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IS THE FOSTERING OF COMPETITION THE POINT OF AMERICAN CONSTITUTIONAL FEDERALISM?

Roderick M. Hills, Jr.*

MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012). Pp. 518. Hardcover \$36.62.

American constitutional federalism suffers from a surfeit of text and a deficit of function. Depending on how one counts, the constitutional text of the 1791 Constitution defining the state governments' reserved powers occupies more than 450 words (in Article I, Section 8 and the Tenth Amendment) — roughly ten percent of the 1791 Constitution's approximately 4,500 words.¹ Yet neither courts nor commentators have much to say about what purpose this elaborately exclusive definition of Congress' powers is supposed to accomplish. This is not to say that courts and commentators have nothing to say about the general "values of federalism." Such catalogues of the "values" that robust subnational governments are supposed to advance are a common fixture of both judicial and scholarly commentary on constitutional federalism.² These "values of federalism," however, suggest only that a subnational government of *some sort* might be useful without saying anything usefully specific about *which* sort of federalism *our* Constitution creates. Like "individualism," "federalism" is an umbrella under which lots of sometimes mutually contradictory conceptions of law huddle: praising them all is to say nothing usefully specific about any.

Michael Greve's *The Upside-Down Constitution*³ aims to end the functional vacuity of our federalism. As he trenchantly notes, "federalism is a 'they,' not an 'it.'"⁴ Some forms of subnational power are beneficial, some harmful and conflating, and praising them all is intellectually vacuous. Instead, Greve makes the case for a specific type of federalism — what he calls "competitive federalism."⁵ Our constitution's ground rules for dividing power between state and federal governments are well-suited for "alleviat[ing] the government monopoly problem"⁶ by creating multiple subnational jurisdic-

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1. U.S. CONST. art. I, § 8; U.S. CONST. amend. X.

2. See, e.g., *Gregory v. Ashcroft*, 501 U.S. 452, 457–61 (1991) (containing the canonical statement of such values from the U.S. Supreme Court).

3. MICHAEL S. GREVE, *THE UPSIDE-DOWN CONSTITUTION* (2012).

4. *Id.* at 3.

5. *Id.* at 4.

6. *Id.* at 6 (citation omitted).

tions that compete for a mobile citizenry and thereby constrain each other's power to exploit the citizen.⁷ This single-minded focus on competition means that some forms of subnational power actually undermine the point of our federalism, because such power undermines interjurisdictional competition.⁸ Federal grants to state governments, for instance, create fiscal cartels from which no citizen can migrate, because federal taxes follow them wherever they go.⁹ The U.S. Supreme Court once understood that not just any sort of state power was consistent with the brand of federalism protected by our Constitution. By the time of the New Deal, however, the Court had forgotten how to distinguish between constitutionally beneficial and harmful varieties of state power.¹⁰ The result is that the Court, in the name of federalism, now praises and upholds arrangements that actually undermine our federalism's competitive purpose, thereby turning our constitution upside-down.¹¹

Greve's book is an ambitiously conceived, vigorously argued, elegantly written, and exceptionally erudite *tour de force*. Although he would likely not take the statement as a compliment,¹² Greve's method is reminiscent of Ronald Dworkin's recipe for resolving "hard cases" through "fit" and "justification."¹³ According to Greve, competitive federalism "fits" Article I and the Tenth Amendment — a "fit" that is "justified" by competitive federalism's manifest benefits for limited and accountable government.¹⁴ We now routinely expect freedom of speech or equal protection to be determined, at least in part, by normative principles that have some bite in deciding cases. Greve means to create the same expectation for federalism — an ambition to which I can only respond "amen."

I come, however, not only to praise *The Upside-Down Constitution* but also to bury its "competition" principle as an interpretative tool. As commendable as Greve's ambitions for a federalism theory organized around big normative principles are, I doubt that competition can serve as the lodestar for American federalism. To invoke those Dworkinian concepts once more, the problem is one of both "fit" and "justification."¹⁵ *The Upside-Down Constitution's* competitive framework for understanding American federalism does not have an especially good "fit" with the text of the U.S. Constitution. Moreover, pitched at the abstract level favored by *The Upside-Down Constitution*, competition is simply too vague to provide a satisfactory justification for any federal regime. In particular, the general notion of competition cannot tell us how to distinguish good from bad competitive effects. States can compete with each other by exporting their indigent households, smoke emissions, goods manufactured through "unfair" processes, "harmful" products, firearms, and medical marijuana to other states. The abstract concept

7. *Id.* at 6–7.

8. *See id.* at 7.

9. *Id.* at 7–8.

10. *Id.* at 13.

11. *See id.* at 12.

12. Greve states that his "aim" is not to show that "competition" is "a Dworkinian abstraction that makes the Constitution appear in its 'best light.'" *Id.* at 63. Despite this disclaimer, Greve's project seems Dworkinian in spirit if not in intent to this reviewer.

13. *See* Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1059 (1975).

14. *See* GREVE, *supra* note 3, at 73–74.

15. *See generally* Dworkin, *supra* note 13.

of “competition” cannot tell us whether other states should be permitted to exclude these exports nor whether Congress should be permitted to assist them in doing so. As I explain below, the concept of “competition” and its corollary notion of “externalities” are bland phrases concealing bitter normative conflict: they are the beginning and not the end of an argument.

The obstacle to Greve’s ambitions for the competitive principle, at root, is that the Constitution’s textual framework is too general to define any meaningfully specific normative theory of subnational power. Like a Polaroid photo, the purpose of American constitutional federalism only gradually came into focus long after the moment that the relevant constitutional text was ratified as a result of rival efforts at judicial and political constitutional interpretation precedents, each jostling for preeminence as the correct theory by which the Constitution ought to be expounded. I will describe one such theory that proved remarkably resilient during the nineteenth century — a regime that I call “anti-corporate federalism.” Anti-corporate federalism, I suggest, provides a “fit” for the constitutional precedents that is just as good as Greve’s theory of competitive federalism. Whether anti-corporate federalism is better justified is a more difficult normative question about which I shall offer a few thoughts at the end.

I.

