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# **SENIOR THESIS APPROVAL**

This Honors thesis entitled

**“Modern American Federalism: Defending a Dualist Approach  
to State-Federal Government Relations”**

written by

**Julia E. Williams**

and submitted in partial fulfillment of  
the requirements for completion of  
the Carl Goodson Honors Program  
meets the criteria for acceptance  
and has been approved by the undersigned readers.

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An Undergraduate Honors Thesis to meet the requirements for Ouachita Baptist University's Carl Goodson Honors Program

# Modern American Federalism

Defending a Dualist Approach to State-Federal Government Relations

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4-25-2019

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## I. Introduction

One of the greatest tenets of what American founders called this “experiment in democracy” is the Constitutional standard of federalism. Those in the Continental Congress labored over the proper relationship of a people to its government and, thus, the proper size of government that this relationship implies.

The tyranny from which the young republic sought independence just thirteen years before the drafting of the Constitution was a pervasive and seemingly omniscient one. The hand of the British Crown into the affairs of the common man was an instrument of autocratic control, rather than that of guiding protection. According to Constitutional scholar Craig R. Ducat, “The centralization of governmental power breeds tyranny, where tyranny is essentially defined as the systematic exploitation of most of the populace by a narrow, self-serving few.”<sup>1</sup> It was this struggle that fostered the ideas of limited and distant government. Quite plainly, the role of the American government was to protect the free exercise of liberty of its people, while keeping a safe distance. As long as taxes were collected by April 15, then there should be no cause for interference.

Because of these founding sentiments of limited government, congressmen of the day felt it necessary to create a Constitutional standard for smaller institutions such as municipal and state-level government. These smaller institutions were to be left to the discretion of popularly elected state representatives in each geographically bound state, allowed to enforce its own laws and standards of social behavior. All the while, these states were to be subservient to the

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<sup>1</sup> Ducat, 284.

supremacy of the federal American Government. While exercising the freedom of self-government, states must also recognize the over-arching national supremacy.

Some scholars note shifts between different eras of American jurisprudence, mostly seen in the differences of the Warren, Burger, and Rehnquist Courts from those of decades past. Specifically, constitutional academics note the distinction between two primary, competing practices of federalism. The first is dual federalism. More the Jeffersonian model, this “layer-cake” practice would consist of two equally powerful, mutually exclusive levels of government, the state and the national level. Using the textualist approach to Constitutional interpretation, many would argue in favor of a stronger reading of 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.” A stricter application of this text would imply very little use of the elastic clause (i.e. necessary and proper clause) to expand powers of the national government. As some would say, “If, in the exercise of its enumerated powers, the national government happened to touch upon the functions reserved to the states, then the action of the national government was unconstitutional.”<sup>2</sup> Furthermore, the diffusion of power into lower-level systems allows the citizen greater opportunity for participation, and thus, a greater adherence to the republican ideal of self-government.

The competing view — and what many would consider the dominant view of the last 70 to 80 years — is cooperative federalism.<sup>3</sup> Focusing more on the urbanized, industrial society of the Hamiltonian model, cooperative federalism features more of a partnership between the national and state levels of government, which finds its strength in the supreme power of the

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<sup>2</sup> Ducat, 285.

<sup>3</sup> Ducat, 286.

centralized national government. In Ducat's estimation, the nation's growth out of Jefferson's agrarian society necessitated a stronger national government to regulate a vast and trade-centered economy.<sup>4</sup> Taking a nationalist approach, scholars argue that federalism in this sense is not a "contract among states," but rather a means in which to form a more perfect union, composed of "only one — the ultimate sovereign — the people."<sup>5</sup> Comparable to the dualist's limited use of the elastic clause, cooperative federalists tend to enlist a looser application of Article I, Section 8, in conjunction with a heavy reliance upon the supremacy clause (i.e. Article VI, Paragraph 2).

