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U.S. AGENCY PRINCIPAL RELATIONSHIP WITH THE STATES

Clifford Fisher, Meredith Pohl and Holden Aven
Purdue University, United States

INTRODUCTION

In the late 1780s, the citizens of this newly free American republic were battling amongst themselves over the proper direction of the future of their country. After the failure of the Articles of Confederation, many colonial leaders agreed that a stronger central system was needed. Arguments raged in pubs and dinner tables, eventually culminating in the Constitutional Convention of 1787. The Convention lasted for months as the Founding Fathers decided on the structure of this new democracy: bicameralism, the separation of powers, and the federal structure of the national government. Eventually, they produced the document we now know as the Constitution of the United States. However, following the Convention there was much disagreement among those unwilling to support its ratification in their respective colonial governments. They worried about the possible strength of this new central authority. Having just ousted an autocratic king in the long, bloody Revolution, citizens were weary of an executive power seizing their newfound sovereignty and political freedom.

To combat this rising tide of what later came to be known as "anti-federalism," three of our most famous Founding Fathers, James Madison, John Jay, and Alexander Hamilton, came together to write a series of eighty-five articles and essays published in *The Independent Journal* and *The New York Packet* in an attempt to shift public sentiment. These essays would later be collected into a work entitled, *The Federalist Papers*. To this day, these essays remain essential to the study of American democracy for their keen insight into the minds and values of the Founding Fathers during the very formation of our government. To promote ratification, these authors directly refuted the very claims of the Anti-Federalists, insisting that the new federal system of government left the majority of the decision making authority to the colonial (or, under the Constitution, state) governments, while the power of the Executive branch was institutionally limited by Congress. Their writings were persuasive enough to turn the tide of public opinion in favor of ratification by promising that a Bill of Rights would later be added to assuage many Anti-Federalist doubts; and, thus in 1789 the Constitution came into being. However, would Madison, Hamilton, and Jay feel that their words are just as applicable to today's government structure? How would they react to the elaboration of the Executive veto power? Essentially, *The Federalist Papers* were written to assuage citizens' doubts about their own weaknesses and perceived irrelevance in their own government. So, the now-relative weakness of state governments

in today's day and age, may make the original design for stronger states seem like a false promisemade over two hundred years ago and now de facto irrelevant. Or, does it? This paper examines the original design of the federal government structure in the context of an agency-law type relationship, and the subsequent usurpation of the principal'sstate sovereignty by theagent(national government) over the years.

II. FEDERALIST 45 & 46

Agency law examines the relationship between "agents" and their "principals." "The American Law Institute's *Restatement of the Law – Agency* defines agency as 'the fiduciary relationship that arises when one person (a "principal") manifests consent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent and otherwise consents to the act.'"[1] Essentially, a "principal" hires an agent to fulfill a specific appointed task or tasks, and they act with the legal authority required on behalf of their "principal" in forming legal contracts. The original design of federalism, as explained by Madison in Federalist 45 and 46 more closely resembles this agency-law type relationship than the current, often combative, system.

The Constitution outlined a small shift in government structure from thirteen distinctly individual and sovereign colonies to separate principal "states" inextricably linked from one another by their admission to the United States federal system, unified under a weak centralizing agency. Madison envisioned a role in which the national government acts on behalf of the collective state's best interests in international relations, tax collection, military maintenance, and overall administration, namely as the "agent" of the colonial state governments. Authorizing a central agency to act in the collective interests of the Thirteen Colonies streamlined the efficiency in international relations between states, and smoothed tax collection for central defense purposes both of which had posed significant obstacles under the Articles of Confederation. But, critically, under the Constitutional system each state would retain autonomy in its decision-making for its citizens within its borders and the federal government would remain answerable to the States for its actions as the agent acting on their behalf. In practice, however, it seems the system has rarely worked this way.