Consider, first, the most persuasive part of *The Upside-Down Constitution* — its negative case against what it calls “balance federalism.”¹⁶ According to Greve, “balance federalism” is the notion that the Constitution’s rules exist to preserve a certain minimum level of subnational power for the sake of balancing national government’s power with subnational governments’ power.¹⁷ Such a “balance” is supposed to produce some desirable result — so-called “values of federalism” like political participation, tailoring of policies to regional tastes, and so forth — but the desirable result does not rest on any particular definition of national and state powers.¹⁸ Instead, the benefits accrue simply from the states having a sufficient quantity of power to be significant policy-makers.¹⁹

Greve rightly lambasts this notion of balance federalism as “untheorized burble” that undermines any “carefully wrought constitutional structure.”²⁰ If federalism consists simply of having officials elected from subnational jurisdictions who have some unspecified quantity of power (or “dignity” or “influence on the national political process”), then it is difficult to see why anyone would value federal regimes at all.²¹ After all, subnational power has costs as well as benefits. Construing the Constitution to pump up the power of state politicians by pointing to the latter while ignoring the former is to attribute to the framers an idiotic theory of government. Moreover, such a theory cannot tell us *which* powers ought to be assigned to which levels of government: one could maintain a “balance of power” between state and federal governments by assigning diplomacy to

16. *Id.* at 21.

17. *Id.* at 21–22.

18. *Id.* at 22.

19. *See id.* at 72–73.

20. *Id.* at 21.

21. *See id.* at 22.

the former and land-use controls to the latter, but one would hardly call this arrangement a functionally satisfactory regime.²²

Greve is altogether persuasive to denounce notions of federalism rooted in “balance” as a “formless wasteland” indefensible on any practically functional grounds.²³ Why would any sane framer want to insure that governors and mayors have more or less power than Presidents and Senators? Surely the point of both sorts of political office is to better serve Us the People and not simply to enhance the “dignity” of the office-holder. Greve repeatedly and rightly invokes Madison’s statement in *Federalist No. 45* that state governmental officials’ power, like federal power, has no value as an end in itself but instead has instrumental value only, as a device by which to secure “the real welfare of the great body of the people.”²⁴ It does not make normative sense to protect subnational jurisdictions’ power unless one can show how such power advances citizens’ welfare on net. “Balance federalism,” however, can make no such showing, because its merely quantitative definition of state powers has no such likely or predictable benefits.²⁵

Greve also rightly notes that the Rehnquist Court’s vision of judicially enforced federalism failed miserably to ask, let alone answer, the question of what sort of federalism might produce which sorts of benefits.²⁶ The five Justices comprising the majority in *Lopez*²⁷ and *Morrison*²⁸ simply had no definition of which sort of state power was worth protecting — “state power on what margin and to what end?”²⁹ Lacking such a definition, the majority could do nothing more than insist on *some* sort of limit on Congress’ power, however trivial, formalistic, or easily evaded.³⁰ Moreover, Greve actutely notes that the Rehnquist Court won no plaudits for its judicial modesty in refusing to explain how limits on state power fit into any larger constitutional purpose.³¹ Instead, the on-again, off-again quality of the Court’s willingness to enforce limits on Congress made the whole enterprise “appear purely opportunistic, as a smokescreen to be thrown up” for conservative causes.³²

Greve’s mission is to replace these vacuous notions of “balance federalism” with a more specific theory geared to some larger purpose than merely protecting state power for its own sake.³³ What, then, does Greve think federalism is good for, and why does the Constitution reflect this theory of federalism’s benefits?

22. *Id.*

23. *Id.*

24. *Id.* at 31.

25. *See id.* at 21–22.

26. *Id.* at 309.

27. *United States v. Lopez*, 514 U.S. 549 (1995).

28. *United States v. Morrison*, 529 U.S. 598 (2000).

29. GREVE, *supra* note 3, at 314.

30. *Id.* at 314–15.

31. *Id.* at 315–17.

32. *Id.* at 317.

33. *See id.* at 4.

II.

The normative heart of Greve's argument is that American federalism, as codified in the text of the U.S. Constitution, is best suited for constraining governmental power through citizen mobility.³⁴ Citizens upset over one state's choice of policies can migrate to another state, thereby limiting the power of a dominant faction to impose its views on people who disagree with that faction's politics.³⁵ There is nothing new about the idea that mobility within a federal system beneficially constrains governmental power.³⁶ Greve's contribution is to argue that the Constitution codifies such mobility-based constraints on government.³⁷ In Greve's phrase, "[c]ompetition' . . . makes sense of the clauses, the principles, and the structure [of the Constitution]."³⁸ Greve's claim is not merely the weak position that the constitutional text does not exclude competitive federalism as a possible gloss, but rather the strong position that there is somehow "fundamental congruence" between the concept of competition among the states and constitutional text.³⁹ As Greve pungently puts the matter, competitive federalism is "the Founder's constitutional child" while cooperative federalism is "a bastard."⁴⁰

How successful is Greve's argument that the Constitution uniquely or even distinctively implies a theory of competitive federalism? As I explain below, despite some heroic exegetical efforts, Greve does not sustain this claim. The text of the Constitution does not strongly suggest (or, for that matter, exclude) competitive federalism: the text is an empty vessel into which, if one were so inclined, one might pour either or both competitive or cartelizing principles.

Greve infers the Constitution's endorsement of competitive federalism from three basic ideas allegedly immanent in constitutional text.⁴¹ First, Article I, Section 8 enumerates the Congress' powers, giving Congress control over textually specified activities that affect more than one state while reserving to the states powers over everything else.⁴² Second, the spheres of national and state jurisdiction are mutually exclusive: "presumptively, any given problem or transaction is governed by federal or state law, but not by both."⁴³ Finally, the Constitution bars states from impeding "free entry and exit" or imposing "excessive externalities" on each other,⁴⁴ and it authorizes both the federal courts and Congress to enforce such limits on states.⁴⁵ The three combined principles guarantee that states will engage in economic and political competition over some range of activities, allowing citizens to pick which package of rules and taxes best suits their

34. *Id.* at 6–7.

35. *Id.* at 59–60.

36. For systematic expositions of this normative theory of federalism, see, for example, GEOFFREY BRENNAN & JAMES M. BUCHANAN, *THE POWER TO TAX: ANALYTICAL FOUNDATIONS OF A FISCAL CONSTITUTION* (1980) and Barry R. Weingast, *The Economic Role of Political Institutions: Market-Preserving Federalism and Economic Development*, 11 J. L. ECON. & ORG. 1 (1995).

37. GREVE, *supra* note 3, at 60.

38. *Id.* at 64.

39. *Id.* at 58.

40. *Id.* at 89.

41. *See id.* at 66–86.

