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Rehabilitating Federalism

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TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM. By *Samuel H. Beer.* Cambridge: Harvard University Press. 1993. Pp. xxi, 474. $29.95.

Historically, federalism has appeared in political debate primarily as an argument to support conservative causes. During the early nineteenth century, for example, John Calhoun argued that states had independent sovereignty and could interpose their authority between the federal government and the people to nullify federal actions restricting slavery (p. 224). Similarly, during Reconstruction, southern states claimed that the federal military presence was incompatible with state sovereignty and federalism.[1]

In the early twentieth century, opponents of federal legislation successfully used federalism as the basis for challenging laws regulating child labor, imposing the minimum wage, and protecting consumers.[2] During the Depression, conservatives objected to many of President Franklin Roosevelt's proposals, such as social security, on the ground that they usurped functions properly left to state governments.[3]

During the 1950s and 1960s, those objecting to federal civil rights efforts phrased their protests primarily in terms of federalism. Southerners challenged Supreme Court decisions mandating desegregation and objected to proposed federal civil rights legislation by resurrecting the arguments of John Calhoun. Proponents defended segregation and discrimination less on the grounds that they were desirable practices and more in terms of the states' rights to choose their own laws concerning race relations.[4]

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1. For example, in the Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court narrowly construed the Reconstruction-era amendments, based in part on federalism considerations. Notably, the Court gave the Privileges or Immunities Clause an extremely narrow construction because of its belief that the provision was not intended to alter federal-state relations. 83 U.S. (16 Wall.) at 74-80.

2. *See, e.g.,* Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating the federal regulation of employment, including a minimum wage); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating the federal regulation of child labor), *overruled by* United States v. Darby, 312 U.S. 100 (1941); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (holding that the Sherman Antitrust Act could not be applied to businesses engaged in production).

3. *See, e.g.,* WILLIAM MANCHESTER, THE GLORY AND THE DREAM 137 (1974) ("To the conservative justices, apparently, any federal participation in local problems was forbidden.").

4. *Cf.* pp. 20-21 (discussing the "compact model," in which states and nation are separate political communities).

In the 1980s, President Ronald Reagan proclaimed a "new federalism" as the basis for attempting to dismantle federal social welfare programs (p. 2). In his first presidential inaugural address, President Reagan said that he sought to "restor[e] the balance between . . . levels of government."[5] His administration thus employed federalism as its rationale for cutting back on countless federal programs.

Hindsight reveals that federalism has primarily been an argument conservatives have used to resist progressive federal efforts, especially in the areas of civil rights and social welfare. There is, of course, nothing inherent in federalism that makes it conservative. In recent years, for example, prominent liberals, such as Justice William Brennan, have argued that there should be more use of state constitutions to protect individual liberties.[6]

What is striking, however, about the historical use of federalism arguments is that the discussions are very much value-laden. Advocates debate important issues of national policy in terms of the proper allocation of power between the federal and state governments.

Yet, each year as I teach constitutional law and specifically the material about federalism, I am struck by the absence of discussion about underlying values in the material. Supreme Court decisions about federalism rarely do more than offer slogans about the importance of autonomous state governments. Occasionally, the Court will mention that states are important as laboratories of ideas or that state governments are crucial as a check on the tyranny of the national political government.[7] Never, though, is there much elaboration of the values of federalism, and rarely is there any explanation of how the values of federalism relate to the Court's holdings. For example, in its 1992 decision in *New York v. United States,*[8] the Supreme Court relied on federalism and the Tenth Amendment to invalidate a provision of federal law.[9] Yet the Court provided little discussion about why a federal statute requiring states to dispose safely of nuclear wastes undermined important values of federalism.

Indeed, I believe that, of all of the areas of constitutional law, it is in discussions about federalism that the underlying values are least discussed and most disconnected from the legal doctrines. In separation-of-powers cases, courts frequently give explicit consideration to the tension between accountability and flexibility.[10] In dormant com-

5. Ronald Reagan, First Inaugural Address, PUB. PAPERS 1, 3 (Jan. 20, 1981).

6. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

7. *See, e.g.,* Gregory v. Ashcroft, 111 S. Ct. 2395, 2399-400 (1991) (discussing the value of federalism in checking national power).

8. 112 S. Ct. 2408 (1992).