Federalist 45: "Alleged Dangers From the Powers of the Union to the State Governments Considered," written by James Madison, is a passionate refutation of the then-popular Anti-Federalist idea that citizens would have far less input in this new centralized, federal government system than they did under the decentralized Articles of Confederation or as individual sovereign states.[2] Madison repeats his earlier claims from previous Federalist essays, that the Union is essential to the security of the States from outside force, and from war between the States, and to "guard against those violent and

[1]Munday, R. (2010). The Nature of 'Agency' In *Agency: Law and Principles*. Oxford University Press.
[2] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.

oppressive factions which embitter the blessings of liberty."[3] He declared the "impious doctrine of the Old World"[4] that "people were made for kings, not kings for people,"[5] would never be reinstated in this New World and that the blood and death of the Revolution was not in vain. The public welfare is paramount to any government structure, and what good would be served by replacing one monarchy with another?

The federal structure envisioned by the Founding Fathers and enshrined in our Constitution was designed to safeguard the public welfare by limiting the likelihood of central authoritarianism. "The State governments will have the advantage of the Federal government, whether we compare them in respect to the immediate dependence of the one on the other; to the weight of personal influence which each side will possess; to the powers respectively vested in them; to the predilection and probable support of the people; to the disposition and faculty of resisting and frustrating the measures of each other."[6] When viewed through an agency lens, the principal state governments were designed with the distinct advantage of directing the federal government to act as they wished. Although authorized to engage in international relations, defensive war, and the collection of central taxes, in all respects the state governments would remain preeminent; even in these few powers of the federal government, they must act in accordance with the wishes of the states and the people.

Madison then listed the majority of powers preserved under the Constitution by State governments, explaining how they each serve as automatic checks on the national government: State legislatures are integral to the appointment of the President, and Senators were then elected solely by the State legislature; even members of the House of Representatives should be those men who have previously served in State legislatures or who are extremely familiar with the process.[7] "Thus, each of the principal branches of the federal government will owe its existence, more or less, to the favor of the State governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious than too overbearing towards them."[8] The national government will necessarily gain authority in times of war, while the State governments shall remain paramount in all

[3] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[4] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[5] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[6] Madison, James. "Federlist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.

[7] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[8] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.

times of peace and prosperity.[9] Madison was careful to emphasize that the State governments would remain closest to the influence and opinion of the people, and the federal government must necessarily subordinate its wishes to the people's as voiced by the State legislatures.[10]

In Federalist 46: "The Influence of the State and Federal Governments Compared," Madison elaborated further on the respective symbiotic relationship explicated in Federalist 45. While both bodies remain "substantially dependent upon the citizens of the United States,"[11] they are too "different agents and trustees of the people, constituted with different powers, and designed for different purposes."[12] Madison then points out that the Anti-Federalists have lost sight of the most important tenet of American democracy: that "the ultimate authority [...] resides in the people alone."[13] But as far as which side should have any predominate authority or influence over policy direction and decision-making, "the State governments must clearly have the advantage."[14] Federalist 46 also discusses at length the federal government's role as policeman in the maintenance of peace. But essentially, the sum of the essay is found in the concluding paragraph: "...that the powers proposed to be lodged in the federal government are as little formidable to those reserved to the individual States, as they are indispensably necessary to accomplish the purposes of the Union."[15]

The federal government structure described by Madison in these two essays in some ways resembles the idealized form of American democracy taught today, but de facto hardly looks like the federal government structure in practice. State governments are rarely, if ever, described as more prominent legal and political authorities than the national Congress. Perhaps it is that, as Madison described, the federal government shall necessarily be more authoritative in times of war than peace,[16] and so often has the United States found itself at war in the last two hundred years that the shift toward central authority became a permanent fixture of American democracy. The passage of the 17th

[9] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[10] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.
[11] Madison, James. "Federalist 46: The Influence of State and Federal Governments Compared." *Federalist Papers*. 29 Jan 1788.
[12] Madison, James. "Federalist 46: The Influence of State and Federal Governments Compared." *Federalist Papers*. 29 Jan 1788.
[13] Madison, James. "Federalist 46: The Influence of State and Federal Governments Compared." *Federalist Papers*. 29 Jan 1788.
[14] Madison, James. "Federalist 46: The Influence of State and Federal Governments Compared." *Federalist Papers*. 29 Jan 1788.
[15] Madison, James. "Federalist 46: The Influence of State and Federal Governments Compared." *Federalist Papers*. 29 Jan 1788.