42. U.S. CONST. art. I, § 8; GREVE, *supra* note 3, at 74.

43. GREVE, *supra* note 3, at 66.

44. *Id.*

45. *Id.* at 79.

preferences and values.⁴⁶ Because Congress is excluded from certain regulatory spheres, states have to compete with each other in those non-federal areas, “whether they like it or not.”⁴⁷ And because the areas of state and federal regulatory power are mutually exclusive, Congress cannot level the competitive playing field between the states by promulgating national regulatory standards implemented or supplemented by state governments, thereby depriving citizens of “any ability to migrate from one [set of state laws] to the other . . . with the usual result that the more restrictive set of rules dominates.”⁴⁸ Most important, because federal courts intervene to prevent states from excluding goods or people from other states, state regulation is curbed by the prospect of provoking an exodus of citizens to less oppressive jurisdictions.⁴⁹

There are two problems with this effort to tie competition to the constitutional text by way of some general principles. First, Greve’s principle of exclusivity has no textual manifestation whatsoever. Second, Greve’s other two principles (limits on national powers and state interference with mobility) are so textually ambiguous that they easily could be turned to goals other than competitive federalism.

First, consider exclusivity: Greve, to his credit, makes no pretense that this principle can find any home in any textual provision.⁵⁰ He instead relies on *Federalist No. 32* as support for the idea that federal and state powers are non-overlapping.⁵¹ But *Federalist No. 32* presents Hamilton’s view that the state and federal governments have *concurrent* taxing authority.⁵² How is this strong support for the idea that federal and state powers are not concurrent? Greve provides a complicated account for why Hamilton’s argument is a “brilliant piece of misdirection” that subtly suggests exclusivity of state and federal spheres.⁵³ Without attempting to summarize the argument here, I suggest that extra-textual “misdirection” hardly constitutes proof that the principle of exclusivity is somehow embedded in text. In any case, Greve expressly abjures any reliance on original understandings of the Constitution⁵⁴ — a wise move, since, as I will explain below, the Federalist framers of the Constitution had little sympathy for mobility-based competition.⁵⁵ Why, then, should one quasi-monarchist’s and nationalist’s “brilliant piece of misdirection” be taken as the authoritative exposition of the Constitution’s spirit?

Second, consider the vagueness of the Constitution’s limits on national powers. Contrary to *The Upside-Down Constitution*, it is difficult to distill any thick notion of competitive federalism from such a watery broth. Greve at times acknowledges as much: he actually seems to abandon limits on Congress’ powers as an important foundation for competitive federalism when he notes that “the degree of decentralization per se is in-

46. *See id.* at 71.

47. *Id.* at 67.

48. *Id.* at 77.

49. *Id.* at 71, 77.

50. *See id.* at 76.

51. *Id.* at 76–77.

52. THE FEDERALIST NO. 32, at 171 (Alexander Hamilton) (Am. Bar Ass’n ed. 2009); *see GREVE, supra* note 3, at 77.

53. GREVE, *supra* note 3, at 77.

54. *Id.* at 63–64.

55. *See* discussion *infra* notes 73–77 and accompanying text.

consequential”⁵⁶ and that the scope of national legislation can safely be set by “political argument” in “ordinary politics.”⁵⁷ In particular, Greve concedes that Congress has unlimited taxing and spending powers, enabling the federal government to buy its way around any limits on their regulatory powers by bribing state governments with grants of federal revenue to pursue national objectives.⁵⁸ These concessions seem to give away the whole argument: if the national government can preempt state authority on any topic, then the national government can *pro tanto* eliminate competition on any topic. What good, then, is federalism?

To answer this question, Greve invokes the old tried-and-true maxim, first offered by Herbert Wechsler,⁵⁹ that the national political process will adequately constrain the national government’s monopoly over policy-making through “the state’s agency in federal institutions.”⁶⁰ But this Wechslerian idea invites a response out of Greve’s own book: state officials’ political incentives are not well-aligned with the requirements of a constitutionally sound federalism.⁶¹ Why will they not use their influence over national politicians to pressure Congress into conferring either federal revenue or federal enforcement authority on state and local governments, thereby undermining the states’ bare-knuckled competition for mobile citizens?

Greve never offers any constitutional principle immanent in the Constitution’s text to foreclose such a competition-suppressing intergovernmental system of grants and mandates. Greve instead suggests only that the doctrine of state autonomy — nowhere found in the text of the Constitution — will somehow insure enough political transparency to deter such devious alliances between state officials and Congress.⁶² According to this venerable (albeit unwritten) constitutional doctrine, Congress cannot require state officials to enforce federal rules against private citizens.⁶³ To induce state officials to adopt such rules, therefore, Congress must win their voluntary cooperation through offers of federal revenue.⁶⁴ According to Greve, such voluntary state yielding to federal bribery will be so transparent to voters that they will be able to constrain such limits on competition through the national political process.⁶⁵

But Greve’s invoking of the so-called “anti-commandeering” principle to support his edifice of competitive federalism shows that the textual jig is up.⁶⁶ Whatever the merits of the anti-commandeering principle, it has no home in constitutional text. At best, such a principle is a corollary of Greve’s equally homeless “exclusivity principle.”⁶⁷ Moreover, Greve provides no empirical support for the notion that the anti-

56. GREVE, *supra* note 3, at 72.

57. *Id.* at 74–75.

58. *Id.* at 81–82.

59. See Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

60. GREVE, *supra* note 3, at 82.

61. See *id.* at 84.

62. *Id.* at 83–85.

63. *Id.* at 84.

64. *Id.* at 84–85.

65. *Id.* at 85.

66. See *id.* at 67–68 (discussing the anti-commandeering principle).

67. *Id.* at 77 (discussing the exclusivity principle).

commandeering principle somehow makes federal violations of competitive federalism's principles more transparent. True, the U.S. Supreme Court has asserted that federal conscripting of states' services undermines political accountability.⁶⁸ Relying on Supreme Court Justices' *ipse dixit* to support predictions about voters' behavior is, however, an act of desperation, not constitutional interpretation. As a matter of common sense intuition, there is little reason to believe that federal grant conditions are more transparent than federal mandates. Governors and mayors can surely squawk loudly enough when they are conscripted, and it is an unusually well-informed voter who can recite the conditions tied to federal revenue.⁶⁹

