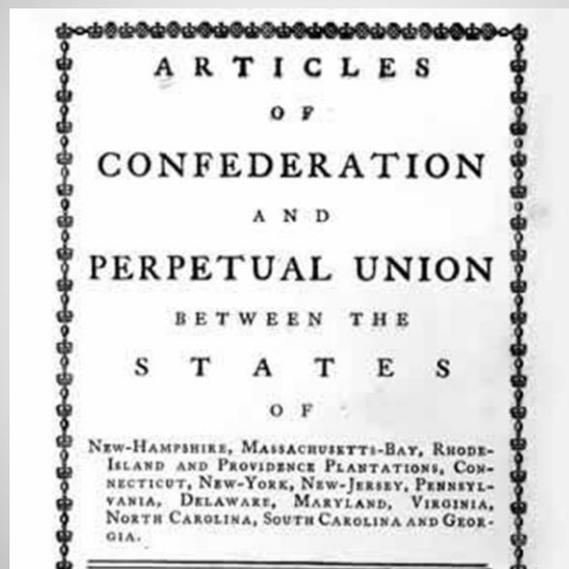


FEDERALISM SYMPOSIUM 2013

Historical Development & Modern Governance





FEDERALISM : HISTORICAL DEVELOPMENT & MODERN GOVERNANCE

The American Founding Fathers established a new order for the ages through a constitutional system whose centerpiece and foundation is federalism. Federalism is that constitutional balance between the dual sovereignty of the national and state governments. The papers in this Symposium explore the historical development of federalism since American independence and the present issues of intergovernmental relations. The presentations explore themes of the historical development of federalism, theories of federalism, statesmanship and leadership under federalism, and modern governance in systems of federalism.

FEDERALISM : HISTORICAL DEVELOPMENT & MODERN GOVERNANCE

12-1pm – REGISTRATION

1pm – WELCOME & INTRODUCTIONS

Michael Hail, Morehead State University
Holly Carter, Federalism In Action – State Budget Solutions
Stephen Lange, Morehead State University

1:30-2:30pm – KEYNOTE SPEAKER:

"Teaching Federalism: What's Happened to Federalism and How Have Universities Responded?"
Richard Cole, University of Texas

2:30-4pm – PANEL ONE: Federalism: Historical Development & Current Issues

CHAIRS:

Michael Hail and Murray Bessette, Morehead State University

PAPERS:

"Federalism and Representation in the U.S. Senate"
Michael Hail, Morehead State University

"Unfunded Mandates Reform Act: How Effective?"
Duane Milne, West Chester University

"The Transformation of the Preemption Doctrine: From the Supremacy of Federal Laws to Rule by Executive Memo"
James Clinger, Murray State University

"Representation and the Transition from the Articles of Confederation to the 1787 Constitution"
Stephanie Davis, University of South Carolina

"Broadening the National Sphere: Hamiltonian Principles and the Federal Courts' Expanding Commercial Jurisdiction"
Kate Elizabeth Brown, University of Virginia

4-4:15pm BREAK

FEDERALISM : HISTORICAL DEVELOPMENT & MODERN GOVERNANCE

4:15-5:45pm – PANEL TWO: Federalism, Statesmanship, & Accountability

CHAIR: Michael Hail, Morehead State University

PAPERS:

“Evidence-based Practice in the Intergovernmental Context: Confronting Challenges, Embracing Opportunities”

Jeremy Hall, Rutgers University

“Civic Virtue and American Federalism”

Stephen Lange, Morehead State University

“Aristotle's Advice to Statesmen: The Role of Justice, Honor, and Prudence in Responsible Leadership”

Kathleen Arnn, Morehead State University

“Taking Federalism Seriously”

Marc Landy, Boston College

5:45-6:15 CLOSING REMARKS

Michael Hail, Morehead State University

6:15 ADJOURN

6:15-7pm Cocktails Mixer & Networking



ABSTRACTS

“Aristotle's Advice to Statesmen: The Role of Justice, Honor, and Prudence in Responsible Leadership”

Kathleen Arnn, Morehead State University

This paper examines how magnanimity, justice, and prudence, three central virtues in Aristotle's *Nicomachean Ethics*, can be of service to modern political leaders. The paper begins with an examination of Aristotle's magnanimous man, a figure distinguished by his great concern for honor and by the fact that he deserves the high honors he so keenly seeks. Aristotle's treatment of magnanimity instructs us how pride can be a source of political virtue. This leads to a consideration of the relationship between justice and magnanimity, the two peaks of moral virtue in the *Ethics*. A full appreciation of the magnanimous man's virtue leads us to believe that he is a just man as well, but there remain tensions between what is good for him and what is good for his political community. Aristotle teaches us that politics is rife with such tensions, but that the pursuit of justice and a good reputation justly deserved helps political leaders to navigate them in the best political regimes. Crucial for this effort is the intellectual virtue of prudence, which aids the statesman as he deliberates about political matters.

