro-competitive constitution in the world” (p. 330). In a fascinating discussion of the original 1787 Constitution, Greve shows how various seemingly disparate provisions came together to force states to compete with each other for people and businesses, and limited their ability to establish anticompetitive trade barriers and otherwise interfere with interstate commerce (ch. 3).

For example, the Privileges and Immunities Clause requires states to treat migrants from other states on par with their own citizens, thereby facilitating interstate mobility (pp. 64, 69).⁵ The Compact Clause forbids states to make compacts among themselves without congressional consent, thereby preventing them from forming anticompetitive cartels (p. 69).⁶ The Commerce Clause, of course, prevents states from setting up trade barriers (p. 64).⁷ Article I, § 10 of the Constitution bars the states from laying imposts and duties on exports and imports, and from establishing duties on tonnage. This prevents states from taxing the commerce of other states, and forces them to engage in tax competition in order to raise revenue (pp. 81–82). Greve effectively explains how many other parts of the original Constitution facilitate “horizontal competition” between state governments, as well (ch. 3). For example, the Contract Clause forbidding state impairment of the obligation of contracts, prevents state governments from reneging on contractual obligations to out-of-staters or authorizing their citizens to do so.

5. U.S. CONST. art. IV, § 4.

6. U.S. CONST. art. I, § 10, cl. 3.

7. U.S. CONST. art. I, § 8, cl. 3.

In addition to enumerating the ways in which various parts of the original Constitution promote competition, he also suggests that the Constitution cannot readily be interpreted as promoting some other, noncompetitive, objective of federalism. Unlike John C. Calhoun and others who saw inherent value in state sovereignty,⁸ Greve contends that the leading Founders viewed states as “mere instruments” (p. 50). This is shown by the willingness of James Madison and Alexander Hamilton to advocate the complete abolition of state governments in the debates over the Constitution, and the desire of the former to establish a federal “negative” over state laws (pp. 45–50, 56–57). He also rejects the idea, commonly used to justify many federal systems outside the United States,⁹ that American federalism can be seen as a way of reconciling opposing ethnic, religious, or political identities by giving minority groups a degree of autonomy at the state level (p. 49).¹⁰

Greve is probably correct to argue that this idea was not much considered by the Founding Fathers. In *Federalist* 2, John Jay even (somewhat inaccurately) claimed that one of the advantages enjoyed by the United States is that Americans are “one united people; a people descended from the same ancestors, speaking the same language, [and] professing the same religion.”¹¹

More controversially, Greve rejects the traditional view that one major purpose of American federalism is to enable the states to resist federal usurpations and threats to liberty (pp. 52–53). He dismisses the significance of Madison’s famous statement in *Federalist* 51 that the existence of rival state and federal governments creates a “double security” for “the rights of the people” because the different levels of government will “control

8. See, e.g., John C. Calhoun, *A Discourse on the Constitution and Government of the United States*, in CALHOUN, UNION AND LIBERTY: THE POLITICAL PHILOSOPHY OF JOHN C. CALHOUN 194–96 (Ross M. Lence ed., Liberty Fund Books 1990) (describing the Constitution as a creation of states that retain inherent rights of “sovereignty”).

9. See, e.g., DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 601–28 (rev. ed., 2001) (describing ways in which federal systems can be used to alleviate ethnic conflict).

10. For a recent argument that this theory has greater applicability to the American case than Greve and others suppose, see Heather Gerken, *A New Progressive Federalism*, *DEMOCRACY* (Spring 2012), available at http://www.democracyjournal.org/pdf/24/a_new_progressive_federalism.pdf. In a forthcoming article, I contend that American federalism has historically benefitted minority groups more and harmed them less than longstanding conventional wisdom supposes. See Ilya Somin, *Foot Voting, Federalism and Political Freedom*, *NOMOS* (forthcoming) (Symposium on Federalism and Subsidiarity).

11. THE FEDERALIST NO. 2 (John Jay).

each other,” even as separation of powers within each level ensures that “each will be controled [sic] by itself.”¹² Greve is skeptical that this idea was really significant to Madison’s thinking because, elsewhere in the *Federalist*, Madison details a variety of abuses by state governments, which indicates his belief that they were “out of control” and a threat to liberty themselves (p. 53). Greve argues that Madison’s vision implies that “state resistance to federal assertions of power will typically materialize in defense of factional schemes” rather than “the rights of the people” (p. 53). However, there is no necessary inconsistency in simultaneously believing that state governments are threats to liberty in their own right and that they will nonetheless act to constrain federal threats to liberty. The latter could threaten the prerogatives of the states themselves or the “factional schemes” of the state government’s political supporters. As Madison famously suggested in *Federalist* 51,¹³ state governments might defend liberty against federal encroachment out of self-interest rather than high-minded principle.

Greve is probably wrong to suggest that competition is the near-exclusive purpose of American federalism.¹⁴ But he makes a strong case that the original Constitution is at least compatible with a competitive vision, and promotes it in many ways.

B. JUDICIAL ENFORCEMENT OF COMPETITIVE FEDERALISM IN THE NINETEENTH CENTURY

In one of the strongest and most original parts of the book, Greve gives a fascinating discussion of how the Constitution’s competitive structure was promoted and enforced by the federal judiciary from the early republic through the early twentieth century.