Ducat asserts that a sort of "pendular swing" characterizes the last several decades of Court rulings on federalism, but he further asserts that while there have been "recent dualist stirrings," he finds the dual-federalism argument to be "obsolete" and "inappropriate."<sup>6</sup>

At issue in this analysis is the current standing of the notion of federalism in the American government. Research compiled here will use historical views of federalism decisions to determine what the modern context entails. Evaluating two recent cases, we can make an assumption about the future of American federalism. In essence, with the recent changes to those seated on the bench and shifts to domestic politics, what is to be expected of the current relationship of states' rights versus federal supremacy? Could we expect a shift back toward more trust in the state system during this new era of the Roberts Court?

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<sup>4</sup> Ducat, 286.

<sup>5</sup> Ducat, 287.

<sup>6</sup> Ducat, 286, 288.

## II. Methodology

The best method for discovering the modern perspective on federal-state relations is through a case study of current issues before the Supreme Court. With the historical perspective of past courts under Earl Warren, Warren Burger, and William Rehnquist, the question of the Roberts' Court leaning could only be found in evaluating recent cases on the Court's docket.

The first case this paper analyzes is *Murphy v. National Collegiate Athletic Association* (2018). At issue in this case is national government ability to demand states act to protect a federal interest. In short, the decision handed down in *Murphy* allows each state to determine whether it will permit or enable sports betting. The *Murphy* opinion will reference other recent Court cases which relied upon the dualist understanding of federalism in an effort to reinforce state autonomy. The Court's decision to overturn the Professional and Amateur Sports Protection Act (i.e. the Bradley Act) seemed to assert a dual-federalist approach in respecting the state ability to police its own statutes, without the hand of the national government.

A second case worthy of consideration is *Gamble v. United States*. The final hearing was held December 6, 2018. Recent conferences have not yielded a vote, nor has the Court rendered a decision. The primary question within *Gamble* is that of retaining the separate-sovereigns doctrine in regard to the Fifth Amendment protections against double jeopardy.

The facts of the case include the prosecution of an Alabama citizen, Terance Gamble, on charges of possession of a firearm as a convicted felon. After Gamble pleaded guilty to the state charges and was sentenced to a year in prison, the federal government filed its own charges on the same crime for the same charge. Under the dual-sovereigns doctrine, both the state and federal governments would have jurisdiction to prosecute, but Gamble appealed the



conviction of the federal charges on the grounds that it violated his Fifth Amendment rights regarding double jeopardy. In essence, the United States should not be allowed to convict him for the same crime for which he has already served time in the state of Alabama. Not only does this draw into question the double jeopardy claim, but, if the Court were to grant the appeal to Gamble, analysts must draw into question the supremacy of the national government.

Given the undecided nature of the first case, a conclusive statement is unlikely at the end of this thesis. However, given the decision of the *Murphy* case and the pendular shift of the Court's last few decades, we might be able to deduce a plausible outcome for Mr. Gamble and for the future of the American federalist perspective.

### III. Literature Review

Scholars will resoundingly agree that American federalism took a national turn following the end of the Civil War. Even more so, there were extreme strides forward on the part of the federal government during the Great Depression and both World Wars. Before the Civil War, however, many argue that the shared balance of state power was a healthy picture of the Framers' intent for a federal-state relationship.

One such Constitutional commentator is the executive director of the National Conference of State Legislatures, William T. Pound. In a July 2017 article for the NCSL, Pound used the perspective of American history to mark pendular shifts in the practice of federalism, similar to the explanation of Ducat provided above. His conclusion, however, seems to trend more

toward the direction of a dualist approach, favoring stronger state sovereignty.<sup>7</sup> “The last 40 years have been a period of more balanced federalism,” Pound writes. “State governments, generally, have been fiscally healthy and active as the country’s creative laboratories and public policy innovators.”

He describes the fallout of the 2007 recession in which states were granted access to more federal funding when state constitution budget requirements made funding of shared programs— like Medicaid and education — nearly impossible. In his words, federal subsidy became hard for “states to resist.”