9. 112 S. Ct. at 2428-29.

10. *See, e.g.,* INS v. Chadha, 462 U.S. 919, 1002 (1983) (White, J., dissenting) (arguing in favor of the legislative veto based on the importance of checks and balances); United States v.

merce clause cases, courts often weigh the importance of a national market economy unrestricted by protectionist state laws.[11] In equal protection cases, courts eloquently speak of the need for racial and gender equality.[12] In procedural due process cases, courts identify and expressly balance the underlying values of accurate decisionmaking, individual interests, and government efficiency.[13] In freedom of speech cases, courts constantly discuss the value of expression and the dangers of government censorship.[14] But where in federalism cases is there any careful exploration of why state autonomy matters and how specific federal actions undermine it?

In fact, post-1937 Supreme Court decisions concerning federalism have been paradoxical. The Supreme Court has aggressively used federalism as the basis for limiting federal *judicial* power, but has almost completely refused to employ federalism to limit federal *legislative* power. This approach to federalism persisted almost unchanged for fifty-five years, from 1937 until 1992, with the Court declaring only one federal statute unconstitutional on federalism grounds, and that case — *National League of Cities v. Usery* — the Court later expressly overruled.[15] During this same period, however, the Court has frequently used federalism as the basis for limiting federal judicial power — for example, by requiring abstention,[16] expanding the scope of the Eleventh Amendment and state immunity to federal court litigation,[17] and limiting the scope of federal habeas corpus review.[18]

I sketch this history because it is only against this backdrop that

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Curtiss-Wright Export Corp., 299 U.S. 304, 319-21 (1936) (discussing the importance of according the President broad powers in the area of foreign policy).

11. *See, e.g.*, City of Philadelphia v. New Jersey, 437 U.S. 617 (1978) (discussing the harms of protectionist state legislation); H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949) (same).

12. *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677 (1973) (gender equality); Brown v. Board of Educ., 347 U.S. 483 (1954) (racial equality).

13. *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976) (articulating the balancing test for procedural due process). For an application of the *Mathews* balancing test, see Connecticut v. Doehr, 501 U.S. 1 (1991) (requiring procedural due process for prejudgment attachments).

14. *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761-65 (1976) (explaining the importance of protecting commercial speech); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (explaining the importance of protecting criticism of the government and government officials); Whitney v. California, 274 U.S. 357, 375-77 (1927) (Brandeis, J., concurring) (eloquently explaining the rationale for protecting speech); Abrams v. United States, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting) (articulating the market-of-ideas rationale for freedom of speech).

15. 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

16. *See, e.g.*, Younger v. Harris, 401 U.S. 37 (1971) (using "Our Federalism" as the basis for requiring federal courts to abstain when there is a pending state court criminal proceeding).

17. *See, e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974) (using state sovereignty and the Eleventh Amendment as the basis for limiting federal court jurisdiction to hear suits against state governments).

18. *See, e.g.*, Coleman v. Thompson, 501 U.S. 722 (1991) (preventing federal habeas corpus petitions when there is a procedural default in state court).

one can evaluate Professor Samuel H. Beer's[19] new book on federalism. Beer's central thesis is that history supports expansive national powers and refutes the view that states retain substantial sovereignty. In a brilliant exploration of history, starting with Thomas Aquinas and continuing through the Framers' views, Beer seeks to demonstrate that federalism need not be viewed solely as a conservative or regressive concept. Quite the contrary, Beer's express goal is to "rediscover" federalism as a source for progress and for the protection of individual rights. There is no doubt that Beer has made a major contribution to the literature on the subject.

Whether Beer succeeds, however, depends on how his audience views his goal. If one reads his book looking to gain a better understanding of the origins of American federalism, the book is a tremendous success. It is clearly written, impeccably documented, and extremely persuasive. Moreover, if one wants to refute conservatives' claims that the origins of the doctrine justify their view of federalism, Beer's book is invaluable.

On the other hand, Beer's book is much less helpful if one is looking for insights as to how political and legal analysts have actually used federalism since 1787. The introductory chapter sketches a brief history of federalism since the Constitutional Convention, focusing on issues raised by slavery, by the industrial revolution, and by the civil rights movement (pp. 8-20). Beyond that, however, and the discussion of the values of federalism in the last chapter (pp. 382-92), the book's focus is entirely historical. Thus, Beer's book is of limited benefit for approaching the issues specific to federalism that will confront government in the future. Rather, it is almost entirely about the intellectual foundations of federalism prior to the beginning of American government.

