

Washington Law Review

Volume 84 | Number 4

11-1-2009

American Federalism: Punching Holes in the Myth

Hugh D. Spitzer

University of Washington School of Law

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wlr>



Part of the [Law Commons](#)

Recommended Citation

Hugh D. Spitzer, Book Review, *American Federalism: Punching Holes in the Myth*, 84 Wash. L. Rev. 717 (2009).

Available at: <https://digitalcommons.law.uw.edu/wlr/vol84/iss4/4>

This Book Review is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Law Review by an authorized editor of UW Law Digital Commons. For more information, please contact cnyberg@uw.edu.

AMERICAN FEDERALISM: PUNCHING HOLES IN THE MYTH

Book Review of—

SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING

By John D. Nugent. Norman, Oklahoma: University of Oklahoma Press, 2009. Pp. 344. \$45.00.

Reviewed by Hugh D. Spitzer*

Political myths are persistent, and the myth of American federalism's supposed twentieth-century decline is a tale that persists despite empirical evidence to the contrary. A new book by Connecticut College's John Nugent punches a few more holes in the myth, but it is yet to be seen whether the widely accepted version of this nation's modern federalism will be altered.

The myth is typically as follows: In 1787, the states agreed to a convention to repair the failed Articles of Confederation, but instead that convocation proposed an entirely new constitution—one creating a limited but robust national government with a powerful executive, improved taxing authority, and strong control over specified areas like foreign affairs, war, commerce among the states, the post office, currency, and navigation. But the states were left with governing the rest of Americans' day-to-day lives. States controlled the laws relating to public order, property, contracts, and domestic life, and they provided public services such as roads and transport, public records, and most courts. According to what became known as the “dual sovereignty” doctrine of federalism, state and federal activities were thus neatly split for 150 years; the national government remained sovereign within its sphere of enumerated powers, and the sovereign state governments, closer to home, dutifully provided most public services.

The Supreme Court policed this neat division until the late 1930s,

* Affiliate Professor of Law, University of Washington School of Law; LL.M. 1982, University of California at Berkeley; J.D. 1976, University of Washington School of Law; B.A. 1970, Yale University.

when the Court buckled under pressure from President Franklin Roosevelt and a New Deal Congress, allowing a massive expansion of the national government into areas previously off-limits: economic activities within the states, labor relations, workplace safety, market regulation, agricultural production, welfare, social services, and public works.¹ The role of the states supposedly withered. Beginning with World War II, followed by the civil rights era and President Johnson's Great Society, even more programs and powers shifted to the now-dominant federal government. This centralization and growth would have continued unabated but for President Ronald Reagan's cutbacks coupled with Chief Justice Rehnquist's efforts to return to dual sovereignty's distinct separation of powers between the national government and the states.

This is the history of federalism as widely understood by most legal academics and by educated Americans in general—both liberals and conservatives alike. One reason this view is so persistent is, as Nugent points out,² because the political parties have a common stake in this misconception. Republicans want the public to believe they can rescue the country from a national government that is much too big and powerful, while Democrats would like voters to feel that the federal government (led by their party) can cure virtually all social and economic ills. Further, a truly national press developed in the twentieth century, featuring stories about the national government that were inherently “bigger” and could sell more papers across the country. As the Washington Post's Richard Cohen has written, “[f]ew journalists have become nationally famous, not to mention rich, covering state or local governments.”³

During the past fifty years, a handful of academics have methodically punched holes in the standard tale of modern American federalism. Their careful research has received only modest attention, and accordingly has had only a modest impact on the myth. In 1962, Temple University Professor Daniel Elazar published detective work revealing

1. For an overview of the expansion of the national government's authority and activities in the late 1930s, see for example, ROBERT G. MCCLOSKEY, *THE AMERICAN SUPREME COURT* 123–26 (Sanford Levinson rev., 4th ed. 2005) (1960) and ROBERT A. SCHAPIRO, *POLYPHONIC FEDERALISM: TOWARD THE PROTECTION OF FUNDAMENTAL RIGHTS* 40–45 (2009).

2. JOHN D. NUGENT, *SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING* 216 (2009).

3. *Id.* (quoting Richard Cohen, *Always the National News*, WASH. POST, May 2, 1995, at A19).

that in the early nineteenth century, the states constantly begged for federal help to finance public works projects such as the Dismal Swamp Canal, highways across the Appalachians, and canals to open the west for development.⁴ National land grants for local schools began as early as 1785.⁵ Elazar showed how even ultra-states' rights advocates such as John C. Calhoun actively promoted federal grants-in-aid for roads and canals.⁶ Elazar also documented how the national government relied on the states to carry out its programs, and how a "cooperative federalism" was very much the norm over much of the nation's history.⁷