[16] Madison, James. "Federalist 45: Alleged Dangers From the Powers of the Union to the State Governments Considered." *Federalist Papers.* 26 Jan 1788.

Amendment in 1913 amended the Constitution's Article I, §3, clauses 1 and 2 by providing for the direct election of Senators by the people, and no longer by State legislatures.[17] Most political scientists and students of American democracy would agree that the relative strength of the State legislatures began to erode in the twentieth century,[18] and only in recent years have States again begun to assert their sovereign rights.[19] Although Madison's description is eloquent, emboldening, and stirs a certain patriotic warmth for his described Union, the reality has often fallen short of his vision.

III. BEDROCK DOCTRINE VS. LIVING DOCUMENT: PHILOSOPHIES OF CONSTITUTIONAL INTERPRETATION

It is certainly not Madison's fault that his vision perhaps seems too idealistic and naïve now in 2014, but rather that the very foundation of our nation, the binding authority of the Constitution, has eroded with time. There is continual struggle between not just Supreme Court Justices and members of the national legislature, but even between individual citizens, over the nature of the interpretation of the Constitution.[20] Some feel it serves as the "bedrock" of our democracy,[21] and so we should abide strictly by its precepts regardless of the age in which it was written. Others feel it should serve as a kind of "living document"[22] that evolves to meet the needs of the time, as certain contentious issues today were unthinkable to the Framers and thus cannot be answerable by a strict interpretation of the document's wording. This discussion can become extremely partisan, as certain political factions or parties feel more strongly about preserving the exact wording of the Constitution versus interpreting as guidelines for the nature of our government as its needs evolve. Reasonable people could easily come down on either side of the argument.

This fundamental philosophical disagreement has left our nation's government system broken, and damaged the reputation of our Constitution. By interpreting the document as a "living," adaptable system, we leave more room for interpretation and elaboration of central government authority at the expense of the States, which appears to be the empirical precedent since the beginning of the Twentieth century. Most of the debate between the "bedrock" and the "living" nature of our Constitution centers around Supreme Court or judicial decisions, rather than outright action by the state or federal governments. Many court cases have both elaborated and restricted the powers of the central government, like *United States v. Windsor*, *Citizens United v. FEC, or Hobby Lobby v. Burwell*, according to the how the Justices interpret the pertinent language of the Constitution. Meaning, the decision can often turn on a justice's individual predilection for judicial activism/restraint in the

[17] U.S. Const. amend. XVII.
[18] Edward A. Purcell, *Evolving Understandings of American Federalism: Shifting Parameters.*50 N.Y.L. Sch. L. Rev. 635 (2006).
[19] Owen M. Fiss, *Why the State?*4 H.L. Review 100, (1987).
[20] Owen M. Fiss, *Why the State?* 4 Harvard Law Review 100, (1987).
[21] Bruce Ackerman, *The Living Constitution.* 7 Harvard Law Review 120 (2007).
[22] Bruce Ackerman, *The Living Constitution.* 7 Harvard Law Review 120 (2007).

interpretation of Constitutional language.