Interestingly, Greve contends that the judiciary, not Congress, was the main vehicle for promoting interstate competition. He goes so far as to say that the enforcement of the Constitution’s “procompetitive rules and arrangements [was] supplied almost exclusively by the federal judiciary,” while congressional activity in this field was “sporadic” at best (pp. 88–89). Such “judicial dominance” was viable, Greve contends, because the

12. THE FEDERALIST NO. 51 (James Madison).

13. *See id.* (“Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”).

14. Greve does acknowledge that Madison might have envisioned state governments as a potential check on extreme abuses of federal power, which they might resist by force of arms (pp. 54–55).

sectional antagonisms of nineteenth century America—which arose from conflicts over slavery, the tariff, and other issues—prevented the states from uniting to curb the judges’ power (pp. 89–91).

It would be impossible in a review to fully document the richness and insight of Greve’s analysis of this period (chs. 4–7). But among the most noteworthy parts are his analysis of the jurisprudence of the Dormant Commerce Clause (ch. 4), his discussion of the ways in which the courts used the Fourteenth Amendment to protect interstate trade conducted by corporations (pp. 112–32), and his discussion of the role of federal common law in protecting commercial enterprises against exploitation by state courts (pp. 133–52).

Greve’s analysis of the issue of the status of corporations in nineteenth century constitutional law is particularly fascinating, addressing an issue little-noticed by modern constitutional law scholars. As he points out, there was considerable uncertainty in the nineteenth century over whether corporate entities had standing to sue under the Privileges and Immunities Clause of Article IV, which required states to treat citizens of other states equally with their own (pp. 112–15). An 1809 Supreme Court decision held that corporations, because they are not “citizens,” may not “sue and be sued in the courts of the United States unless the rights of the members, in this respect, can be exercised in their corporate name.”¹⁵ As a result of this ambiguous ruling and other similar cases, it was not clear whether corporate entities could assert constitutional rights under the Privileges and Immunities Clause (pp. 113–19). This ambiguity left open the possibility that states could discriminate against out-of-state businesses organized as corporations in favor of in-staters. The nineteenth century Supreme Court eventually ended up combating such discriminatory legislation under the Dormant Commerce Clause (pp. 123–27), whose protections—unlike those of the Privileges and Immunities Clause—were not limited to citizens. Greve persuasively argues that the Court’s efforts to constrain state protectionism played a valuable role in facilitating the rise of interstate trade, especially that conducted by large corporate enterprises (pp. 126–28). If he is right, the Supreme Court deserves more credit than it usually receives for the impressive economic growth of the United States in the late nineteenth century.

15. *Bank of the United States v. Devaux*, 9 U.S. (5 Cranch) 61, 86 (1809).

Greve sees the Dormant Commerce Clause as central to the operation of American federalism in the nineteenth century, pointing out that several of the Court's most important constitutional decisions of that era involved efforts to combat state protectionism. *Gibbons v. Ogden*,¹⁶ the Court's most significant early Commerce Clause case, involved a state effort to create a steamboat monopoly on an important interstate shipping route between New York and New Jersey (pp. 96–98). Both *Gibbons* and later nineteenth century decisions, Greve argues, played an important role in constraining state government favoritism towards in-state businesses at the expense of outsiders (pp. 101–11). Greve notes that the nineteenth century Court's objective was less to promote state competition as such, but to ensure economic "union" (p. 111). But, as he explains, promoting union by restricting state protectionism also had the effect of promoting interstate economic competition (p. 111). States unable to protect their firms against out-of-state competition must instead promote policies that are conducive to attracting investment and fostering economic growth, if they want to benefit in-state businesses and develop a healthy tax base.

Regarding federal common law, Greve interestingly sees the federal common law system established by the Court's famous decision in *Swift v. Tyson* as a tool for protecting interstate commerce against state courts seeking to victimize out-of-staters.¹⁷ Greve argues that out-of-state firms should not be required to litigate "diversity" cases under state common law because not only the state forum, *but* the state substantive law could be biased against them (pp. 134–37). For this reason, he contends, *Swift's* requirement that federal courts apply a unified federal common law in diversity cases was a necessary response to the danger of state favoritism and towards their own firms. It was particularly important in the case of industries such as railroads and maritime shippers, which had to span many states in order to operate efficiently (pp. 149–51).

Finally, Greve points out that nineteenth century views of the Spending Clause took a relatively restrictive view of the power of Congress to grant subsidies to state governments, and Congress in fact granted few such subsidies for local projects (ch. 7).¹⁸ The push for the states to largely subsist on their own fiscal

16. 22 U.S. (9 Wheat.) 1 (1824).

17. *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

18. Greve does point out some inconsistencies in the views of nineteenth century presidents such as Jefferson, Madison, and Andrew Jackson, who claimed to take a nar-

resources stimulated interstate competition for business and taxpayers, and also incentivized state policies that promote economic growth (pp. 167-69).¹⁹

Perhaps the biggest merit of this part of the book is Greve's successful integration of these seemingly disparate nineteenth century doctrines into a unified framework of competitive federalism. Although the nineteenth century Supreme Court did not always intend to do so, Greve argues that it deserves credit for fostering competitive federalism through a combination of several different doctrines.