Third, contrary to Greve's argument, the Constitution's limits on states' powers to restrict mobility of goods and services are either too specific or too vague to yield any broad principle of competitive federalism. Consider, first, the specific prohibitions in Article I, Section 10 barring "Imposts or Duties on Imports or Exports" or "any duty of Tonnage."⁷⁰ One cannot derive any general prohibition on state protectionism from these specific bans without assuming a background norm of competition that the text itself is supposed to prove. Indeed, one might just as easily argue, *expressio unius*-style that the specific enumeration of one sort of limit on states' protectionism implies the exclusion of other judge-made limits: if states cannot enact "Imposts or Duties," then perhaps they can, by negative implication, grant discriminatory subsidies to their own businesses or impose onerous occupational licensing. Greve tries to derive a general "principle of non-aggression" or "antiexploitation principle" from the limits contained in Article I, Section 10, arguing that these provisions are all directed toward the common goal of preventing "an exploitative effect on other states."⁷¹ Contrary to Greve's assertion, however, it is impossible to characterize Article I's prohibitions as embodying any sort of "antiexploitation principle" because such prohibitions apply even when the only affected persons are the state's *own* citizens. Indeed, Gouverneur Morris opposed the Contract Clause precisely because the provision barred a state from impairing its own residents' contracts, which was contrary to Morris' idea that "within the State itself a majority must rule, whatever may be the mischief done among themselves."⁷²

The unavoidable conclusion is that Article I, Section 10 is not a set of specific prohibitions embodying a general antiexploitation norm protecting the citizens of one state from exploitation by another state. It is instead a grab bag of prohibitions, some of which are designed to stop specific sorts of state burdens on neighboring states, but others of which are designed to enforce purely intrastate norms of justice.

Greve also rests the antiexploitation idea on Article IV, Section 2's guarantee that "[t]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."⁷³ This provision undoubtedly protects some level of citizen mobil-

68. See, e.g., *New York v. United States*, 505 U.S. 144, 168 (1992) ("[W]here the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.").

69. Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and 'Dual Sovereignty' Doesn't*, 96 MICH. L. REV. 813, 824–30 (1998).

70. U.S. CONST. art. I, § 10.

71. GREVE, *supra* note 3, at 71.

72. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 439 (Max Farrand ed., 1911).

73. U.S. CONST. art IV, § 2, cl. 1; see GREVE, *supra* note 3, at 59.

ity between the several states. But at what level, exactly? Does it, for instance, guarantee to non-resident banks and other corporations the right to set up branches on equal terms with state-owned enterprises? Does it allow non-residents to take advantage of a state's reduced tuition at the state's universities? Does it guarantee to non-residents the right to hold state offices or vote in state elections? The answer depends on the definition of "citizen" and "Privileges and Immunities." Nothing in the Constitution's text itself requires that these terms be read with the gloss of competitive federalism. One could just as easily read these provisions with an anti-corporate gloss (as it was read by the Taney Court in *Bank of Augusta v. Earle*⁷⁴) or the gloss of participatory democracy (as has every court that allows states to exclude non-residents from the privilege of voting or holding political office⁷⁵) or some third big principle. Nothing in the text even hints that the clause is rooted in some big principle of unbridled competition for mobile residents.

In short, Greve's three principles of competitive federalism are neither excluded by, nor immanent within, the text of the U.S. Constitution. Instead, the Constitution contains open-ended provisions that required time to develop into a specific picture. Competitive federalism is certainly one possible spin that the mass of words could be given, but not the only or even most plausible interpretation.

This should hardly be a surprise. The Constitution was a bitterly contested compromise drawn between bitterly divided factions who were unlikely to agree on anything more than mutually deferring some of their most important disagreements for later resolution by some third party.⁷⁶ These disagreements included the proper scope of the market economy and the powers and immunities of corporations.⁷⁷ The idea that the framers planted in 1789 the seeds of corporate power and market competition that later blossomed during the Gilded Age is fanciful, albeit comforting, to constitutional originalists sympathetic to those Gilded Age trends.

III.

One can gauge the indeterminacy of the Constitution's text by considering a view of federalism radically at odds with Greve's theory of competitive federalism — a theory that was far more prominent among the Constitution's framers than Greve's competition principle and that dominated constitutional interpretation for three decades before the Civil War.⁷⁸ I will call this view "anti-corporate federalism." This theory of subnational power was the dominant position among western Anti-Federalists, Jeffersonian Republi-

74. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 553–56 (1839).

75. See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274, 282–83 n.13 (1985) ("Because . . . a lawyer is not an 'officer' of the State in any political sense, there is no reason for New Hampshire to exclude from its bar nonresidents.").

76. See Hills, *supra* note 69, at 833–37 (discussing some of the history of the disagreements over state autonomy).

77. For a discussion of the early arguments against growing corporate power, see Pauline Maier, *The Revolutionary Origins of the American Corporation*, 50 WM. & MARY Q. 51, 66–72 (1993). For a discussion of some of the founders' ideas concerning the market economy, see JOYCE APPELBY, *CAPITALISM AND A NEW SOCIAL ORDER: THE REPUBLICAN VISION OF THE 1790S* (1984).

78. See DANIEL FARBER, *LINCOLN'S CONSTITUTION 46–59* (2003) (discussing constitutional thought in the early nineteenth century); see also Note, *Incorporating the Republic: The Corporation in Antebellum Political Culture*, 102 HARV. L. REV. 1883 (1989).

cans, and Jacksonian Democrats.⁷⁹ It became the reigning ideology of the antebellum Democratic Party by 1832 and defined the federalism doctrines of the Taney Court.⁸⁰ Greve ignores anti-corporate federalism as a coherent ideology, dismissing its victory over legal theories protecting corporations from state power as mere “[c]ontingency and politics.”⁸¹ But anti-corporate federalism was every bit as ideologically coherent as, and no more politically contingent than, the brand of competitive federalism championed by Greve.