There is evidence to suggest that judicial restraint and preservation of the original Constitutional wording at face value is more likely to engage citizens in the democratic process and preserve the distinct values of American federalism. By allowing state and local governments more autonomy (like the original Constitutional design), the line "between federal and state power is not fixed, but fluid; it responds to the costs and benefits of intergovernmental relations, seamlessly adjusting in that uncertain region where sovereigns meet."[23] So too, does it allow for better market incentives for public goods and access.[24] State governments are better prepared to address public needs on a local level, as they have more accurate information about local preferences and needs than does the national government.[25] Local jurisdiction or a state or even municipal level also sorts citizens into smaller groups better able to assign jurisdiction over public goods and welfare, or to lobby for certain agendas of public goods. [26]

Amendments 10 and 14 of the Constitution

As The Federalists promised to secure passage and ratification of their Constitution, the Bill of Rights was added to assuage doubts about the limits to national authority. Of the first ten amendments comprising the Bill of Rights, one was inserted with the specific intent of preserving State autonomy and the semi-sovereign authority of State legislatures, and while it is extremely short, the Constitutional Framers intended it to be enormously important: the Tenth Amendment. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[27] This short amendment was clearly intended to serve as a limiting mechanism to the United States government by preventing them from usurping any power not expressly delegated them in the wording of the Constitution by reserving those powers to the State legislatures and their citizens respectively.[28] Whether in reality this has proven to be the case remains to be seen; however, there are many scholars who would argue this has not held true even for a minority of the time.

The other amendment which deals exclusively with State's rights and powers is not contained within the Bill of Rights, but rather stems from the legacy of President Lincoln's Emancipation Proclamation, the horrors of the United States Civil War, and the resultant Thirteenth, Fourteenth, and

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[23] Roderick M. Hills, Jr. *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Federalism" Doesn't.* 96 Mich. L. Review 813 (1996).

[24] Yingyi Qian and Barry R. Weingast, *Federalism as a Commitment to Preserving Market Incentives.* 4. Econ. Assoc. 11 (1997).

[25] F.A. Hayek, *The Use of Knowledge in Society.* 4 The American Economic Law Review 35 (Sep. 1945).

[26] Charles M. Tiebout, *A Pure Theory of Local Expenditures.* 5 Journal of Political Economy 64 (1956).

[27] U.S. Const. amend. X.

[28] David M. Sprick. *EX ABUNDANTI CAUTELA (OUT OF AN ABUNDANCE OF CAUTION): A HISTORICAL ANALYSIS OF THE TENTH AMENDMENT AND THE CONTINUING DILEMMA OVER "FEDERAL" POWER.* 27 Cap. U.L. Rev. 529. (1999).

Fifteenth Amendments to the Constitution. The Fourteenth Amendment guarantees the extension of the recognized privileges and immunities of U.S. citizens to the laws of the states under which they live, and that no State shall deprive its citizens of due process of law, and shall afford them equal protection under State law.[29] The original intent of the passage of this amendment was to extend all the rights enjoyed by white citizens of the United States under federal law to their respective State law to newly freed and enfranchised slaves, and thereby prevent Southern states from limiting their Fifth Amendment rights to due process of law and equal protection. This amendment has proven an immensely powerful tool in the arsenal of the federal judiciary by limiting States' autonomy in areas of civil rights and civil liberties and guaranteeing fundamental access to due process of law under not just federal, but also state, law.[30]

IV. HOW THE ORIGINAL RELATIONSHIP DEVOLVES AND CHANGES

Throughout history there are several distinctive instances where the federal government assumed power that wasn't enumerated within the Constitution. The first instance happened under Hamilton when the loose interpretation of the Necessary and Proper Clause led to the establishment of a national bank. Nowhere in the Constitution does it give the national government the explicit right to establish a centralized bank. However, in the landmark McCulloh vs. Maryland case heard in 1819, Chief Justice John Marshall expanded the Necessary and Proper Clause to mean anything the national government deems useful in carrying out other explicitly enumerated powers (e.g. collecting taxes). This establishment of a national bank dramatically decreased the power of state banks, and expanded the power of the federal government. Of those in opposition to a centralized bank, Jefferson was the most outspoken. He believed the Constitution didn't give the national government the power to establish a national bank, realizing that a national bank *would* limit the power of the individual state banks. Although this bank was eventually superseded by our existing Federal Reserve System, this was the first instance where the federal government exercised powers not explicitly enumerated within the Constitution. This seemingly minor shift in power was also a contributor to the current distribution of power in the American political system.