Generally, it would be unfair to criticize a work of history for not being "relevant" to later issues. However, Beer invites this reaction with his preface and first chapter. There he begins by quoting Ronald Reagan's view of federalism as American government being a compact among the states (p. 2). In large part, the book is a thorough — indeed, brilliant — refutation of that view based on the historical origins of federalism.

Yet, I question whether one can challenge a contemporary view solely based on historical evidence. Two hundred years of American experience are far more important in understanding the content of federalism than are the views of those who died long before the Constitution was drafted.

Therefore, I am left with a mixed reaction to Beer's book. As a work of constitutional history, the book is flawless. Beer unquestiona-

19. Eaton Professor of the Science of Government, Emeritus, Harvard University.

bly succeeds in refuting any *historical* claim that we should view American democracy as a compact among the states. The book, however, cannot accomplish all that Beer seeks. As a basis for modern analysis about federalism issues, the book's value is inherently very limited. This, of course, is only a criticism to the extent that the book seeks to provide a basis for contemporary analysis of federalism issues.

This review is divided into three Parts. Part I briefly describes Beer's analysis. Part II explains why his historical exploration is of limited benefit for understanding federalism issues as they have occurred over the course of American history. Finally, Part III considers aspects of Beer's book that offer insights warranting further development in dealing with federalism issues.

By *federalism,* I simply mean the allocation of power between the federal and state governments. More specifically, *federalism,* as used throughout this review, refers to the extent to which consideration of state government autonomy has been and should be used as a limit on federal power.[20] Of course, this is not the only meaning of *federalism* or the only relevance of federalism considerations in American government. It is, however, the definition of *federalism* that is implicit in Beer's book.

I. PROFESSOR BEER'S HISTORY

Except for the first and last chapters, Beer's book is a history of the ideas that formed the basis for American federalism. The book is organized into three parts. The first part looks at the writings of Thomas Aquinas, John Milton, and James Harrington (pp. 31-131). Beer contends that Aquinas's philosophy was the intellectual justification for monarchy. As such, it was this philosophy, above all, that American government rejected. Beer, after describing Aquinas's political theory, states: "Th[e] double work of destroying the old doctrines of virtue and grace and conceiving a new rationale for authority and purpose laid the intellectual foundations for the American republic" (pp. 64-65).

Beer suggests that John Milton's emphasis on government by discussion provided a key foundation for the American republic. Milton saw individuals as autonomous and isolated in a manner much different than earlier philosophers had. Beer notes the importance of this autonomy:

> This new view of the individual leads to a new view of society, history, and government. Looked at in one way, Milton's individual is painfully isolated. He no longer enjoys the moral and intellectual secur-

20. Federalism by this definition has both a descriptive element, referring to the extent to which courts have used state sovereignty as a check on federal power, and a normative application, referring to the extent to which state sovereignty should be a limit on federal government authority.

> ity that came from the deference of his inferiors and the guidance of his superiors. Deprived of these vertical supports of the great chain of being, he confronts the enormous questions of belief and conduct, of good and evil, alone with his reason and his God. On the other hand, since his fellows have similar powers which they are exercising in the same quest, he can and must look to them for counsel. [p. 74]

For this reason, rational deliberation is essential, and facilitating it is a central function of government.

To conclude his first part, Beer describes the contribution of James Harrington to American political thought. Beer makes a compelling case that Harrington played a pivotal role in the ultimate scheme of American government. Harrington's tract, *Oceana,*[21] published in 1656, strongly advocated popular government as an alternative to monarchy and authoritarian regimes. Beer notes that "[o]ne element in this constitutional order was a vertical distribution of powers between center and periphery, protected by fundamental law. This scheme of constitutional decentralization foreshadows the federal structure adopted by the Americans in 1787" (p. 85).