“Broadening the National Sphere: Hamiltonian Principles and the Federal Courts’ Expanding Commercial Jurisdiction”

Kate Elizabeth Brown, University of Virginia

In *Swift v. Tyson* (US, 1842), Justice Joseph Story famously announced that commercially-oriented lawsuits brought into the federal courts under diversity jurisdiction could be decided according to a broad and undefined body of law that he dubbed the “general commercial law.” Although scholars have long debated the origins and ramifications of Story’s general, federal commercial law, my presentation examines the fundamental principles of federalism articulated by Alexander Hamilton that opened up the intellectual and jurisdictional space that eventually allowed for Swift's sweeping declaration of judicial authority. By putting key Hamiltonian principles into practice, Congress, federal judges, and even Hamilton himself helped to create a broad federal jurisdiction over commercial matters, based in admiralty jurisdiction and concurrent with that of the states. By articulating two key principles—the coextensive principle of Federalist 80 and Federalist 82’s rules for concurrent jurisdiction—Hamilton provided the intellectual tools for nationalist lawmakers and jurists to use to expand the authority of the federal bench without limiting the commercial jurisdiction that historically belonged to the states. Through his public service and his private law practice, Hamilton put into practice these rules in order to help expand the federal courts’ jurisdiction and prestige during the early republic’s neutrality struggles. Later, antebellum judges would cite these Hamiltonian principles in order to enhance and to justify their ever-expanding reach over commercial matters. My presentation will demonstrate how Alexander Hamilton provided a jurisdictional blueprint from which subsequent nationalists built a strong federal judiciary while remaining within the confines of the federal system.

"The Transformation of the Preemption Doctrine: From the Supremacy of Federal Laws to Rule by Executive Memo"

James Clinger, Murray State University

The proposed paper discusses the development of the preemption doctrine from the founding to the present day. The paper argues that many different theories regarding the doctrine have developed over time as political conflict between the federal and state governments has occurred and as practical problems of implementation in a multi-level system of governance have developed. In recent years, however, the battle over preemption has not been solely about political conflict between the states and the federal government, nor has it been primarily a matter of implementation of policy at the state level causing implementation problems at the federal level. Instead, federal preemption of state policies has occurred (and sometimes been supported by the courts) when there is no express conflict of laws. In fact, preemption has occurred when the federal executive opposes both state policies and federal laws, as written by Congress. Informal directives (i.e., memoranda, office communications, presidential signing statements) by presidents, cabinet secretaries, and agency heads have been construed as binding "laws" that preempt state statutes, even if state law does not explicitly contravene federal statutes. This raises the question of whether modern preemption controversies are primarily matters of federalism or for the most part separation of powers issues involving executive prerogatives and discretion that circumvent legislative intent and sometimes the "plain meaning" of statutes.

The paper will summarize much of the legal scholarship and several of the landmark court decisions that bear on the constitutional and administrative issues regarding preemption. The analysis will culminate in some discussion of the holding in *Arizona v. United States* (132 S. Ct. 2492 [2012]) regarding federal preemption of a state law regarding illegal immigrants. The decision in this case will be compared to holdings in other cases in which state policies regarding environmental and consumer protection were upheld, despite their departure from federal regulation in the same policy areas. The paper will conclude with some informed conjectures regarding how partisan and ideological divisions between the branches of the federal government and between the federal executive and the state lawmakers will be addressed in the future.

"Teaching Federalism: What's Happened to Federalism and How have Universities Responded?"

Richard Cole, University of Texas

This presentation reviews developments in American federalism and intergovernmental relations (FED/IGR) in the past quarter of a century or so and examines the response of those who teach and conduct research in the area to those developments.