At the same time, Greve recognizes that nineteenth century competitive federalism was not simply a result of legal doctrine divorced from politics. The Court's ability to enforce these pro-competitive rules depended on a political system characterized by deep sectional conflict in the antebellum period. Later on it relied on the support of the then-dominant Republican Party, which favored internal free trade, even as it also promoted tariffs against foreign goods (pp. 171-74). This favorable political environment for competitive federalism "could not and did not last" (p. 177). It began to deteriorate in the early twentieth century, and largely collapsed during the constitutional revolution of the New Deal period.

C. THE DECLINE OF COMPETITIVE FEDERALISM SINCE THE NEW DEAL

The idea that American constitutional federalism underwent a profound transition in the 1930s is hardly a new one. Scholars have long argued that the constitutional revolution of that period led to a major increase in federal government power, especially over the economy.²⁰ Leading Supreme Court decisions of that era removed previous restraints on congressional power under the Commerce Clause and Spending Clause, enabling Congress to regulate almost any economic transaction and spend

row view of the spending power, but also approved local pork-barrel projects at various times (pp. 164-67).

19. On the importance of "hard budget" constraints for competitive federalism, see, e.g., JONATHAN RODDEN, *HAMILTON'S PARADOX: THE PROMISE AND PERIL OF FISCAL FEDERALISM* ch. 4 (2006); McGinnis & Somin, *supra* note 4; Weingast, *supra* note 3.

20. For a good statement of the conventional view, see, e.g., WILLIAM LEUCHTENBURG, *THE SUPREME COURT REBORN* (1995). *But see* BARRY CUSHMAN, *RETHINKING THE NEW DEAL COURT* (1998) (arguing that many of the New Deal innovations in federalism doctrine were already present in previous cases, though even Cushman recognizes that a major change occurred).

money for virtually any purpose.²¹ Greve agrees that an important transformation occurred, but argues that it empowered the states more than Washington (chs. 8–9).²² Greve describes the result as a “constitutional inversion” (pp. 181–83) under which states were now free to restrict competition and form cartels—exactly the sort of behavior that the pre-New Deal Supreme Court had sought to constrain.

In the fiscal arena, Greve points out that an incredible seventy-five percent of the increase in nonmilitary federal spending between 1932 and 1940 consisted of federal grants to state governments, which increased almost twenty-fold in all (p. 183). Moreover, a high proportion of these new grants worked in ways that undermined state incentives to compete with each other for taxpayers, for example by making state taxes deductible from federal taxes (thereby diminishing incentives for tax competition), and by enabling states to spend money on a variety of projects without having to raise it from their own tax revenue (pp. 250–57).

Many of the New Deal economic regulations upheld under the new, far more expansive Commerce Clause interpretation of the Commerce Clause also upheld cartel-like regulations (pp. 206–08). For example, the wheat production restrictions endorsed by the Supreme Court in *Wickard v. Filburn* were meant to keep up the price of wheat by preventing producers in one state from undercutting those in others. As Greve points out, state governments often supported these schemes because they themselves preferred federally enforced cartels to competition—much like competitors in many other markets (pp. 189–94). Greve also emphasizes the lesser known fact that, during this period, the Supreme Court loosened Dormant Commerce Clause restrictions on state laws that curtail the movement of out-of-state goods (pp. 214–20). This development reinforces Greve’s argument that the New Deal empowered states rather than constrained them.

Greve notes that much of the new federal regulation and spending was justified by the alleged need to curb “races to the

21. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (expanding New Deal-era commerce power to its broadest extent); *Seward Machine Co. v. Davis*, 301 U.S. 548 (1937) (embracing a very broad view of Congress’ power to spend money under the General Welfare Clause).

22. For an important previous argument along similar lines, see Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483 (1997).

bottom,” in which states would otherwise engage in destructive competition (p. 186). The paradigmatic example of such a pre-New Deal “externality” was the Supreme Court’s 1918 decision in *Hammer v. Dagenhart*,²³ which struck down a federal law banning child labor. Greve points out that virtually all states had adopted their own child labor laws by the time *Hammer* was overruled, and industrial child labor had nearly disappeared by 1930 (pp. 187–88). The “race to the bottom” threat was greatly overblown. By contrast, New Deal constitutionalism enabled states to impose “actual externalities” on their neighbors by “tax[ing] and regulating . . . interstate commerce” and by facilitating the formation of cartels (p. 188).

Finally, Greve provides a long and detailed critique of the Supreme Court’s 1938 decision in *Erie Railroad Co. v. Tompkins*,²⁴ which reversed *Swift v. Tyson* and required federal courts to apply state common law rather than federal common law in most diversity cases (ch. 10). Greve contends that *Erie* allowed states to use their common law to discriminate against out-of-state producers and prey on interstate commerce for the benefit of in-state interest groups (ch. 10).