Beer explains that Harrington sought to answer Machiavelli's view that "diversity leads to disorder and that disorder leads to tyranny" (p. 91). Harrington saw a solution in popular sovereignty and a federalist structure of government. Beer writes:

> What the American student of federalism must find especially illuminating in Harrington's thought is how vividly it brings out the nationalist emphasis of the republican tradition. His advocacy is all the more convincing because he considered other possibilities. He considered and rejected the small state theory of republicanism advocated by Machiavelli. He repeatedly spurned the confederate model later popularized by Montesquieu and adopted by many Anti-Federalists. [pp. 129-30]

The second part of the book describes republican thought as a feature of the revolutionary sentiment (pp. 133-214). At the outset of that part, Beer reminds the reader that the American rebels chose not only independence but democratic government as well (p. 134). This part of the book also explores the conflict over the appropriate nature of American government at the earliest stages of American history. Beer describes, for example, how the commitment to a republic articulated by men such as Benjamin Franklin and Thomas Paine also justified a centralized government (pp. 153-62). Beer explains the importance of these thinkers to Framers such as Alexander Hamilton: "In the spirit of Franklin, Alexander Hamilton construed the constitution of 1787 in the light of the tasks of nation-building and in his prophetic reports showed how an active central government could lead

21. JAMES HARRINGTON, THE COMMONWEALTH OF OCEANA (1656), *reprinted in* THE POLITICAL WORKS OF JAMES HARRINGTON 155 (J.G.A. Pocock ed., 1977).

the way toward making the country rich, powerful, and united" (p. 162).

The Framers, explains Beer, sought to assure both liberty and a successful union by creating a national and federal republic (p. 195). Beer sketches the competing philosophy of the anti-federalists that was founded in the writings of Montesquieu and advocated a confederate republic among sovereign states (pp. 219-93). Interestingly, Beer points out that this philosophy had few advocates before 1787 or at the Constitutional Convention but that the compact view of federalism was resurrected in the late 1780s (pp. 236-37).

Beer then carefully reviews the writings of the Federalists, especially those of James Madison, and shows their rejection of compact federalism (pp. 244-307). Furthermore, the ratification of the Constitution by the people supports Beer's contention that the Constitution is not properly regarded as a compact among the states.[22]

Beer's presentation of the history is superb. The writing is clear and readable; the research impeccable. Beer has written the definitive intellectual history of federalism in the United States. This review's brief sketch cannot begin to describe the care and nuance in his historical account of the formation of American government.

II. The Limited Usefulness of Professor Beer's History

If Beer offered this history solely as an elucidation of the intellectual foundations of American federalism, I would have little to say in this review. I would question the extent to which the views of Milton, Harrington, or Montesquieu can be attributed to the Framers simply because the Framers were familiar with their writings and relied upon some of their ideas. But this would not in any way undermine the value of a clear description of the intellectual foundations of federalism.

Moreover, Beer seeks at the very least to refute the historical underpinnings of the view that American government is best understood as a compact among the states. At this level, too, I have nothing but praise for Beer's effort.

Apparently, however, Beer seeks to go further than this. In the introduction and last chapter, Beer professes to link his historical analysis to modern debates about federalism. In the introduction he writes: "Whether one is trying to say what is the law of American federalism or what is the proper use to be made of that law, one can hardly arrive at an unambiguous conclusion without explicitly or implicitly supplementing the argument by drawing on a framework of

22. This, of course, was the approach taken by Chief Justice John Marshall in McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819). According to Marshall, the people, and not the states, created the national government by approving the Constitution, and thus the people, and not the states, retain ultimate sovereignty. 17 U.S. (4 Wheat.) at 402-05.

theory" (p. 23). Beer sees history as providing that theory, explicitly believing that his "reconstruction of nationalist thought presents . . . a past which is usable today" (p. 25).

It is at this level — in the linkage of his historical analysis to modern issues concerning federalism — that I question Beer's conclusions. First, an understanding of American federalism is impossible without a view to the experiences of the two hundred years since the framing of the Constitution. As a matter of intellectual history, the constant presence of the compact view lends it credibility, regardless of the views of the Framers Beer quotes. In other words, Beer implicitly assumes that compact theory depends on historical authenticity for its legitimacy. However, one can justify the theory as a viable conception of American government by defending its normative desirability entirely apart from its historical pedigree.

Moreover, American experiences since 1787, much more than those earlier, are a powerful refutation of compact theory. Most notably, the Civil War and the constitutional amendments that followed it dramatically changed the conception of the relationship of the federal and state governments.[23] More recently, the assertion of compact theory by southern states seeking to avoid desegregation was dramatically unsuccessful. The repeated rejection of compact federalism since 1787 is a powerful argument against it, if it is to be evaluated from a historical perspective.