Data for the first portion of this presentation, FED/IGR developments in the past few years, will come from various sources including government reports, private sources, and surveys conducted by the author and colleagues. An ever growing proportion of federal aid is targeted for people (Medicaid and welfare) rather than capital investment projects, the federal government's use of mandates and preemption tactics have dramatically increased, and institutions designed for intergovernmental cooperation and consultation (such as U.S. ACIR) have all but vanished. At the same time, the public's

trust and confidence in the national government has declined to all-time lows, state and local challenges to federal authority have increased dramatically, and policy activism at the state and local level as measured by such efforts as initiative and referenda activity has reached all-time highs. Developments such as these have convinced some to argue that “centralization” has replaced “cooperation” as the central feature of local, state, federal relations in the United States today, and that significant policy activism has shifted to the state and local level.

Data for the second portion of the presentation will come from just-completed surveys conducted by the author and a colleague of chairs of political science departments in the United States and faculty involved in the teaching and conducting research in FED/IGR at the college and university level. The survey explores such issues as the extent to which courses specifically devoted to topics of American federalism and intergovernmental relations are offered and whether the offering of such courses is increasing or decreasing, those regional and other factors related to the teaching of such courses, whether such courses are required or elective, topical content of such courses, whether such courses are offered on-line or not, extent to which such courses seem valued by colleagues and students, the reasons for such courses not being offered in those places where they are not taught, and so forth. The study will determine whether a set of “core concepts” characterizes the teaching of federalism today; and, if so, how that—and other aspects of teaching federalism—may have changed over time.

Significant features of U.S. federal and intergovernmental relations have changed significantly over the past few years. Whether the mode of teaching and the content of courses offered in U.S. colleges and universities have changed as well will be the focus of this presentation.

**“Representation and the Transition from the Articles of Confederation to the 1787 Constitution.”
Stephanie Davis, University of South Carolina**

The Articles of Confederation and the 1787 Constitution were both founded on the principles of a Republican government. The 1787 Constitution contains much of the same wording as the Articles, and it relies on the Articles as its background. As a result, representation under both governing documents should not change in the transition of the documents. To determine whether representation changed or remained constant, the votes of 19 men who served both as delegates in the Articles Congress and senators in the First Congress are compared using similar legislation under each governing document. Their votes regarding the Impost Acts of 1781 and 1783 in the Articles Congress are compared with the votes for provision for U.S. debt and assumption of state debt under the First Congress. In addition, their votes regarding standing armies in times of peace in the Articles Congress were compared to those in the First Congress. The votes were recorded from the Journals of the Continental Congress and The Documentary History of the First Federal Congress: Senate Legislative Journal from Johns Hopkins University. An analysis of the votes show representation changed in the transition from the Articles to the 1787 Constitution, which was unexpected because of the similar foundation and wording of each document. Upon further examination, despite the similarities, state sovereignty was weakened under the 1787 Constitution. When state sovereignty was weakened, representation was altered, because state sovereignty is an important element to representation in a Republic.

“Federalism and Representation in the U.S. Senate”

Michael W. Hail, Morehead State University

The representation of States in the national government experiences important transformations from Colonies to Confederation to Constitution. The culmination of this historical process is the Constitution of 1787 which features a dual sovereignty and a new form of government termed “federalism.” The Founding Fathers reached this watershed through deliberation and compromise at the Philadelphia Convention, where the political thought of John Dickinson and Roger Sherman is most significant for federalism. The Founding Fathers political theory is examined with regard to the meaning of the Great Compromise that secured representation of the States in the United States Senate. The intergovernmental policy tools central to the checks and balances for federalism are analyzed with a focus upon the use of these by States in relation to the Senate; these include States use of censure, instruction, recall, and memorials. Federalism in the 21st century continues to present challenges for rebalancing despite the end of an era of devolution. Understanding the constitutional foundations of the representation of States will be essential for rebalancing federalism.

“Evidence-based Practice in the Intergovernmental Context: Confronting Challenges, Embracing Opportunities”

Jeremy Hall, Rutgers University

A great deal of emphasis is now placed on the use of evidence in governmental and quasi-governmental organizations in the form of evidence-based practices, policies, and programs. As a comparatively recent development in the U.S. context relative to other former commonwealth nations, little research has yet reflected upon the interaction between EBP and federalism and intergovernmental relations. In fact, this nascent body of research has not yet established a descriptive account of EBP’s utilization by government agencies, or the intensity of its utilization. Seemingly an approach to policymaking and management that is here to stay, this essay offers a conceptual reflection on the potential for EBP, or mandates requiring EBP, to improve governance or to generate new challenges to governance. Central among the concerns explored is the potential to impact the balance of power between the federal and state governments, and to affect the degree of innovation and variation in governmental approaches to solving problems.