While his argument likely has some validity, it is difficult to fully embrace it. At the very least, competitive pressure of the kind he praises elsewhere in the book should impose constraints on state governments whose common law doctrines go too far. Businesses will be reluctant to locate in such states or sell their products there. In recent years, such pressures have forced a number of states to enact tort reform laws, including such previously infamous “tort hellholes” as Alabama and Mississippi.²⁵ Be that as it may, *Erie* reinforces Greve’s more general thesis that the New Deal revolution empowered the states.

Greve’s theory that the New Deal constitutional revolution empowered the states more than it restricted them is both insightful and largely accurate. He is, however, perhaps too quick to reject the idea that it also promoted the centralization of power in the hands of the federal government (pp. 182–83). Such

23. 247 U.S. 251 (1918).

24. 304 U.S. 64 (1938).

25. See Ilya Somin, *Federalism and Tort Reform*, VOLOKH CONSPIRACY (Feb. 13, 2011), <http://www.volokh.com/2011/02/13/federalism-and-tort-reform-3/> (discussing state tort reform laws that have helped alleviate this problem); Cf. Michael Krauss & Robert Levy, *Can Tort Reform and Federalism Coexist?*, CATO INSTITUTE (Apr. 14, 2004), <http://www.cato.org/pubs/pas/pa-514es.html> (explaining how state-level tort abuses can be constrained without wholesale displacement of state common law).

centralization clearly occurred, as witness the massive expansion of federal spending and regulation permitted by the new Supreme Court decisions. But centralized political power could be, and often was, used for the benefit of state governments and local interest groups, rather than to promote a systematic plan of economic regulation designed in Washington. Centralized power need not be wielded for the benefit of the center itself.

Greve also provides a long and detailed discussion of the post-New Deal period. During this era, in his view, the anticompetitive tendencies first established in the New Deal era have deepened (chs. 12-16). He faults the modern Supreme Court for doing little or nothing to curb the excesses that began in the 1930s (ch. 16). He is also very critical of the “federalism revival” that began in the Rehnquist Court in the 1990s, which he sees as conflating the interests of state governments with those of federalism. “The notion that there might be a difference between constitutional federalism and state demands . . . never enters the picture” (p. 262).

On this last point, Greve is somewhat unfair to the justices. In the important 1992 case of *New York v. United States*, Justice O’Connor’s majority opinion clearly emphasizes that “[s]tate officials cannot consent to the enlargement of the powers of Congress beyond those enumerated in the Constitution . . . Indeed, . . . powerful incentives might lead both federal and state officials to view departures from the federal structure to be in their personal interests.”²⁶ Constitutional federalism, she wrote, exists for the benefit of “the people,” not the states alone.²⁷ More recently, in *Bond v. United States* (2011), Justice Kennedy wrote an opinion for a unanimous Court which held that “States are not the sole intended beneficiaries of federalism,” because “[f]ederalism secures the freedom of the individual,” as well as the prerogatives of state governments.²⁸

The justices clearly do recognize the “difference between constitutional federalism and state demands” (p. 262). But it is fair to add that this recognition only rarely affects the results of important federalism cases.²⁹ Elsewhere, I have argued that it is

26. *New York v. United States*, 505 U.S. 144, 182 (1992).

27. *Id.* at 182–83.

28. *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011). It is fair to note that this decision, which came down in June 2011, may have been decided too late to be considered by Greve in his book.

29. *New York v. United States* remains the only decision of the “federalist revival” that struck down a law on federalism grounds despite the likely prior consent of the state

at odds with the Court's willingness to license almost any grants to state governments so long as the states have consented to them.³⁰

Greve's assessment of the situation is not completely negative. He argues that the United States still has a more competitive federal system than most other nations, and hopes that competition-promoting reforms might arise under the combined impact of a severe fiscal crisis and a revival of constitutional originalism (pp. 381–95). The former, he believes, has rendered the current system unsustainable, while the latter provides a potential way out of our present crisis. (pp. 394–96). The federal government can no longer afford to lavishly subsidize states. Thus, they may be forced to compete with each other in order to obtain new fiscal resources, as happened in some other federal systems that have gone through similar “acute crisis” (pp. 380–83). Originalism, Greve hopes, might help us find a way out of our crisis by reinvigorating judicial enforcement of constitutional rules restricting anticompetitive state policies (pp. 385–96). But he also recognizes that the future of American federalism might be continued decline or even collapse (pp. 381, 389).

II. WHY COMPETITIVE FEDERALISM REQUIRES LIMITS ON FEDERAL POWER

Greve's often compelling analysis of the Constitution as a system for facilitating competitive federalism suffers from a potential internal contradiction. On the one hand, Greve recognizes that state governments dislike competition and will lobby Congress for measures facilitating the establishment of a cartel (pp. 8–9, 206–08). He is pessimistic about the prospects for congressional resistance to such pressures. As discussed above, he argues that much of the post-New Deal transformation of federalism can be explained as a process of federally-enforced cartel formation.³¹

Yet Greve also defends a nearly unconstrained interpretation of Congress' powers to regulate under the Commerce Clause and Necessary and Proper Clause, and spend money un-

involved. *New York*, 505 U.S. at 182–86. But it is worth noting that the Court invalidated the provision of the Violence against Women Act challenged in *United States v. Morrison* despite the fact that 36 states filed an amicus brief urging it to uphold the law, while only one state, Alabama, argued the other way. See McGinnis & Somin, *supra* note 4, at 114.