The next milestone in increasing federal regulatory power occurred in 1824 when the Supreme Court heard the case of Gibbons vs. Ogden. This case concerns the interpretation of Article 1, Section 8 of the Constitution which states: "[The Congress shall have power] to regulate commerce with foreign nations, and among the several states, and with the Indiana tribes." The facts of the case are: Ogden was given the exclusive right to navigate the waters within the jurisdiction of New York by steam/fire boat. The Chancellor also awarded an injunction which prevented any other person from navigating the water by steam/fire boat. Gibbons, however, continued using the water to navigate his steamboats from

[29] U.S. Const. amend. XIV.

[30] Richard E. Levy. *Symposium on New Directions in Federalism: Federalism, the Next Generation.* 33 Loy. L.A. L. Rev. 1629 (2000).

New York to Elizabethtown. He claimed that since his boats were both licensed and enrolled in conformity with an act passed by Congress in 1793, he was entitled to the right of navigating the waters within the jurisdiction of New York. The courts ruled in favor of Gibbons and determined that the act of Congress gave Gibbons authority to navigate the waters of New York, and determined that the law prohibiting him from doing so was void. This decision carried with it two momentous implications. The first of which being the broadened definition of "commerce." Justice Marshall writes in his opinion, "The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and does not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more: it is intercourse."

This expansion of the definition helped justify the regulation of several commercial activities, with the only exception being activities that are solely executed within the confines of a single state. From this point forward in history, Congress has maintained the preemptive power to regulate numerous activities that previously fell in the jurisdiction of the individual states. Congress relied on this newly founded constitutional power to regulate interstate commerce when the Sherman Antitrust Act passed in 1890. This Act dissolved trusts that engaged in, or affected interstate commerce. Under the commerce clause and this Act, Congress was granted not only the power to regulate businesses, but also to prohibit the existence of certain businesses.

Congress also expanded the federal government's power when they established the Food & Drug Administration in 1906. This agency was established with the purpose of protecting the consumer from misbranded and adulterated food and drugs. The Mann-Elkins Act, passed in 1910, and the Hepburn Act, passed in 1906, also relied on the expanded definition of the commerce clause. They both granted additional power to the Interstate Commerce Commission, which was established with the initial intent to decrease customer-agitation with the railroads. The Hepburn Act gave the Interstate Commerce Commission additional power by allowing Congress to set the maximum rate that can be charged by the railroads. The Mann-Elkins act prohibited the railroads from allowing commodities, which they were financially interested in, to ship free-of-charge. Both Acts gave additional power to the federal government, thus again reducing the power of the states.

The most pivotal epoch with regard to the power of the federal government, however occurred during the FDR Administration, and the New Deal programs. The nation was going through a time of great economic instability when FDR was elected President, and he was tasked with the challenge of economic recovery. During his inaugural address, President Roosevelt reaffirmed the struggles the nation was facing, but also promised that circumstances would improve and the country would eventually prosper. His solution, however, resulted in an unprecedented expansion of the federal government. Within the first one-hundred days in office, FDR and Congress passed a total of fifteen bills that became the foundation of The New Deal. Some of the most notable programs include: the Glass-Steagall Act, the Agricultural Adjustment Act, the Civilian Conservation Corps, the Tennessee Valley Authority, and the Public Works Administration. The Glass-Steagall Act helped further regulate

the banking industry until it was repealed in 1999. This Act also created the FDIC, which is still in place today. The FDIC insured all bank deposits up to $2,500. This program helped prevent bank-runs which were popular after the collapse of the stock market in 1929. It also contributed to a renewal of faith in the banking system by the people. The Agricultural Adjustment Act (AAA) helped farmers by paying them to reduce their production, which consequently reduced supply in the market, and helped raise prices.