Beer clearly recognizes the importance of these intervening events. In the introduction, he suggests that the national idea confronted three great trials: "the trial of sectionalism, culminating in the Civil War; the trial of industrialism, culminating in the great depression and the New Deal; and the trial of racism, which continues to rack our country today."[24] Although it might have required another book, I wish that Beer had done more to describe the relationship of these events to his theory. They, much more than the intellectual history that preceded the Constitution, shaped the modern theory and practice of federalism.

Moreover, I question whether the debate between the national and compact views of federalism is at the core of contemporary disputes over federalism. The central federalism issue in modern constitutional law is whether, and to what extent, state sovereignty limits federal powers.[25] Is there a zone of activities assigned to the states for their exclusive control? Do some federal actions unduly interfere with state sovereignty?

The answers to these questions are rarely put in terms of compact federalism. Indeed, even those completely persuaded by Beer's refuta-

23. BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 81-104 (1991).

24. P. 8; *see also* ACKERMAN, *supra* note 23, at 58-59.

25. *See, e.g.*, New York v. United States, 112 S. Ct. 2408, 2417-19 (1992).

tion of the historical pedigree of compact federalism still could defend state sovereignty as an important value. They could justify the need to protect state governments from congressional overreaching based on the values served by federalism and the benefits gained by vigilant protection of state sovereignty.[26]

Moreover, a central question is whether the paradox of modern federalism since 1937 — federalism as a limit on the federal *judicial* power but not on the federal *legislative* power — is justified. This crucial question cannot be answered in historical terms. The professed justifications for deferring to state courts, especially the reliance on comity and parity as reasons for limits on federal judicial power, do not depend on acceptance of the compact theory of federalism.[27]

Simply put, the scholarly literature of the 1980s persuasively demonstrates the limited usefulness of originalist approaches to constitutional interpretation.[28] These criticisms apply equally to any attempt to use Beer's analysis as a basis for contemporary constitutional decisionmaking. Did the Framers really have one view, or were there many views not captured in the Federalists' perspective? Why should the Framers' conception of federalism be controlling, even if it is knowable? Serious questions remain about using Beer's historical analysis — or any purely historical analysis — to draw conclusions in the modern constitutional debates.

III. Professor Beer's Contribution to Modern Analysis

I believe that the central problem with the Supreme Court's approach to federalism is that it has treated the concept as if it were a rule for deciding cases rather than an important value to be weighed and considered in decisionmaking. When the Court has relied upon federalism, it has reasoned in a quite mechanical, formalistic manner. The Court has defined rigid categories of activities left to the states — production in the earlier era, freedom from federal control of legislation or regulation in the modern one — and invalidated laws that intrude into these areas. By using this categorical approach, the Court has avoided careful consideration of the values of federalism.

I believe that federalism decisions should take a different approach. In any case concerning federalism, the Court should explicitly identify

26. *See* Robert F. Nagel, *Federalism as a Fundamental Value:* National League of Cities *in Perspective,* 1981 Sup. Ct. Rev. 81, 97-109. *See generally* Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 Sup. Ct. Rev. 341.

27. For a discussion of comity and parity as a basis for federal courts' decisions, see Erwin Chemerinsky, Federal Jurisdiction § 1.5, at 29-33 (1989).

28. *See, e.g.,* Paul Brest, *The Misconceived Quest for the Original Understanding,* 60 B.U. L. Rev. 204 (1980) (arguing against originalism as a method of constitutional interpretation); Ronald Dworkin, *The Forum of Principle,* 56 N.Y.U. L. Rev. 469, 471-500 (1981) (same); Larry Simon, *The Authority of the Constitution and Its Meaning: A Preface to a Theory of Constitutional Interpretation,* 58 S. Cal. L. Rev. 603 (1985) (same).

the values of federalism to be served — or compromised — by a particular judicial ruling. The Court also should identify the competing concerns and explicitly describe the basis for its ultimate balance.