He and the NCSL argue that the best way for federalist principles to function is when state liberty, power, and autonomy are protected. “NCSL is here to ensure that states’ interests and concerns are heard and included in the national dialogue. The creative tension in federalism can only be maintained by avoiding overreaching federal pre-emption and mandates,” he writes. “If states are to be the laboratories of democracy, they need the freedom, power and flexibility to innovate, create and adapt policies that best meet the needs of their citizens.”<sup>8</sup>

Yet another scholar who tackles the ever-ambiguous definition of modern federalism is Joseph Lieberman, the American lobbyist, attorney, and Connecticut Senator who ran as a 2000 vice presidential candidate on Al Gore’s presidential ticket. In a spring 1988 article in *The Urban Lawyer*, Lieberman added another “cake” to the civics lesson. With dualism often described as a “layer cake” and cooperativism described as a “marble cake,” Lieberman rather quotes another scholar calling the 1980s perspective as that of a “fruit cake,” meaning it was

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<sup>7</sup> NCSL, Pound.

<sup>8</sup> NCSL, Pound.

“thick, impenetrable, and too cumbersome for digestion.”<sup>9</sup> In this estimation, he writes briefly on the overgrowth of the national-government power, which has become so pervasive in local and state issues that many states either cannot escape it or forcefully push back at what they deem to be overreach.

Later in his arguments, Lieberman notes the role of the executive branch of government in actively facilitating the development of a shadow fourth branch of government—the bureaucracy. From his perspective, this is further evidence of the national disintegration of traditional federalism. In his descriptions of the Reagan Administration’s 1986 report *The Status of Federalism in America*, he detailed the rampant suggestions made by the White House Domestic Policy Council task force, which genuinely attempted to define and rectify the actions of the federal government that aided in this federalist decline. He also claims that the federal judiciary itself is to blame for the weakening of federalism.<sup>10</sup> He further argues that it is up to states to “seize the initiative,” given the “specific strategies” provided by the 1986 report.

## IV. Case Studies

### a. State Gambling

At issue in *Murphy v. National Collegiate Athletic Association* was the constitutionality of The Professional and Amateur Sports Protection Acts, or PASPA (1992). This was a piece of federal legislation that provided for the prohibition of state-

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<sup>9</sup> Lieberman, 287.

<sup>10</sup> Lieberman, 291.

sanctioned sports gambling. According to Oyez, an archive of the U.S. Supreme Court, there were also, included within the legislation, exceptions to this for sports wagering in the State of Nevada and for “sports lotteries” in Oregon, Delaware, and New Jersey, “provided that New Jersey also enact a sports gambling scheme within one year of PASPA’s enactment, which it did not do.”<sup>11</sup> The New Jersey legislature did not pass the Sports Wagering Act until 2012, “which authorized certain regulated sports wagering at New Jersey casinos and racetracks and implemented a comprehensive regulatory scheme for licensing casinos and sporting events.”<sup>12</sup> This followed a 2011 referendum vote in the state in which 64 percent of the population voted in favor of permitting sports gambling.

The NCAA and other petitioners sought to enjoin the State of New Jersey’s law on the grounds that the 2012 Act violated PASPA. New Jersey applied for a writ of certiorari to the Supreme Court on the grounds of “anti-commandeering” principles that had been asserted in previous Court cases, *New York v. United States* (1992) and *Printz v. United States* (1997). According to the Opinion of the Court, drafted by Justice Samuel Alito, “The anti-commandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, i.e., the decision to withhold from Congress the power to issue orders directly to the States....Thus, both the Federal Government and the States wield sovereign powers, and that is why our system of government is said to be one of ‘dual sovereignty.’”<sup>13</sup>

In the two cases cited by the petitioners in *Murphy*, the Court was presented with similar questions of dual sovereignty and, thus, the modern interpretation of federalism. In

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<sup>11</sup> Oyez, *Murphy*.

<sup>12</sup> Oyez, *Murphy*.

<sup>13</sup> LII at Cornell Law School, *Murphy*, decision of the Court.