The essence of anti-corporate federalism is the idea that subnational governments are less likely to be captured by the owners of finance and investment capital than are national governments.⁸² Enjoying insider connections and specialized expertise, such “capitalists” are, according to the anti-corporate federalist, a threat to democratic control of government by individual proprietors — a class that anti-corporate federalists variously denominated “producers,” “yeoman,” or just “the middling sort.”⁸³ Nineteenth century polemicists used “capitalist” as a specialized term to signify owners of finance or investment capital rather than any owner of the means of production.⁸⁴ Subnational governments were allegedly less prone to control by owners of finance and investment capital for several reasons.⁸⁵ Subnational electoral districts are smaller in population than national electoral districts, reducing the costs of communication and, thus, the value of cash for political campaigns.⁸⁶ Subnational governments also have a higher ratio of elected generalists to appointed policy specialists, reducing the influence of financial expertise and enlarging the points of access by which a populist campaigner could gain political power through emotional egalitarian appeals.⁸⁷ The population of subnational governments was also generally more homogenous than the national population, making it easier to assemble a stable majority against a minority of financiers and their dependents.⁸⁸

At its most general level, anti-corporate federalists value subnational governments because they are believed to reduce agency costs that muddle the connection between voters and politicians.⁸⁹ Anti-corporate federalism is, therefore, a theory of democratic “voice” rather than a theory of “exit” in Albert Hirschman’s famous typology.⁹⁰ On this account, subnational governments help voters monitor and control politicians when those voters stay put and vote with their hands rather than their feet.⁹¹ Anti-corporate federal-

79. See Note, *supra* note 78, at 1892–95.

80. See FARBER, *supra* note 78, at 59–69, 133–36.

81. GREVE, *supra* note 3, at 117.

82. See Note, *supra* note 78, at 1893–94.

83. TONY A. FREYER, PRODUCERS VERSUS CAPITALISTS: CONSTITUTIONAL CONFLICT IN ANTEBELLUM AMERICA 4, 7 (1994).

84. *Id.* at 5.

85. SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788-1828, at 69–70 (1999).

86. See *id.* at 72–73.

87. *Id.*

88. *Id.* at 73.

89. See *id.*

90. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

91. See CORNELL, *supra* note 85, at 72–73.

ism is, therefore, diametrically opposed to Greve's theory of competitive federalism.

How does anti-corporate federalism stack up against Greve's theory of competitive federalism as an explanation for American federalism? As Greve concedes, no one at the framing of the Constitution endorsed or was even aware of the notion that liberty could be enhanced through citizen mobility between subnational jurisdictions.⁹² Indeed, the historical record suggests that at least the more conservative Federalist advocates of the Constitution were suspicious of Americans' restlessly migratory habits, fearing that the scattered settlements on the western frontier would erode Americans' respect for law and order.⁹³

By contrast, anti-corporate federalism importantly shaped both the drafting and the early interpretation of the Constitution.⁹⁴ In particular, Anti-Federalist fear of finance capitalists, unlike Greve's theory of competitive federalism, actually affected the drafting of the Constitution by deterring the Constitution's framers from conferring on Congress an express power to charter corporations.⁹⁵

Greve dismisses the Anti-Federalists as supporters of what he terms a "consociational program" to "stabilize some distribution of burdens and benefits among groups."⁹⁶ This characterization of the Anti-Federalists is, however, inaccurate (and Greve, in fact, cites nothing whatsoever to support it). In reality, the western Anti-Federalists like William Findley and Melancton Smith sought to disrupt the *status quo* rather than entrench it.⁹⁷ Often located in the rural outback of the western frontier, they feared that insiders on the eastern seaboard would monopolize economic opportunity by exploiting connections with corrupt politicians.⁹⁸ Their effort to constrain national power led not only to

92. GREVE, *supra* note 3, at 59–60.

93. See PAYSON JACKSON TREAT, *THE NATIONAL LAND SYSTEM, 1785-1820*, at 29 (1910) (describing George Washington's support for "progressive seating" through the "selling a small amount of land at a medium price"). As Peter Onuf noted, eastern Federalists feared that scattered settlement would lead poor western settlers to revert to savagery. Peter S. Onuf, *For the Common Benefit: The Northwest Ordinance*, *TIMELINE*, April-May 1988, at 7.

94. See CORNELL, *supra* note 85, at 20–34; Roderick M. Hills, Jr., *Exorcising McCulloch: The Conflict-Ridden History of American Banking Nationalism and Dodd-Frank Preemption*, (New York Univ. Sch. of Law Pub. Law & Legal Theory Research Paper Series, Working Paper No. 12-45), available at http://papers.ssm.com/sol3/papers.cfm?abstract_id=2131266 (U. PA. L. REV. (forthcoming 2013)).

95. In response to Madison's September 14th proposal "to grant charters of incorporation where the interest of the U.S. might require & the legislative provisions of individual States may be incompetent," Rufus King, the Massachusetts ally of Alexander Hamilton, argued that "[t]he States will be prejudiced and divided into parties by [an express power to charter corporations] and reminding the Convention of the controversies over the Bank of North America by observing that "[i]n Philad[elphia] & New York, [i]t will be referred to the establishment of a Bank, which has been a subject of contention in those Cities. In other places it will be referred to mercantile monopolies." When James Wilson, a Philadelphia Federalist who had supported the re-chartering of the Bank of North America, confidently asserted that federal banks would not "excite the prejudices & parties apprehended" and that "mercantile monopolies" were "already included in the power to regulate trade," George Mason of Virginia, one of the few Anti-Federalists present at the Philadelphia Convention, quickly put him on notice that Country Party fears of banks and "mercantile monopolies" was alive and well, noting that "[h]e was afraid of monopolies of every sort, which he did not think were by any means already implied by the Constitution as supposed by Mr. Wilson." Madison's proposal to grant Congress a power to charter corporations was thus quickly defeated in apprehensions that it would be the basis for a rehearsal of the fracas over the Bank of North America.

Hills, *supra* note 94, at 10–11 n.25.

96. GREVE, *supra* note 3, at 29, 26.

97. CORNELL, *supra* note 85, at 83–84, 168–71.

98. See *id.* at 81–85 (describing the political goals of Anti-Federalists).

the post-ratification proposal of a Bill of Rights, but also to an ongoing movement to shape the Constitution's interpretation to limit the power of private corporations.⁹⁹ In particular, Jefferson and Madison took advantage of the vagueness of Congress' implied powers — vagueness preserved by the Anti-Federalist opposition — to mobilize a “Democratic Republican” political party against federal charters or subsidies for corporations.¹⁰⁰ Their support for “states' rights” was neither an effort to protect “consociationalism” nor “competitive federalism,” but rather to oppose financiers — in their bitter phrase, “speculators [and Tories]” or “stockjobbers” — who were believed to dominate large jurisdictions.¹⁰¹