Certainly, the values of federalism can include traditionally invoked justifications such as limiting federal tyranny, encouraging responsive government, and protecting states as laboratories.[29] I believe, however, that in very few cases will any of these values really be at issue when the Court considers the constitutionality of a federal statute or the appropriateness of a particular limit on federal court jurisdiction. It is very difficult to think of past Supreme Court cases in which these values really were at stake.

Instead, I suggest that it would be desirable to expand the types of values of federalism that the courts consider in their weighing process. Here, Beer's analysis is potentially very useful. Beer articulates three values served by federalism (p. 386-88). One value he labels *community* (p. 386). He writes: "The argument from community, which descended from the political philosophy of ancient Greece through medieval conceptions of the organic, corporate society, had been reformulated by continental thinkers such as Althusis and Bodin. This idealization of the small community had played no part in the thought of the American rebels . . ." (p. 386).

Communities have many values worth protecting. Safeguarding community decisionmaking enhances diversity as groups are allowed to decide their own nature and composition. Communities can define themselves to serve most effectively the needs of their members. Thus, the Court can ask in a particular case whether a specific federal law likely intrudes upon the ability of a community to define itself and, if so, whether another important interest justifies the federal action.

The attention to community as a federalism concern need not be limited to cases concerning the Tenth Amendment and federal jurisdiction. For example, in *Village of Belle Terre v. Boraas,*[30] the Court upheld a zoning ordinance that limited the number of unrelated individuals who could live together in the same household,[31] emphasizing community self-determination. In *Moore v. City of East Cleveland,*[32] however, the Court declared unconstitutional a similar restriction when it was applied to keep a grandmother from living with her two grandsons, who were first cousins.[33] The community's interest was the same, but the Court explained that the application of the East Cleveland zoning ordinance violated the constitutional right to keep

29. For a summary of these traditional arguments, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 134-38 (2d ed. 1991).

30. 416 U.S. 1 (1974).

31. 416 U.S. at 2.

32. 431 U.S. 494 (1977).

33. 431 U.S. at 499.

the family together.[34]

The value of community will need elaboration and judicial development. It is not a value that will lead to predictable decisions. Instead, it is an important consideration that the Court should expressly weigh in its federalism decisions.

Beer identifies a second value of federalism: *utility.* He writes:

> The argument from utility had provided a rationale for the division of authority between the colonies and Westminster when the prerevolutionary debate turned to the federal option. Reflecting the way economists think . . . it was and has continued to be a sensible and practical premise for deciding what functions should be assigned respectively to central and to local governments. [pp. 386-87]

There are some tasks that are better accomplished on a national scale, some that are better done at a state level, and some that are best handled at the local level. Undoubtedly, this should be a relevant consideration in congressional decisionmaking about what federal laws to enact. However, it is unclear how much weight the judiciary should give to utility when it evaluates the constitutionality of federal laws on federalism grounds. Absent a reason to distrust congressional determinations, there is no reason why Congress cannot consider utility arguments and give efficiency concerns their appropriate weight.

Also, efficiency is a value the Supreme Court should consider as it defines the jurisdiction of the lower federal courts. The Court must treat efficiency and utility, though, as among the values to be attained and not as the ultimate goals of the system. Any restriction of federal court jurisdiction arguably enhances efficiency by decreasing federal court caseloads. The focus must be on the detriments of jurisdictional restrictions as compared with the benefits in efficiency to be gained.

Finally, Beer suggests that *liberty* is a value to be gained by federalism. He writes: "The argument which was foremost in the minds of the framers and which still holds greatest promise as a rationale for states is the argument from liberty" (p. 387). Federalism is most likely to enhance liberty when state governments expand the scope of individual rights beyond those protected by the federal government.[35] For example, courts in many states have found a state constitutional right to substantial equality in educational funding.[36] Likewise, states have used their constitutions to provide more protection for speech and ad-

34. 431 U.S. at 505.

35. *See* Robert N.C. Nix, Jr., *Federalism in the Twenty-First Century — Individual Liberties in Search of a Guardian, in* FEDERALISM: THE SHIFTING BALANCE 65 (Janice C. Griffith ed., 1989) (arguing that state courts should and do exercise leadership in defining and protecting individual liberties as the federal courts retreat from doing so).