*New York v. United States*, the State of New York filed suit against the federal government after it tried to dictate the waste-management practices of the state. The petitioner argued that this violated the Tenth Amendment and a state's own rights of policing powers. The Court agreed with New York, overturning one of three provisions listed by the petitioners as being in violation of anti-commandeering principles. It further ruled that if it were allowed to stand, the Low-Level Radioactive Waste Management Act Amendments of 1985 would be "inconsistent with the Constitution's division of authority between federal and state governments."<sup>14</sup>

In *Printz v. United States*, Justice Antonin Scalia drafted an Opinion of the Court which asserted that the United States Government did not retain the right under the Commerce Clause to require state and local officials to carry out provisional enforcement of its laws, even temporarily. At issue in this case was the Brady Handgun Violence Prevention Act, i.e. The Brady Bill, which required state and local law enforcement to report on local gun sales and conduct background checks until the federal government could develop a system on its own.<sup>15</sup> After local sheriffs Joe Printz and Richard Mack brought separate law suits forward, both District Courts found in favor of the petitioners. The Ninth Circuit Court of Appeals reversed this decision, causing Printz to petition for a *writ of certiorari*.

As Scalia stated in the opinion, "there is no historical evidence that Congress ever had the power to compel state executives into federal service."<sup>16</sup> According to video by Quimbee, Scalia centered his argument primarily around the principle of dual sovereignty,

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<sup>14</sup> Oyez, O'Connor opinion, *New York v. United States*.

<sup>15</sup> Quimbee, *Printz*.

<sup>16</sup> Quimbee, *Printz*.

arguing that the compelling of state officials to do federal work would upset the careful balance between state and federal power, as well as violate the static separation of powers doctrine. He further cited *New York v. United States*, saying that Congress could not force state legislatures to enact federal laws.

These two cases served to aid the Court in determining the fate of the *Murphy* decision. The Court voted 6-3 that PASPA was in violation of the Tenth Amendment under the anti-commandeering principle established by *New York v. United States* and *Printz v. United States*. As stated by Oyez, “In so holding, the Court explained that when a state fully or partially repeals old laws prohibiting sports gambling schemes, as New Jersey did in enacting the 2014 Law, it ‘authorizes’ those schemes under PASPA. The Court also explained that there was no meaningful difference between directing a state legislature to enact a new law or prohibiting a state legislature from doing so, and PASPA’s anti-authorization provision violated the anti-commandeering principle because it specifically mandated what a state could and could not do. The Court stated that complying with the anti-commandeering rule is important because it serves as one of the Constitution’s structural safeguards of liberty, advances political accountability, and prevents Congress from shifting regulatory costs to the states.”<sup>17</sup>

*Murphy* presents the modern Constitutional scholar with a dualist perspective, the same one which Ducat asserted was “obsolete.” The *Murphy* decision establishes the boundaries of federal overreach, hearkening back to the Alito and Scalia in *Printz* and *New York*, reasoning which protected the ideal of dual sovereignty. In Scalia’s estimation,

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<sup>17</sup> Oyez, *Murphy*.

specifically, the idea of federalism should be still contingent upon the balance and separation of federal and state power, thus lending credence to the dual- federalist approach that Jefferson and his camp so desired.

#### b. Double Jeopardy

According to the Legal Information Institute at Cornell Law School, *Gamble v. United States* (docket no. 17-646) is a case that was not expected to reach levels of national attention. When discussing the facts of the case, the LII states that Terance Gamble of Alabama had previously been convicted on felony drug charges seven years before the incident in question. In 2015, Gamble was pulled over by an Alabama police officer for a “faulty headlight.”<sup>18</sup> When the officer approached the vehicle, he smelled marijuana, and after a brief search, he discovered marijuana, a digital scale, and a 9mm handgun in Gamble’s possession. According to the LII’s description, both Alabama state law and the federal law are essentially the same in that both statutes prohibit a convicted felon’s possession of a firearm. The federal law punishes this offense by a year or more in prison.