Another hole-puncher, historian Jon Teaford of Purdue University, established that the role of the states hardly withered during the twentieth century as the national government expanded. On the contrary, states rejuvenated, restructured, professionalized, and grew in tandem with the federal government.⁸ Rather than fading away, they negotiated themselves into an indispensable role in carrying out nationwide regulatory, social service, and public works programs.⁹ UCLA law professor Stephen Gardbaum has done complementary work on an evolving Supreme Court in the mid-twentieth century, relating how the New Deal Court freed the states from anti-government doctrines that had shackled them every bit as much as the judiciary had restricted federal regulatory and social programs.¹⁰ Barry Rabe of the University of Michigan fast-forwarded this history, carefully documenting how "policy entrepreneurs" in state governments recently built coalitions of liberals and conservatives to implement far-reaching environmental and energy programs that left the federal government in the dust.¹¹ Simultaneously, political scientists and legal scholars like G. Alan Tarr¹² of Rutgers University-Camden, have recounted the growth of "judicial

4. DANIEL J. ELAZAR, *THE AMERICAN PARTNERSHIP: INTERGOVERNMENTAL CO-OPERATION IN THE NINETEENTH-CENTURY UNITED STATES* 36–44, 58–64 (1962).

5. *Id.* at 131.

6. *Id.* at 56–57.

7. *Id.* at 197.

8. JON C. TEAFORD, *THE RISE OF THE STATES: EVOLUTION OF AMERICAN STATE GOVERNMENT* 1–10 (2002).

9. *Id.*

10. Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 485–91 (1997).

11. BARRY G. RABE, *STATEHOUSE AND GREENHOUSE: THE EMERGING POLITICS OF AMERICAN CLIMATE CHANGE POLICY* (2004).

12. G. ALAN TARR, *UNDERSTANDING STATE CONSTITUTIONS* (1998).

federalism” which, since the mid-1980s, has seen many state courts using their state constitutions vigorously to defend civil liberties—much more vigorously than the Burger, Rehnquist, and Roberts Supreme Courts.¹³

In *Safeguarding Federalism*, John Nugent joins the small cadre of researchers who avoid high-flying political or legal theories and instead trudge through the nitty-gritty of how government actually works. Nugent’s new book punches still more holes in the Swiss cheese notion that a massive federal government crippled the states to mere shadows of their former selves. He meticulously shows how states protect themselves and promote their interests in every phase of federal activity that might affect them. Working through more than 250 different lobbying groups—most notably through major organizations such as the National Governors’ Association and the National Conference of State Legislatures—states pursue a broad range of strategies to block, preempt, and manipulate federal policy initiatives.¹⁴ Nugent describes how, in the mid-twentieth century, states thwarted a federal takeover of commercial law by writing their own Uniform Commercial Code.¹⁵ He then shows how, whenever Congress is determined to act in an area of special concern to the states, governors and lawmakers of all political stripes invade Washington D.C., attempting to steer the congressional agenda, influencing national policies, participating in law drafting, and writing themselves into implementation of new federal programs.¹⁶

Drawing on detailed examples starting with the New Deal, through Lyndon Johnson’s Great Society, to modern clean air and clean water programs, Nugent describes how states participate in the federal rulemaking process to drive the national government away from “one size fits all.”¹⁷ In the numerous federal programs that rely on states for implementation, the states manage and manipulate the federal managers. With the help of their own congressional delegations, states seek and receive waivers from national rules. Nugent also demonstrates that, more frequently than we realize, state agencies simply ignore federal requirements they dislike because they know the federal government

13. *Id.* at 161–62.

14. NUGENT, *supra* note 2, at 118–26.

15. *Id.* at 77–114.

16. *Id.* at 118–20, 133–37.

17. *Id.* at 168–212.

lacks the staff and the funding to “fire” them and take programs back under the central government’s wing.¹⁸ For example, if a state’s noncompliance with federal regulations forced the national government to take back a state’s clean air, clean water, or hazardous waste program, the result would have a significant impact on the Environmental Protection Agency’s staff resources and budget. Finally, he recounts how open rebellion from a handful of states, like Montana’s and Washington’s refusal to participate in the Bush Administration’s “Real ID” legislation, and Utah’s near-withdrawal from No Child Left Behind, can force Congress and the executive branch to backtrack, rewrite, and reformulate federal programs.¹⁹ In the case of No Child Left Behind, the United States Department of Education gave waivers to the states more freely, or provided additional inducements for state cooperation.²⁰

Does this mean that the states run the national government? Not at all. Does it mean that Americans are protected from a federal administration that decides that national security justifies significant violations of our civil liberties? No. Is the federal government prevented from launching programs that are beyond its capacity to administer effectively? Hardly. But Nugent’s book convincingly demonstrates that the federal government never has been and probably never will be the only game in town. And that is a very good thing.

18. *Id.* at 172–75, 177–78.

19. *Id.* at 193–95.

20. *See id.* at 201–03.