36. *See, e.g.,* Serrano v. Priest, 557 P.2d 929 (Cal. 1976) (finding a right to substantial equality of educational expenditures under the California state constitution), *cert. denied,* 432 U.S. 907 (1977).

ditional safeguards for privacy.[37]

I believe that the values of community, utility, and liberty — although each needs to be much more fully developed — provide a better basis for judicial decisionmaking than the traditional values invoked for federalism. The task for a court will be to analyze the extent to which a particular law undermines these values and then to balance that need against the benefits of the federal authority. In other words, and most important, the court's role should be to consider these values and countervalues expressly as they apply in particular cases.

Consider an example: How should the Court have handled *New York v. United States*[38] under this approach? The Court would need to ask whether requiring state cleanup of low-level nuclear wastes in some way intruded upon the ability of communities to define themselves. It is highly doubtful that assuring the safe cleanup of hazardous wastes would adversely affect community self-determination. Nor does it seem that the federal regulation would compromise the values of utility or liberty. Relying on states to ensure cleanup is probably more efficient than creating or relying upon federal enforcement. No one's liberty seems unduly restricted by mandating that states assure the safe disposal of nuclear wastes.

Thus, from the perspective of the underlying values that should drive the new, reoriented federalism, the Court's decision in *New York v. United States* seems misguided. It is highly questionable how the federal law really compromised any of the important values behind protecting federalism.

Discussions about community, utility, and liberty are inherently indeterminate, and advocates and scholars might try to use these values to argue for a particular result. But the key is that courts should discuss these values and expressly weigh them in the judicial decisionmaking process.

Is anything really gained by focusing on these particular values as opposed to the abstract statements that have long dominated discussions about federalism? For several reasons, I think so. Most of all, the goal should be to encourage courts to consider and discuss carefully the values of federalism in rendering particular decisions. The values of community, utility, and liberty focus attention directly on the underlying concerns. Ideally, judicial opinions that expressly balance these considerations will be better reasoned and will provide more guidance to lower courts and commentators.

Perhaps best of all, attention to the underlying values of federalism provides a way to end the paradox that has plagued federalism juris-

37. *See, e.g.*, PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (upholding a state constitutional right of access to shopping centers for speech, though no such right exists in the U.S. Constitution).

38. 112 S. Ct. 2408 (1992).

prudence for fifty-five years. The rule should not be that federal laws are always upheld when there is a federalism challenge. Nor should it be a bright-line principle that all federal laws that compel state legislative or regulatory activity are unconstitutional. Rather, the Court should consider each federalism challenge to a federal statute individually and in each instance decide the case with careful and explicit attention to the values of federalism. At the same time, the Court should give more attention to the values of federalism in the area of limits on the federal judicial power. Over time, courts probably will use federalism as a limit on both the federal judiciary and the federal legislative power in relatively rare instances. The treatment of these two powers, however, will be the same, and hopefully, the paradoxical handling of federalism issues will end.

CONCLUSION

The dispute over allocating power between the national and state governments is inherent in the constitutional design. Beer approaches this as a historical question. He seeks to show what view of federalism is preferable by reviewing the intellectual history that underlies the American Constitution.

Beer's implicit assumption is that champions of states' rights believe that history justifies their position. Those who disagree with Beer's conclusion might accept this premise and offer a different historical analysis that emphasizes the views of the anti-federalists. Alternatively, and I think more profitably, they might argue that, regardless of history, state sovereignty is an important value that justifies limiting the power of the national government. Although I agree with Beer's conclusions, I believe one can only justify them with normative arguments about the desirability of federalism as a constitutional principle.

Moreover, even if the debate over federalism occurs at both the historical and the normative level, something is missing in understanding the role of federalism in American government. Federalism has long been a rhetorical strategy used by those who oppose particular federal efforts to argue against the proposed federal actions without addressing their merits. The opponents of abolition, or of social security, or of civil rights advances, challenged the reforms based not on their intrinsic desirability but rather on the process grounds of federalism. The persistence of the view that Beer seeks to refute has much less to do with its historical legitimacy and much more to do with its political usefulness.

Perhaps, just perhaps, works like Beer's book that challenge the historical basis for protecting state sovereignty might also, over time, undermine the political persuasiveness of such appeals. Any relationship between scholarly historical writings and political rhetoric is in-

herently tenuous. But all who discuss federalism in the future — and especially those who ground their arguments in history — would be well advised to read carefully Professor Beer's masterful new book.