30. See Somin, *Closing the Pandora's Box of Federalism*, *supra* note 4, at 495–96.

31. See Part I of this review.

der the Spending Clause (pp. 162–65, 257–58, 343–46). This interpretation leads him into a potential cul de sac: the competitive federalism he seeks to promote by imposing restrictions on state behavior could easily be undermined by state-supported federal legislation.

As to the Commerce Clause, Greve endorses the outcome, though not all of the reasoning of the Court's decision in *Wickard v. Filburn* (pp. 343–46),³² a crucial 1942 case which ruled that the Commerce Clause gave Congress the power to limit farmers' growth of wheat on their own property even in cases where the wheat in question had never crossed state lines or been sold in any market. Greve concludes that *Wickard* was correct because Congress has the authority to "limit the interstate supply" of any commodity, and presumably to take any measures that might facilitate that end (p. 345). In his view, the power upheld in *Wickard* may not be justifiable under the Commerce Clause alone, but is permitted by a combination of that Clause and the Necessary and Proper Clause (pp. 344–45).

Greve does not endorse completely unlimited congressional regulatory authority. He supports the Court's decisions in *United States v. Lopez*³³ and *United States v. Morrison*,³⁴ which ruled that Congress lacked the power to ban gun possession in school zones and gender-motivated acts of violence (pp. 345–46). Perhaps more surprisingly, he also argues that the Obama health care plan individual health insurance mandate recently upheld by the Supreme Court,³⁵ is unconstitutional, because it is not "proper" under the Necessary and Proper Clause (p. 346).³⁶

It is not entirely clear why Greve's argument does not require him to reject *Lopez* and *Morrison*, as well as endorse *Wickard*. As the dissenters in the former two cases pointed out, banning guns in school zones and restricting gender-based violence could well facilitate the regulation of commerce in guns in

32. 317 U.S. 111 (1942).

33. 514 U.S. 549 (1995).

34. 529 U.S. 598 (2000).

35. See Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

36. I authored an amicus brief in the individual mandate case that advanced a similar position. See Brief for Washington Legal Foundation and Constitutional Law Scholars as Amici Curiae Supporting Respondents, Dep't of Health and Human Serv. v. Fla. (No. 11-398), available at <http://www.wlf.org/upload/litigation/briefs/11-398bsacWashingtonLegalFoundation.pdf>. For a good statement of the case that the requirement of propriety is intended to protect state autonomy against federal infringement, including by laws that are "necessary," see Gary Lawson & Patricia Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267 (1993).

the former case and promote various types of commerce by making it easier for women to travel in the latter.³⁷ Regardless, *Wickard* alone is enough to authorize most federally-sponsored cartels of the type that rightly worry Greve. Any effort to restrict competition between state governments for businesses or taxpayers can easily be portrayed as an attempt to “limit the interstate supply” of a commodity, or conversely, expand it.

Greve worries that a narrow interpretation of the Congress’ affirmative powers under the Commerce Clause would lead to a narrow interpretation of the Dormant Commerce Clause, which in turn would make it impossible for the courts to constrain “protectionist and exploitative” state legislation targeting interstate commercial enterprises (pp. 343–44). This concern is not entirely without merit, but it is overstated. Even the narrowest originalist interpretation of the Commerce Clause as only covering interstate trade in goods and services is still sufficient to create a parallel Dormant Commerce Clause that combats many state protectionist measures.³⁸ State law excluding out-of-state producers or discriminating against them in favor of in-staters would fall.

Such a narrow definition of the Commerce Clause might not allow the Dormant Commerce Clause to be used to combat all possible state efforts to exploit interstate commerce, such as abusive tort suits that mostly target out-of-state producers. But many such efforts might be constrained by the very interstate competition that Greve seeks to invigorate. Businesses will not want to operate in states with abusive laws, or at least not as much as in rival states with a better business climate.³⁹

Some abusive state legislation could also be blocked by reinvigorating constitutional protection for property rights and economic liberties. Stronger enforcement of the Public Use Clause of the Fifth Amendment could curtail state and local efforts to transfer property away from politically weak interest groups to powerful ones.⁴⁰ Similarly, a partial reversal of the modern doctrine of extreme deference to state economic legisla-

37. See *Lopez*, 514 U.S. at 618-24 (Breyer, J., dissenting) (detailing various potential effects of gun possession in school zones on interstate commerce); *Morrison*, 529 U.S. at 614 (noting that Congress had compiled extensive evidence of the impact of gender-based violence on commerce).