After Gamble entered a guilty plea to the State of Alabama, the United States Government filed charges for the same crime. For this charge, Gamble was sentenced to another year in federal prison to be served concurrently with his time in state prison- also a one-year sentence. Gamble challenged these charges, asserting that the federal charge on the same crime would be in direct violation of his Fifth Amendment protection against double jeopardy. The Eleventh Circuit Court of Appeals, however, argued that, under the “separate-sovereigns doctrine,” the federal government and the state have equal

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<sup>18</sup> LII at Cornell Law School, *Gamble*.

jurisdiction. What comes into question, therefore, is the Court's interpretation of the "same offense" found in the Fifth Amendment's text:

"...Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb..."<sup>19</sup>

Gamble rests his defense upon the ambiguity of the "same offence" understanding. Similar to much of the Constitution, the words chosen here leave room for considerable interpretation by the American judicial system. Those who support Gamble often assert that the "same offence" should be understood as the "same crime," but those in favor of the separate sovereigns doctrine claim that the possession of a firearm by a felon in Gamble's case constitutes two different offences, one against the State of Alabama and one against the federal government of the United States.

This reasoning presents an unprecedented dichotomy, one that was brought up by one of the Court's newest members, Justice Neil Gorsuch, during oral arguments in December 2018. In this instance, the federalism question at issue presents a seemingly ironic perspective on the relationship of state governments with the national government and, thus, the protection of individual civil liberties. "I can't think of another case in which federalism is used to justify more intrusions by the government into people's lives (here, the prospect of dual prosecutions), rather than to protect people against intrusions."<sup>20</sup>

According to legal analyst Amy Howe, the Court rejected the lower court's ruling in *Gamble* because of the separate-sovereigns doctrine. Considered an exception to the double

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<sup>19</sup> United States Constitution, Fifth Amendment.

<sup>20</sup> Howe, separate-sovereigns.



jeopardy rule, the Court addressed this doctrine in earlier decisions such as *United States v. Lanza* (1922) and *Abbate v. United States* (1959).

As Chief Justice William Taft described it in *Lanza*, the separate-sovereigns doctrine was an exception to the double-jeopardy protection in an effort to protect the dual sovereignty of the states in regard to their relationship with national law and the laws of other states. This doctrine's history rests on the idea of a revolutionary government that desired the protection of local government's ability to prosecute for offenses against its own jurisdiction. At the same time too, this doctrine was developed with the concurrent idea that there must be a way in which the federal government is not barred from prosecuting those who violate its laws.

“We have here two sovereignties, deriving power from different sources, capable of dealing with the same subject-matter within the same territory. Each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty, not that of the other. It follows that an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each. The Fifth Amendment, like all the other guaranties in the first eight amendments, applies only to proceedings by the federal government, and the double jeopardy therein forbidden is a second prosecution under authority of the federal government after a first trial for the same offense under the same authority.”<sup>21</sup>

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<sup>21</sup> LII at Cornell Law School, separate-sovereigns.

Even though the Court has not ruled on *Gamble*, Howe theorizes that getting the necessary five votes to overturn this doctrine would be difficult, if not next to impossible. However, she detailed some conversation by one of the newest members of the Court, Justice Neil Gorsuch, in an uncharacteristic agreement with Justice Ruth Bader Ginsburg and Justice Elena Kagan.<sup>22</sup>

Kagan's question, which resulted from further oral argument and questioning of Gamble's representation, had more to do with the doctrine of *stare decisis* – that is, “let the decision stand.” “Kagan was the first to raise this issue, noting that the separate sovereigns doctrine is a ‘170-year-old rule’ for which 30 justices have voted. *Stare decisis*, she stressed, is at bottom a doctrine of ‘humility’; we don’t want to overrule an earlier decision or rule just because we think we can do it better,” Howe stated in her summaries.<sup>23</sup>

According to Howe, Kagan further argued that Gamble's petition was asking for the Court to determine the Framers' original intent of the legislation, since Gamble's argument refers back to the colonial era and British common law. Justices Clarence Thomas and Neil Gorsuch concurred with Kagan and Ginsburg that a perusal of the old rule is recommended in this instance.

While most scholars currently doubt an overturn of the separate-sovereigns doctrine, a possible revocation of the long-held legal tradition could have serious implications not just in the criminal justice system, but also on the future of Constitutional interpretation. Should the doctrine be overturned, this could endanger the protection of states' rights to prosecute for the same crime that the federal government does. This could undermine state

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<sup>22</sup> Howe, separate-sovereigns.