Greve ignores this anti-corporate theory of subnational democracy, and this oversight causes him to misinterpret or slight its manifestations in early constitutional debates. Take, for instance, the fight over “internal improvements” in antebellum America.¹⁰² Starting in earnest with Andrew Jackson's veto of the Maysville Road appropriation, the Democratic Party made constitutional opposition to federal spending on internal improvements — primarily roads, canals, and railroads — a mainstay of their party platform.¹⁰³ Greve dismisses this position as insincere campaign rhetoric.¹⁰⁴ According to Greve, there is no plausible textual ban on federal aid for internal improvements in the Constitution and, more importantly, no democrat, despite their florid rhetoric to the contrary, really believed that such a constitutional barrier existed.¹⁰⁵ As an example of such insincerity, Greve states that Andrew Jackson, despite his reputation as a “fierce opponent of federal improvements,” spent “twice as much on such projects as all his predecessors combined.”¹⁰⁶ Instead of being a principled constitutional position, the Democrats' opposition to federal spending was, according to Greve, merely an effort to placate southerners who sought to destroy political incentives for maintaining the tariff.¹⁰⁷

Greve's account of the internal improvements debate, however, misinterprets its constitutional significance by ignoring its anti-corporate spirit. Contrary to Greve's assertion, the tariff issue was tangential to the debate over internal improvements. Southerners actually embraced some uses of tariff revenue to fund southern railroads, and, in any case, the federal government had other sources of revenue from the sale of western lands by which to fund transportation infrastructure.¹⁰⁸ The actual reason for democratic opposition to such federal investments was suspicion that corporations would successfully scramble for federal largesse in the form of grants and contracts were the federal gov-

99. *See id.* at 158–71 (recounting ratification and the debate over the Bill of Rights).

100. *Id.* at 168–71.

101. On the centrality of hostility to speculation in federal bonds in Jefferson's and Madison's opposition to the Federalist Party, see STANLEY ELKINS & ERIC MCKITRICK, *AGE OF FEDERALISM* 243–44 (1993).

102. GREVE, *supra* note 3, at 163.

103. *Id.* at 163–66.

104. *See id.* at 164–67.

105. *Id.* at 164–66.

106. *Id.* at 167 (citation omitted).

107. *Id.*

108. LEWIS H. HANEY, *A CONGRESSIONAL HISTORY OF RAILWAYS IN THE UNITED STATES: THE RAILWAY IN CONGRESS 1850-1887*, at 40–45 (1910) (describing how Southerners came to support subsidies of railroad construction through tariff drawdowns and rebates on iron used in railroad construction).

ernment to control the revenue spigot.¹⁰⁹ Thus, Andrew Jackson's veto of the Maysville Road appropriation was motivated by his opposition to federal stock subscriptions in the Maysville Road Corporation.¹¹⁰ Likewise, the antebellum Congress hotly debated and eventually rejected aid to railroads through direct land grants to private corporations, eventually settling instead on the idea of transferring the public domain to states in which such federal land was located on the condition that the states use the land for subsidizing railroad construction.¹¹¹ By using western state legislatures as intermediaries, Congress placated westerners' fears that "monied powers" and "monopolies" would abuse the settlers for whose benefits the railroads were being constructed.¹¹²

Because Greve ignores the anti-corporate basis for antebellum limits on internal improvements, he overlooks the constitutional significance of the debates regarding federal aid for such improvements. Greve notes that spending for such improvements increased during and after Andrew Jackson's presidency.¹¹³ But he overlooks the form of this aid. As Stephen Minicucci has explained, the amount of *direct* aid to railroads was miniscule with the great majority of the aid taking the form of land grants to states that state legislatures could control.¹¹⁴ Contrary to Greve's assertion, this decision to use state governments to channel federal aid was not merely the result of sectional politics, but also the direct result of constitutional objections to direct aid to corporations regarded by democrats as unnecessary and improper since Andrew Jackson's veto of the Second Bank of the United States' charter renewal.¹¹⁵ To be sure, southerners had the additional desire to limit federal administrative capacity as a general matter,¹¹⁶ but the South alone could not win western support on that basis: the anti-corporate theory of Congress' powers was essential for a broader coalition.¹¹⁷

Greve's effort to shoehorn nineteenth century constitutional doctrine into his theory of competitive federalism leads him to offer an arbitrarily dismissive treatment to doctrines that resist his mold. The Taney Court's refusal in *Bank of Augusta v. Earle*,¹¹⁸ for instance, allowed states to discriminate against non-resident corporations by construing narrowly the term "citizens" in the Privileges & Immunities Clause of Article IV, Section 2.¹¹⁹ Greve dismisses *Bank of Augusta* as "insistent formalism"¹²⁰ and asserts that the Marshall Court's earlier reluctance to enforce a broader notion of corporate citizenship for the purpose of Article III diversity jurisdiction was merely "[c]ontingency and

109. See CORNELL, *supra* note 85, at 81–85.

110. Stephen Minicucci, *Internal Improvements and the Union, 1790–1860*, 18 *STUD. AM. POL. DEV.* 160, 162 (2004).

111. HANEY, *supra* note 108, at 149.

112. See *id.* at 150 (congressional debates over granting land to states to fund railroads).

113. GREVE, *supra* note 3, at 167.

114. Minicucci, *supra* note 110, at 161–62.

115. On the constitutional character of objections to federal aid for corporations, see JOHN ASHWORTH, *AGRARIANS AND ARISTOCRATS: PARTY POLITICAL IDEOLOGY IN THE UNITED STATES, 1837–1846* (1983); HANEY, *supra* note 108, at 203; Carter Goodrich, *The Revulsion Against Internal Improvements*, 10 *J. ECON. HIST.* 145, 146–47 (1950).

116. Daniel M. Mulcare, *Restricted Authority: Slavery Politics, Internal Improvements, and the Limitation of National Administrative Capacity*, 61 *POL. RES. Q.* 671, 675–76 (2008).

117. *Id.* at 678.

118. *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 552–53 (1839).

119. *Id.*

120. GREVE *supra* note 3, at 119–20.

politics.”¹²¹ These are accurate characterizations of the doctrines if one starts from the assumption that American federalism seeks to promote competition between the states. Why, after all, should corporate persons not be able to take advantage of such efficiency-promoting competition as much as anyone else?