The intent of the Civilian Conservation Corps was to help reduce unemployment and promote environmental conservation. The Tennessee Valley Authority's sole purpose was to provide power, flood control, erosion control, and general economic support to the Tennessee Valley region. The last notable program was the Public Works Administration. This program focused on constructing public works (e.g. hospitals, schools, airports, etc.) across the country, and to provide jobs to the unemployed.

All of these programs were justified by the previously mentioned loose interpretation of the commerce clause. All of these programs again limited the power of the states to act on their own behalf. These programs contributed to the growth of the federal government during the 1930s, and shaped the current power structure.Before big government was opposed by the "New Federalism" movement led by Ronald Reagan in 1981, a number of distinctive examples occurred as evidence of the coercive power the federal government held over the states. One example includes the passing of a national drinking age by threatening to withhold federal highway funds. Traditionally, the states were able to establish their own drinking age. However, the federal government threatened to withhold money from the states unless the National Minimum Drinking Age Act was passed. Every state needs these funds in order to improve their highway system, so the act passed.

V. "NEW" FEDERALISM

Ronald Reagan ran for president with the hopes of returning power to the states. His movement, known as "New Federalism," gained popularity with both parties. Once in office, his first course of action was to appoint the Presidential Task Force of Regulatory Relief which was in charge of issuing reports on regulations. He then issued executive order 12291, which required all new regulations to be submitted to the Office of Management and Budget (OMB) for final review. He also issued an executive order, number 12303, which created the Presidential Advisory Committee on Federalism. This committee was in charge of advising the President on the overall federalism policy in the United States. The third executive order he issued relating to federalism was number 12372, which enabled local and state governments to influence federal decision-making. Reagan then issued an executive order requiring each federal agency to submit to the OMB "a statement of its regulatory policies, goals, and objectives for the coming year, and information concerning all significant regulatory actions underway or planned." Another significant executive order was number 12612. This executive order established that, "in the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual states." This executive order had a major impact on the relationship between federal and state governments. During his term, Reagan also managed to

consolidate seventy-six categorical grants into nine block grants. These grants had less restrictions, and could be used by the states with more freedom.

VI. STATE ENVIRONMENTAL POLICY EXAMPLES

In recent years, since the era of New Federalism was inaugurated under President Ronald Reagan, States have recently begun to reassert their sovereignty within their own borders in several key areas, one of the most prominent of which is environmental policymaking. As a power not enumerated to the federal government under the Constitution, several states have assumed it is a power reserved to them for the betterment of the quality of life of their citizens.[31] States have found recourse not only in their legislatures and respective state environmental regulatory agencies, but also in the common law.

Although a much older example, in the 1907 case Georgia v. Tennessee Copper Co., Georgia successfully sued a Tennessee copper smelting plant for sending noxious fumes over the border into Georgia, risking the health of both Georgia's citizens and agricultural commodities. As a "dispute between states," the United States Supreme Court was the Court of original jurisdiction, and although originally filed under a common law complaint of public nuisance, the case turned on Georgia's standing as quasi-sovereign entity with the legal right to act on behalf of the welfare of its citizens. Although a seemingly trivial case from more than a century ago, this precedent serves to reaffirm the principle of State's independent sovereignty apart from its national identity and dependence on the United States government.

By contrast, in the Regional Greenhouse Gas Initiative (RGGI) cap-and-trade program, the New England states worked together rather than in opposition as in the Georgia v. Tennessee Copper example and surrendered part of their sovereign autonomy to a regional environmental program that required extensive interstate cooperation. RGGI was a regional program implemented by Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont in which the states agreed to "cap and reduce" their energy companies' CO2 emissions. Fed up with the relatively weak federal government movement on CO2 emissions by power plants, these States enacted their own public program to incentivize emissions reduction.

[31] Neal D. Woods, *Primacy Implementation of Environmental Policy in the U.S. States.* 2Publius 36 (2006).