<sup>23</sup> Howe, separate-sovereigns.

sovereignty, granting fuller access of the federal government into local issues, or the overstep of state into federal ones.

However, a refusal to overturn this doctrine would result in a crisis for the libertarian-minded, those committed firstly to civil liberties. Much as Justice Gorsuch observed, the protection against double jeopardy is tossed out the window in an effort to preserve some semblance of dual sovereignty.

In my estimation, the potential overturning of the separate-sovereigns doctrine would hearken back to Ducat's synopsis of the cooperative federalist movement — that is, the commonly held interpretation of the last seventy to eighty years. This marbled cooperation would further render the dualist approach as “obsolete,” as Ducat asserted.<sup>24</sup>

## V. Implications on Contemporary Questions

### a. Marriage

In the recent past, one of the more contentious cases regarding pressing social issues has been *Obergefell v. Hodges* (2015). This landmark case was one in which the Supreme Court overturned state same-sex marriage bans, calling them unconstitutional. Following the successive lawsuits of the States of Michigan, Ohio, Kentucky, and Tennessee, the Sixth Circuit Court of appeals ruled that such same-sex marriage bans could be considered constitutional if the argument considered *Baker v. Nelson* (1971). This case was dismissed

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<sup>24</sup> Ducat, 286.

by the Supreme Court after it was sent on automatic appeal, but the Court found that there was no substantial federal question at issue. Thus, the lower court *Baker* decision stood, being established later as precedent in regard to marriage. At issue in *Obergefell* was a dual question, according to the Court Opinion.<sup>25</sup> Firstly, there were to determine from two distinct sets of state lawsuits whether a State is required to issue a marriage license to a same-sex couple. The second question addressed whether other States are required to recognize a marriage license granted to a same-sex couple in another state. The Court found the answer to both questions to be “yes.”

In my opinion, *Obergefell* presents the people for the United States with a unfair and uncharacteristic judgment from the Court. With its 5-4 decision, Justice Kennedy delivered the Opinion of the Court, voting with Breyer, Ginsburg, Sotomayor, and Elena Kagan. According to many sources, the petitioners’ claim was granted on the grounds that the same-sex marriage bans of their respective states would be in violation of the due process and equal protection clauses.

Of the remaining votes, I found it interesting that questions of federalism were unlikely to arise in this case. I believe state-federal relations to be much more significant than did the scholars studying this case at the time of the opinion. Scalia, however, drafted a dissenting opinion, in which he detailed that the “Court decision effectively robs the people of the freedom to govern themselves.” He further noted that making marriage a nationally decided issue further slowed down or halted due process.

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<sup>25</sup> Opinion of the Court, *Obergefell*, 3.

If we take into account the dualist leanings of *Murphy*, it is plausible that some strong states' rights sentiments could have affected the outcome of this case. Should this case have been decided in the last judicial term, rather in June 2015, the people of the United States might have expected a significantly different outcome.

Hypothetically, if the dual-sovereigns doctrine is applied in this situation, we could easily establish the Tenth Amendment claim.

“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.”<sup>26</sup>

If we apply a strict constructionist interpretation of the Constitution, this simple amendment could be taken literally to mean that since the U.S. Constitution does not promise the national government the power to define marriage, then it must belong to the respective states. In theory, the dualist approach, if it becomes the emergent view of the next era of the Court, would allow each state to define marriage for itself. While each state would not be forced to issue licenses to same-sex couples, they could still be required to recognize the licenses granted by other states.

On strictly hypothetical grounds, the dual federalist approach in the pressing social issue of marriage could permit states to treat marriage licenses in much the same way that they treat drivers' licenses—with the “full faith and credit” clause of the Constitution. While the application of this is somewhat more elusive, it would be a rather healthier approach to the system of localized, self-government, strengthening the Jeffersonian model of federalism.

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<sup>26</sup> United States Constitution, Tenth Amendment.