38. See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 1 (2001) (defending this view of the original meaning).

39. See the discussion of tort reform in Part I above.

40. See Ilya Somin, *Controlling the Grasping Hand: Economic Development Takings After Kelo*, 15 SUP. CT. ECON. REV. 183 (2007).

tion⁴¹ could make it more difficult for state governments to use economic regulation to benefit in-state interest groups at the expense of outsiders. Such judicial protection for economic liberty has substantial justification on originalist grounds, as it would reinvigorate the nineteenth century constitutional doctrine disfavoring “class legislation” that seeks to benefit one interest group at the expense of another or that of the general public.⁴²

Increased judicial protection for property rights can also help alleviate exploitative state behavior targeting immobile resources, such as property in land, which Greve recognizes competitive federalism is unlikely to alleviate (p. 338).⁴³ Judicial enforcement of protection for property rights and economic liberties could combat state predation on interstate businesses at least as effectively as an expansive Dormant Commerce Clause, and without simultaneously licensing an expansive affirmative Commerce Clause power that can be used to impose the same sorts of exploitative and anti-competitive regulations nationwide. The latter is a crucial point. However harmful one or even several states’ predatory regulations might be, they are less so than a similar law imposed nationwide by Congress.

Obviously, the Supreme Court is unlikely to reinvigorate judicial protection for economic liberties in the near future. But it is also unlikely to embrace Greve’s expansive vision of the Dormant Commerce Clause.⁴⁴ Progress on either front is likely to be slow and incremental, at best. The prospects for property rights are somewhat better, since such efforts were only narrowly defeated in several key decisions over the last decade, most notably *Kelo v. City of New London*.⁴⁵

41. See *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (holding that the Courts must uphold any economic regulation that is “rationally” related to some conceivable “legitimate state interest,” even if it was not one actually envisioned by the legislature that adopted the law).

42. For recent works outlining the originalist case for judicial protection of economic liberties under the Fourteenth Amendment, see e.g., DAVID E. BERNSTEIN, *REHABILITATING LOCHNER* (2011); DAVID A. MAYER, *LIBERTY OF CONTRACT: REDISCOVERING A LOST CONSTITUTIONAL RIGHT* (2011); TIMOTHY SANDEFUR, *THE RIGHT TO EARN AN HONEST LIVING* (2010). See also BERNARD SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980).

43. I discuss why interjurisdictional competition is unlikely to provide effective protection for immobile assets in Ilya Somin, *Federalism and Property Rights*, 2011 U. CHI. LEGAL FORUM 53 (2011).

44. Greve himself stresses the Court’s relative timidity in this area in recent years, as some justices seek to roll back the doctrine rather than expand it (pp. 321–24).

45. 545 U.S. 469 (2005). For a review of the relevant recent case law on constitutional property rights, see Ilya Somin, *Taking Property Rights Seriously: The Supreme Court and the “Poor Relation” of Constitutional Law* (George Mason Law & Economics

Similar criticisms can be raised against Greve's acceptance of the broad interpretation of the Spending Clause (pp. 248–57). If that Clause, which gives Congress the power to spend money to “pay the debts and provide for the common Defence and General Welfare of the United States” gives the federal government virtually unlimited discretion to spend money for whatever purposes it wants, then it can use that authority to curtail interstate competition and promote cartels. States that refuse to take part in a cartel or obey federal mandates can be denied crucial funds and placed at a disadvantage relative to their competitors.⁴⁶ For this reason, Greve notes, “[s]tate acceptance of federal bargains—even on very onerous conditions—is typically a foregone conclusion” (p. 258). Moreover, as he goes on to point out, states will often lobby for conditional grants that give them money and prevent their competitors from undercutting them (pp. 251–53). Finally, conditional federal grants restrict policy diversity between states, which in turn diminishes the range of issues on which states can compete with each other.⁴⁷

Greve correctly points out that the anticompetitive effects of constitutionally unconstrained federal spending are limited by the federal government's fiscal capacities (pp. 257, 280). But this is a relatively weak constraint, given the federal government's enormous resources, including the ability to pile up a massive national debt. Greve himself believes that we cannot rely on congressional self-restraint to restrain grants to state governments short of a fiscal crisis (pp. 250–58, 278–80). If this is correct, he may want to give constitutional constraints on the scope of federal spending a second look.

Even if constitutional constraints on the scope of federal power are necessary to make competitive federalism effective, they may not be enforceable. Greve argues that they are ultimately ineffective “parchment” barriers (pp. 162–65, 343–44), because courts cannot enforce them against resistance by the political branches of government.

It is certainly true that courts cannot enforce strict limits on federal power without at least some substantial external political support. Federal judges will not long remain radically at odds with dominant public opinion, at least not on major issues.⁴⁸ But

Research Paper No. 08-53, 2008), available at <http://ssrn.com/abstract=1247854>.

46. See Somin, *Closing the Pandora's Box of Federalism*, *supra* note 4. Greve recognizes this dynamic (pp. 250–53).

47. *Id.* at 468–70.

48. See generally BARRY FRIEDMAN, *THE WILL OF THE PEOPLE* (2009) (providing

the Supreme Court was able to generate sufficient political support to enforce substantial limits on Congress' enumerated powers throughout much of the nineteenth and early twentieth centuries.⁴⁹ Obviously, such enforcement has been much rarer since the New Deal constitutional revolution. But its revival is far from a hopeless cause. As I write these words, the Court has just recently nearly invalidated President Obama's health reform law, one of the most important federal regulatory statutes of the last several decades,⁵⁰ and imposed significant constraints on Congress' power to "coerce" state governments by attaching conditions to federal grants.⁵¹

Promoting stricter judicial enforcement of limits on federal power is far from an easy task. But it is not clear that it is necessarily more difficult than Greve's program of enforcing strict limits on anticompetitive behavior by state governments, especially when the latter is supported by Congress, as Greve recognizes it often is.