If one reads the Constitution through an anti-corporate lens, however, then *Bank of Augusta* ceases to seem like “insistent formalism” and instead can be seen as enforcement of the deep anti-corporate purpose of the Constitution to give states and their voters the tools with which to bargain effectively with corporate investors, withholding the right to invest in a state unless the investors paid the state voters’ asking price. Using this leverage, voters managed to force the Bank of Pennsylvania to pay taxes sufficient to fund the state’s free system of public schools.¹²² Likewise, the Camden and Amboy railroad was obliged to pay for the state’s public services in return for its monopoly on railroad shipping of goods through the states.¹²³ In effect, states’ voters were using the power to withhold recognition of a corporate charter to extract locational rents from non-resident investors.¹²⁴ This state power was not “contingency and politics” as Greve would have it: it was the linchpin of the Democratic Party’s theory of federalism, under which subnational government became the instrument by which to insure that the owners of finance and investment capital could be controlled by the agents of the people.¹²⁵ As Chief Justice Taney noted in *Ohio Life Insurance Co. v. Debolt*,¹²⁶ the Taney Court’s legal theory requiring the narrow construction of corporate charters was “founded in principles of justice, and necessary for the safety and well-being of every State in the Union”¹²⁷ — namely, the principle of public choice that corporate investors paid much closer attention to the legislative process than ordinary voters and, therefore, could manipulate that process to their advantage.¹²⁸

As Tony Freyer has shown, federalism in antebellum America was not an effort to promote capitalist competition.¹²⁹ Instead, “federalism created a dual market for legal services which could sustain protectionism against capitalist values.”¹³⁰ One can, of course, dismiss this version of federalism as mere “politics” serving the self-interest of

121. *Id.* at 117.

122. FREYER, *supra* note 83, at 103.

123. *Id.* at 108–09.

124. *See id.* at 92–95.

125. *Id.* at 92–93.

126. *Ohio Life Ins. & Trust Co. v. Debolt*, 57 U.S. (6 How.) 416 (1853).

127. *Id.* at 435.

128. In Taney’s words,

[A]lmost every bill for the incorporation of banking companies, insurance and trust companies, railroad companies, or other corporations, is drawn originally by the parties, who are personally interested in obtaining the charter; and that they are often passed by the legislature in the last days of its session, when, from the nature of our political institutions, the business is unavoidably transacted in a hurried manner, and it is impossible that every member can deliberately examine every provision in every bill upon which he is called on to act. On the other hand, those who accept the charter have abundant time to examine and consider its provisions, before they invest their money. And if they mean to claim under it any peculiar privileges, or any exemption from the burden of taxation, it is their duty to see that the right or exemption they intend to claim is granted in clear and unambiguous language.

Id. at 435–36.

129. *See* FREYER, *supra* note 83, at 52–53.

130. *Id.* at 53.

small-scale proprietors in under-capitalized regions of the West and South. But one could just as easily dismiss Greve's competitive federalism as the political preference of eastern capitalists who sought to wipe away the power of household-scale businesses to extract rents from non-resident investors by broadly construing the dormant commerce clause doctrine and other nationalizing doctrines that, Greve rightly notes, are critical for allowing corporations to compete on equal terms with local proprietors.¹³¹ Neither the anti-corporate nor the competitive theory of the Constitution is specified in the ratified text of the document, and both theories were pressed by different partisan and sectional groups — the anti-corporate theory by Democrats mostly in the West and South from 1832 until the Civil War and the competitive theory, mostly by Republicans in the Northeast and Mid-Atlantic regions from roughly the end of the Civil War until the New Deal.¹³²

There is, in sum, no reason to regard competitive federalism as “the Founder's constitutional child” and dismiss “cooperative [federalism]” as “a bastard.”¹³³ Instead one might say that the Constitution itself is an under-specified agreement that left the specifics of federalism up for grabs.¹³⁴ Anti-corporate federalism fits the textual and precedential “evidence” just as well as Greve's theory. Competitive federalism is not any more “legitimate” than the anti-corporate federalism that it replaced. Instead, both theories are equally legitimate products of different political coalitions' dalliance with the constitutional text's open-ended embrace of a variety of plausible federalism theories. If one is to choose between such theories, the choice cannot be based on Dworkinian “fit.”¹³⁵ The choice must be based on practical consequences.

IV.

The Upside-Down Constitution, however, lacks any systematic defense, or even definition, of competitive federalism as a normative principle as opposed to a legitimate one. This is not to say that Greve has not presented many persuasive observations about the benefits of competitive federalism. He has many such observations,¹³⁶ but he has not attempted to define rules for allocating powers among national and subnational governments that would insure that the costs of competition will exceed the benefits.

The general idea of competitive federalism is clear enough. Citizens move between states based on their taste for the various packages of taxes, services, and regulations on offer by each jurisdiction and thereby securing their preferred package.¹³⁷ In this way, migration reveals citizens' true preferences for public goods, insuring an efficient allocation of resources.¹³⁸ Migration also protects citizens' liberty from predatory governments to the extent that predation is defined as the extraction of wealth from a citizen in

131. See GREVE, *supra* note 3, at 214–20.

132. For a general account of these coalitions, see RICHARD FRANKLIN BENSEL, *THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877-1900*, at 91–99 (2000).

133. GREVE, *supra* note 3, at 89.

134. See THOMAS E. PATTERSON, *THE AMERICAN DEMOCRACY* 68 (10th ed. 2010).

135. See Dworkin, *supra* note 13.

136. See, e.g., GREVE, *supra* note 3, at 87–89.

137. *Id.* at 71, 77.

138. See *id.* at 59–60.

excess of the value that the citizen placed on the services provided by the government.¹³⁹ The key to the efficiency and libertarian benefits of federalism, therefore, is a link between the obligation to pay revenues and benefit from expenditures.¹⁴⁰ Each state must “eat what it kills” — that is, expend only that revenue that it derives from residents benefited by those expenditures — to insure that a citizen’s decision to migrate to a state will reflect the citizen’s comparison of the jurisdiction’s costs (in the form of taxation or fees) and benefits (in the form of services).¹⁴¹

There are familiar problems, however, with this locational economy that Greve does not attempt to address, even as he identifies them. Greve realizes that competitive federalism requires a “harm principle” under which “the legal order must protect against the risks of force, fraud, and monopoly.”¹⁴² But Greve makes no systematic effort to define such “harm,” beyond declaring that “injuries from competition — the private firm’s loss of customers, a state’s loss of productive citizens — *must not* count as redressable harms.”¹⁴³ The problem is that the statement is an empty tautology until one defines terms like “harm,” “force,” and “fraud,” and Greve never offers such a definition. Suppose, for instance, that a municipality believes that “formula stores” — retail outlets where the appearance, marketing, products, and services of which are not controlled by the local operator — erode the aesthetic appeal of its central commercial district.¹⁴⁴ Suppose also that the municipality believes that large-scale enterprises operating many such outlets achieve scale economies that undercut the prices of locally owned and operated businesses, even though the latter provide a local external benefit — a sense of unique place, aesthetic charm, etc. — to shoppers and non-shoppers alike.¹⁴⁵ To preserve the “mom-and-pop” businesses, the municipality outlaws “formula stores” (defined as stores required by contractual or other arrangement to maintain standardized services, merchandise, decor, architecture, layout, uniform, “or similar standardized feature”).¹⁴⁶

Has the municipality prevented a “harm” or simply prevented “injuries from competition?” If one adopted an attitude of strong deference to subnational democracy, then one would avoid second-guessing the sincerity or normative merits of the municipality’s aesthetic arguments. If one adopted a skeptical attitude, then one might overturn the local ordinance by finding that its discriminatory effects sufficed under dormant commerce doctrine to constitute “protectionism.”¹⁴⁷ Which attitude one adopts depends on whether one believes that the federal judiciary’s decision-making processes (influenced by the

139. Roderick M. Hills, Jr., *Federalism and Public Choice*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 207, 208–09 (Daniel A. Farber & Anne Joseph O’Connell eds., 2010).