With the passage of *Obergefell*, states' rights took a significant blow, but I theorize that had it been decided with the current Court, the discussion may have shifted more toward dualist, rather than cooperative understanding of marriage. *Obergefell* is one of many recent instances of judicial activism, one in which the fate of Constitutional interpretation rests.

## b. Life

Perhaps the most memorable Supreme Court case for any civics student of an American high school is *Roe v. Wade*, the landmark 1973 case in which abortions in the first trimester were allowed; but, for the second and third trimesters, the Court attempted to balance state interest in protecting the life of an unborn child with what they claimed was a woman's Ninth Amendment right to privacy.

In numerous instances following this, the pro-life movement has mustered all hope that somehow this decision might be overturned. With the recent Conservative swing on the Supreme Court since the beginning of the Donald Trump administration, that hope has been resurrected in a new wave of pro-life activism.

With the passage of *Roe v. Wade*, abortion became a federal issue, one in which the national government asserted its Supremacy, but ignored the language of nearly every founding federal document. Because of this, it is important to note that a reversal of *Roe v. Wade* would not simply make abortion illegal, as many Americans would assume. What essentially would happen would be a referral back to all states on what could be done within their own sovereign borders. While this seems like it would be a tremendous victory for the states' rights movement—and, it would—it complicates the pro-life movement's long-

term goals. While more Conservative states would be able to draft legislation that would prohibit abortion, more progressive states might be drafting legislation that would permit abortion up until partial-birth. If the ultimate goal is to save lives, this posits a precarious situation for those in the pro-life movement.

With a dualist perspective in mind, I also believe it necessary to stress that the protection of life is not a Tenth Amendment issue—meaning, it is not one that belongs to individual states to decide. I believe this issue to be markedly a federal issue, when fundamentally every founding document refers first to the protection of life. In my estimation, there can be no healthy debate on the protection of liberty or the pursuit of happiness without first defining life, a human being, whether born or unborn, of distinct DNA with its own personality, soul, and mind.

### c. Guns

Yet another conversation in the realm of modern federalism is the possession of firearms. Most recently, gun-rights advocates were overjoyed with the passage of The Concealed Carry Reciprocity Act of 2017. This legislation would make the legal possession and carrying of a handgun possible across state lines on a national scale. In other words, a citizen of the State of Arkansas with a concealed carry permit issued by the Arkansas State Police would be able to show that permit upon questioning in the Commonwealth of Virginia. Each state would have to recognize the laws of each state which allows its citizens to carry, as well.

Members of the opposition say, ironically, that this decision should be left up to the states. In a December 2017 article for Jursit, Allen Rostron wrote, “While Congress has some power to protect and enforce constitutional rights, cases like *City of Boerne v. Flores* (have made clear that the federal government does not have the power to enact legislation that infringes state authority merely because Congress thinks a constitutional right should be broader or stronger than the courts have found the right to be.”

This posits another interesting question for a possible dualist shift, in that the interstate travel of legally-owned and carried handguns would be next to impossible without a system of reciprocity. Much like the abortion issue discussed above, the Second Amendment of the Constitution—if a strict constructionist perspective is applied—makes gun ownership a federally protected right, one that cannot even be regulated by a state or local government. In my opinion, a Tenth Amendment claim would be useless, since the Constitution does markedly make the possession of a firearm a national issue rather than a state one.

I believe The Concealed Carry Reciprocity Act of 2017 to be a step in the right direction of nationalizing the right of gun ownership and possession. However, I find the legislation to be somewhat superfluous with a correct knowledge and application of the Framers’ federalism. Myself an advocate of states’ rights and gun rights, I further believe in the enumerated powers of Congress which negate the need for legislation to demand state reciprocity. I contend that it should simply be understood.

#### d. Marijuana

The most recent federalism problem has arrived with the bi-partisan legislation called the STATES Act. This 2018 legislation, co-sponsored by Senator Corey Gardner (R-CO)



and Senator Elizabeth Warren (D-MA), would entrust the management of marijuana laws to each respective state, instead of creating a one-size-fits-all, national solution that many on either side of the aisle have campaigned for. Some of those who favor unrestricted marijuana use want a national protection, while the opposition desires to see a national illegality of marijuana use.