Ultimately, Greve's embrace of extremely broad congressional authority to regulate and spend is at odds with his defense of competition as the organizing principle of American federalism. The way out of this dilemma would be for Greve to endorse more limited interpretations of the Commerce, Spending, and Necessary and Proper Clauses. Doing so could well be consistent with his seeming commitment to originalism. Modern scholarship has unearthed extensive evidence suggesting that post-New Deal decisions have expanded congressional power far beyond the original meaning of these three clauses.⁵²

evidence on this point from many stages of American history).

49. This notion was reflected in cases such as *E.C. Knight Co. v. United States*, 156 U.S. 1 (1895) (striking down application of major federal antitrust law, and holding that Congress lacked the power to regulate "manufacturing" under the Commerce Clause).

50. See *National Federation of Business v. Sebelius*, 132 S. Ct. at 2538–2600 (upholding the individual by a narrow 5-4 margin, while rejecting the federal government's argument that its crucial mandate to purchase health insurance was authorized by the Commerce and Necessary and Proper Clauses).

51. See *id.* at 2601–08.

52. On Greve's embrace of originalism, see Part III. For originalist arguments for a limited interpretation of the Necessary and Proper Clause, see, e.g., Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183 (2003); and Lawson & Granger, *supra* note 36. For similar arguments regarding the Spending Clause and the Commerce Clause, see, e.g., Barnett, *The Original Meaning of the Commerce Clause*, *supra* note 38; John Eastman, *The Spending Power*, 4 CHAP. L. REV. 1 (2001) (defending a narrow originalist interpretation of the Spending Clause); Somin, *Closing the Pandora's Box of Federalism*, *supra* note 4, at 489–94 (same). Obviously, some scholars argue that originalism requires a broader interpretation of these clauses. See, e.g., AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* (2005) (defending a broad interpretation of all three); Jack Balkin, *Commerce*, 109 MICH.

In this review, I do not attempt to prove that the more restrictive interpretations of original meaning are necessarily right.⁵³ Still less do I advance anything approaching a comprehensive case for stronger judicial protection for property rights and economic liberties.⁵⁴ But I do suggest that the more restrictive interpretations of congressional power are a better fit with Greve's theory of competitive federalism than their broader rivals. If it turns out that the broad view is the correct interpretation of the original meaning, that would be an indication that competitive federalism and originalism are much more at odds than Greve assumes.

III. COMPETITION AND ORIGINALISM

There is an interesting potential tension between *The Upside-Down Constitution's* advocacy of competition as the central organizing principle of constitutional federalism and the author's recognition that this ideal was barely even mentioned by the Founding Fathers, much less regarded as fundamental. As Greve recognizes, the idea of competitive federalism "does not appear in the *Federalist* or in any other, lesser writings of the Founding era" (p. 56). He further notes that James Madison ignored the important structural implications of mobility between state governments (p. 59). As a result, the "Father of the Constitution" was apparently oblivious to the major vehicle of beneficial competition between state governments. It is difficult, if not impossible, to understand the case for interstate competition without including the crucial role of mobility in the analysis.

The absence of competition from the vision of the Founders need not be problematic from Greve's point of view if he were to defend competitive federalism as a "living constitution" theory of interpretation.⁵⁵ But Greve instead insists that it is justified on the basis of originalism (ch. 3, pp. 394–96). He pins his hopes for the restoration of a competitive system on the rise of originalism "as a political force" (p. 395), albeit one that rejects "rigid

L. REV. 1, 15–30 (2010) (arguing for a broad originalist interpretation of the Commerce Clause).

53. I have offered such an argument in the case of the Spending Clause. See Somin, *Closing the Pandora's Box*, *supra* note 4, at 489–94.

54. I do develop some elements of such a case in respect to property rights in Somin, *Controlling the Grasping Hand*, *supra* note 40, and Somin, *Taking Property Rights Seriously*, *supra* note 45.

55. For a recent defense of this school of thought, see DAVID A. STRAUSS, *THE LIVING CONSTITUTION* (2010).

clause-boundedness” in favor of a broader unified perspective on the Constitution (p. 393).

The fact that the Founders ignored the idea of interstate competition in their writings does not necessarily mean that Greve’s theory of competitive federalism and originalism are incompatible. One possible way to reconcile the two is to shift the focus from original intent—the plans of the Framers of the Constitution—to original meaning: what the Constitution was understood to mean by the general public at the time. Original meaning has become the dominant school of originalist constitutional theory over the last two decades.⁵⁶ Unfortunately, it is unlikely that the general public at the time of the founding had any greater understanding of competitive federalism than did the Framers. Indeed, they may have had less, given that the public is less likely to be aware of sophisticated theories of constitutional structure than are political elites.⁵⁷

But even if neither the Framers nor the public interpreted the Constitution as establishing a system of competitive federalism, that need not be a death blow for Greve’s theory. Although the Framers and the public may not have had any understanding of competitive federalism as a general theory, it is possible that they nonetheless sought to establish a Constitution that would constrain the kinds of state government abuses that competitive federalism aims to eliminate and do so in the way Greve recommends. As Greve explains in the first part of his book (chs. 2–3), the Framers did repeatedly emphasize the need to break down state trade barriers and eliminate state legislation that preyed on interstate commerce as among the major reasons for establishing the Constitution. It is possible that they arrived at a theory of constitutional federalism without using the name. Perhaps like the proverbial man who never he knew was writing in prose, the Founders were organizing a regime of competitive federalism without knowing it.