140. *Id.* at 212.

141. *Id.* at 208–13 (summarizing these exit-based theories of federalism).

142. GREVE, *supra* note 3, at 186.

143. *Id.*

144. For an example of such a municipal movement, see Beth Greenfield, *Cape Cod Residents Keep the Chain Stores Out*, N.Y. TIMES (June 8, 2010), http://www.nytimes.com/2010/06/09/realestate/commercial/09chain.html?_r=0.

145. *See id.*

146. For an example of such an anti-formula store ordinance, see *Island Silver & Spice, Inc. v. Islamorada*, 542 F.3d 844, 848 (11th Cir. 2008) (holding that the formula retail ban violated the Dormant Commerce Clause).

147. For an example of such an attitude towards facially neutral state laws, see *Bacchus Imports, Ltd. v. Dias*, 486 U.S. 263, 273 (1984).

relative skill of the types of attorneys likely to be hired by small towns and large-scale corporate enterprises) are more trustworthy measures of social welfare than the decision-making processes of small towns. One might predict the latter would be biased in favor of rules preferred by the owners of investment capital; the former, in favor of the rules preferred by local retailers. The towns are disciplined by locational competition from other jurisdictions: the chains might simply locate their outlets in the town next door. The corporations are disciplined by competition from rival retailers. Which competition correctly measures the relevant costs and benefits? Questions like these on relative institutional competence are outside the scope of Greve's book, which is focused on normative principles at a far higher level of legitimacy.¹⁴⁸ Nevertheless, one might want answers to such questions before one signs on to the agenda of competitive federalism.

Greve offers a more detailed account for why he believes that "cooperative federalism" promotes cartels that are antithetical to the agenda of competitive federalism. He argues that, by financing state regulatory or redistributive programs through grants, the federal government "produces a fiscal illusion on the part of taxpayers," because the grant spreads the true cost of the program across the nation, concealing that cost from the program's beneficiaries.¹⁴⁹ Greve suggests that the whole point of enlisting state officials in the project of administering national programs is to create a governmental constituency in favor of the programs — "the states' lawmakers, its bureaucracies" — that might otherwise have a difficult time winning public favor.¹⁵⁰ Thus, "cooperative federalism serves to enhance the growth of government at all levels."¹⁵¹ The difficulty with this argument is that Greve also properly concedes that the programs funded by such federal grants are properly national programs to the extent that their purpose is the redistribution of wealth because such redistribution is a national public good that subnational jurisdictions cannot easily secure.¹⁵²

Greve's argument against cooperative federalism, however, does not explain why state providers will make better advocates for federal spending than (for instance) private providers or federal bureaucrats. After all, wholly federal programs like the Social Security Act's Old Age Insurance or Medicare seem to consume federal resources much more aggressively than the much smaller federal-state programs like Temporary Assistance for Needy Families ("TANF") or Medicaid.¹⁵³ Moreover, entrepreneurial federal officials like Arthur Altmeyer managed to deliberately create constituencies in favor of such programs (e.g., senior citizens) without the aid of governors or mayors.¹⁵⁴ These constituencies suffered from just as much "fiscal illusion" as the residents of any town that ever received a federal grant, because they did not bear the full cost of the programs from

148. See generally GREVE, *supra* note 3.

149. *Id.* at 253.

150. *Id.* at 252.

151. *Id.*

152. *Id.* at 187. Greve does not use the language of "national public goods," but presumably redistribution is a properly national goal.

153. For a summary of the history and current state of Social Security funding, see John McGuire, Comment, *The Public Debt Clause and the Social Security Trust Funds: Enforcement Mechanism or Historical Peculiarity?*, 7 *LOY. J. PUB. INT. L.* 203, 206–12 (2006).

154. For more information on Arthur Altmeyer, see ARTHUR JOSEPH ALTMAYER, *THE FORMATIVE YEARS OF SOCIAL SECURITY* (1966).

which they benefited. What exactly is it about state participation that makes subnational officials uniquely powerful lobbies for the expansion of government?

Greve does not clearly explain why. Again, his book does not offer a theory of intergovernmental relations. He instead offers an argument that the proper role of subnational government in a federal regime is not necessarily the role that confers the largest amount of lucre or power on subnational officials.¹⁵⁵ This argument is surely correct, but it hardly follows that the federal government ought to go it alone in running programs instead of relying on state or local services. One might as well argue that the feds ought to build warplanes in-house rather than contracting out to McDonnell Douglas on the theory that defense contractors will become lobbyists for the military-industrial complex.¹⁵⁶ They surely will — but so what if the efficiencies of “cooperative private contracting” exceed the costs of risking the creation of a powerful lobby?

CONCLUSION

Michael Greve has written such a far-ranging, well-written, and erudite book that one can easily forgive him for offering theories of federalism that have little to do with the U.S. Constitution. Greve is surely correct that American federalism cannot be judicially vindicated until it is understood as more than insuring a minimum “balance” of money and power for subnational officials.¹⁵⁷ But the rejection of “balance federalism” does not entail the embrace of Greve’s “competitive federalism.” Greve’s book sets forth an important, interesting, and unifying account of a federal regime that might very well be a good one. He just has not provided a powerful argument that it is ours.

155. GREVE, *supra* note 3, at 19–22.

156. For an example of one of these contracts in a case concerning a Freedom of Information Act request, see *McDonnell Douglas Corp. v. U.S. Dep’t of the Air Force*, 375 F.3d 1182, 1185 (D.C. Cir. 2004).

157. See GREVE, *supra* note 3, at 19–22.