According to an article in *The Weekly Standard* by Collin Roth, this federalist solution to the marijuana issue could produce a marketplace of ideas, hearkening back to Lieberman's assessment in *The Urban Lawyer*. "Federalism results in fifty different solutions, lowering the stakes for 'losers' on policy decisions and providing a valuable laboratory of experimentation for other states to observe," Roth said. "It is, in many ways, far better than a single national solution imposed by Congress or the courts."

With this in mind, proponents of such legislation consider this would be a victory for states' rights, noting the decrease in national power and the trust of states to self-govern, either by judicial directive, popular vote, or state legislative action. Opponents of the legislation may find problem not just with the moral question of the "gateway drug," but also with the decentralization of federal power.

## VI. Conclusion

Based on the case study above, it is my estimation that Ducat's claim of an "obsolete" dual federalism is not accurate in this current era of the Roberts Court. In regard to *Murphy v. National Collegiate Athletic Association*, it seems that the Court has strongly defended

a dualist perspective on Constitutional federalism in their assertion that the Congress may not force the respective states to fulfill a federal interest.

In citing the decision of both *New York v. United States* and *Printz v. United States*, the Alito Opinion of the Court found that the petitioners' claim that PASPA was in violation of anti-commandeering principles. This decision was a resounding and marked shift in favor of the states' rights, dualist stirrings.

In *Gamble v. United States*, constitutional scholars and experts are placed in a somewhat precarious situation in the balance between states' rights protections and the guarantee of Constitutional civil liberties. Even the Justices themselves noted the ironic nature of the request to overturn the separate-sovereigns doctrine, which serves as an exception to the Fifth Amendment double jeopardy defense. At issue in this case, we studied the ambiguity of "same offense" language of the Amendment, while further extricating the oral arguments from concerns of *stare decisis*.

If the separate-sovereigns doctrine is indeed overturned, this could be interpreted as a threat to the balance of power necessary in a dualist approach. On face value, it would prevent two different sovereigns from prosecuting for the same offense, protecting the individual's guard against double jeopardy. If, however, the separate-sovereigns doctrine were upheld, it could be seen as a victory for the shared, balance of power of federalism.

Based on this research, I do observe some pendular shifts in Constitutional thinking back toward the pre-Civil War notion of dual federalism. This is a trend that has served to counteract the rapid growth of the national government, whether that growth is the result of executive order, legislative action, or judicial activism. In the contemporary idea of

cooperative federalism which many scholars support, I believe the “popular sovereignty” idea to be much too broad to apply to such a distinctly diverse population. Much like the reasoning of the STATES Act above, it would be difficult on many of these social issues to place a blanket, one-size-fits-all response to varying degrees of the same question. For example, one authority cannot be expected to answer a question on the sanctity of the traditional marriage relationship to the liking of both Arkansas and California.

The application of these dualist principles could revolutionize the American perspective on a number of the great social issues. As noted above, the states’ rights claim is often thrown around depending upon the issue or what side of the political aisle one would ask. Aside from marriage, life, firearms, and marijuana laws, consider what the implications could be for immigration, the conversation on sanctuary cities, the Mueller probe into the Trump administration, or the criminal justice system, to name a few.

Stronger state governments would serve to decentralize the monopolistic national power that has grown beyond much of popular or local control. This shift back toward a system that many would deem “arcane” would most likely serve to strengthen political discussion at the local level, grow individual liberty, strengthen personal access to governments, and present a platform on which to circulate a variety of ideas on self-government. Even though our society has transformed into a more complex and stratified one than what the Framers’ envisioned, I do believe that a system of decentralized and localized power can produce a healthier productivity of republican government and further establish a protection of individual liberties. Ultimately, it would preserve the idea that

those powers not expressly granted the United States are “reserved to the states or to the people, respectively.”<sup>27</sup>

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<sup>27</sup> United States Constitution, Tenth Amendment.

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