56. See James E. Ryan, *Laying Claim to the Constitution: The Promise of New Textualism*, 97 VA. L. REV. 1524, 1526 (2011) (arguing that it is the newly dominant school of thought in constitutional theory). For leading works advocating original meaning originalism, see, e.g., JACK M. BALKIN, *LIVING ORIGINALISM* (2011); RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004); KEITH E. WHITTINGTON, *CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW* (1999); Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26 (2000). I have catalogued several different versions of original meaning theory in Ilya Somin, *Originalism and Political Ignorance*, MINN. L. REV. (forthcoming), available at <http://ssrn.com/abstract=2015006>.

57. For the implications of widespread, often rational, political ignorance for original meaning originalism, see Somin, *Originalism and Political Ignorance*, *supra* note 56.

In this respect, Greve's theory is similar to another influential recent work advocating an interpretation of constitutional federalism based on modern economic theory: Robert Cooter and Neil Siegel's "collective action federalism."⁵⁸ Cooter and Siegel argue that Congress' enumerated powers in Article I of the Constitution should be interpreted as giving the federal government the power to solve collective action problems that arise between the states, while leaving most other policy questions to the discretion of the latter.⁵⁹ Although Cooter and Siegel recognize that the framers and ratifiers of the Constitution did not understand modern collective action theory,⁶⁰ they argue that the Founders intuitively "knew a collective action problem when they saw one" and claim that such an intuitive understanding is a unifying theme underpinning their rationales for most of the specific provisions of Article I.⁶¹ Similarly, Greve can be interpreted as arguing that the Founders intuitively grasped the need to promote competitive federalism, even though they may not have understood the idea as a systematic social scientific theory.

It is even possible that Cooter and Siegel's collective action federalism and Greve's competitive federalism could be combined in one single overarching theory. Cooter and Siegel's framework might explain what powers are granted to the federal government, while Greve's approach accounts for the need to impose constraints on predatory behavior by the states, and explains why a substantial realm of autonomy should be left to them, in order to give them control over policy areas on which they could compete.

I do not mean to suggest that either Cooter and Siegel's theory or Greve's are flawless. Elsewhere, I have outlined several concerns about Cooter and Siegel's approach.⁶² I also have my disagreements with Greve.⁶³ Interestingly, both err in underrating the need for judicial enforcement of constitutional limits on

58. Robert Cooter & Neil Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115 (2010).

59. *Id.* at 117–20.

60. *See id.* at 117 (noting that "[t]he Framers lacked the tools and language of modern social science"). Modern collective action theory was not developed until the 1950s and 1960s. For crucial early works, see, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* (1957); MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); Paul A. Samuelson, *The Pure Theory of Public Expenditure*, 36 REV. ECON. & STAT. 387 (1954).

61. Cooter & Siegel, *supra* note 58, at 117, 121–26.

62. *See* Ilya Somin, *Federalism and Collective Action*, JOTWELL (June 20, 2011), <http://conlaw.jotwell.com/federalism-and-collective-action/>.

63. *See* Part II above.

federal power to make their theories work.⁶⁴ And probably neither would welcome a proposal to combine the two theories, at least not without significant reservations. Nonetheless, there are important similarities between the two. Both take a similar approach to originalism, and both seek to use modern political economy to develop a theory of constitutional federalism.

Greve's competitive federalism is potentially reconcilable with originalism. But more work will need to be done to establish the degree of synergy between them.

CONCLUSION

The competitive federalism paradigm advanced by Greve is an impressive contribution to constitutional theory. More than any previous scholar, Greve has shown how it is possible to understand the Constitution as a whole as a structure for promoting competition between state governments.

Greve's work will not be the last word in the debate over federalism. It is open to criticism from both those who reject the competitive approach entirely,⁶⁵ and those like myself who disagree with Greve over some of its implications.⁶⁶ Nonetheless, *The Upside-Down Constitution* is a path-breaking work. In time, it might even help show the way to a better future in which American federalism is turned right-side up.

64. Part II discusses this flaw in Greve's theory. *See also* Somin, *Federalism and Collective Action*, *supra* note 62 (explaining why Cooter and Siegel's theory requires stricter limits on federal power in order to prevent the federal government from creating collective action problems, as well as solving them).

65. For a recent statement of a view of federalism almost diametrically opposed to Greve's, see ERWIN CHERMERINSKY, *ENHANCING GOVERNMENT: FEDERALISM FOR THE 21ST CENTURY* (2008).

66. Part II of this review discusses this disagreement.