“Taking Federalism Seriously”

Marc Landy, Boston College

Federalism is too often viewed in opportunistic terms. Both Left and Right support it when it suits their policy goals and undermine it when it does not. As the title indicates, this paper offers a defense of federalism as a good in itself to be cherished and protected for its own sake. Part One describes seven separate constitutional and political functions of federalism that preserve, protect and promote “life, liberty and the pursuit of happiness.” Part Two examines the current condition of federalism in order to see whether or not federalism is actually performing these vital tasks. It finds that four intrusions by the national government into the affairs of the states are primarily responsible for the failure of federalism to achieve those objectives. The paper concludes by discussing three contemporary judicial and political developments that aim at restoring a robust federalism and it considers the impact of the continuing fiscal crisis on federalism’s future.

“Civic Virtue and American Federalism.”

Stephen J. Lange, Morehead State University

The question of what kind of civic virtues citizens of the United States may need in order to maintain the republic and to enable it to flourish is one that was on the minds of the Framers themselves. They recognized that good government would depend upon the moral character and intellectual abilities of the citizens, on their having certain qualities of heart and mind. An examination of *The Federalist* shows that while they sought to minimize reliance upon such character and abilities as much as possible, they did not understand themselves to be eliminating it. Further, the institutional arrangements they developed were expected to contribute to the fostering of certain civic virtues. Yet it is not the case that such formal, structural provisions were expected to be sufficient on their own to engender good citizens. Rather, the Framers left the bulk of the responsibility of forming character to the states instead of the national government, where it was already being undertaken. An examination of the constitutions of the thirteen original states surrounding the time of the Founding show that there was nearly universal concern for the moral and intellectual qualities requisite in citizens and their representatives. It is less surprising, then, that the national constitution is nearly silent on these matters, and such silence should not be taken to indicate a lack of appreciation for the importance of civic virtue in the American republic. These state constitutions also show that religious instruction and public education were two means by which the thirteen original states sought to cultivate good citizens for republican government.

“Unfunded Mandates Reform Act: How Effective?”

Duane Milne, West Chester University

This paper examines the empirically-based perceptions of local elected officials as to the impact of federal mandates upon their governing jurisdictions. This work compares the attitudes, beliefs and conclusions of a set of local officials prior to effective implementation of UMRA in 1995 with those of comparable officials in the beginning years of the current 2010 decade. The level of analysis is county governments in the Commonwealth of Pennsylvania and the policy actor providing the body of knowledge to compile the data sets is county commissioners across the respective counties in Pennsylvania. The research reveals substantial comparability in the perceptions between the two sets of local officials with respect to attitudes toward federal mandates, beliefs about the nature of governance within the American federal system and conclusions about use of federal mandates as a policy tool to achieve objectives.

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ABOUT THE SCHOOL

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Our MPA program develops a comprehensive understanding of the concepts and principles of public administration while continuing our students' liberal education. Graduates of the program possess both the administrative skills and leadership abilities necessary to deal with the myriad demands placed upon professional administrators.

AREAS OF CONCENTRATION

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- Federalism and Public Affairs
- Homeland Security and Political Theory

Refer to <http://irapp.moreheadstate.edu/mpa> for a full listing of core courses.

<http://irapp.moreheadstate.edu/mpa>

FACULTY

The MPA program employs a multidisciplinary approach toward academic excellence. The faculty have degrees in an array of academic disciplines from universities across the country.

- **Kathleen Arnn**, Assistant Professor (Political Science, Claremont Graduate University)
- **Murray Bessette**, Assistant Professor (Political Science, Claremont Graduate University)
- **Lisa Cave**, Visiting Assistant Professor (Economics, University of Kentucky)
- **Christine Emrich**, Associate Professor (Geography, San Diego State & UC Santa Barbara)
- **William Green**, Professor (Political Science, SUNY Buffalo) (J.D., University of Kentucky)
- **Michael Hail**, Professor & Graduate Program Dir. (Political Science, University of Delaware)
- **Stephen Lange**, Assoc. Professor & Assoc. Dean (Political Science, Boston College)
- **Gregory McBrayer**, Assistant Professor (Political Science, University of Maryland)
- **Jonathan Pidluzny**, Assistant Professor (Political Science, Boston College)

FUNDING OPPORTUNITIES

Graduate assistantships or research assistantships range from \$10,000 up to \$18,000. Tuition scholarships may be received based on academic merit. Qualified part-time students may receive scholarships of up to \$500.

CONTACT INFORMATION

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Federalism in Action
is a joint project of:



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Contact Holly Carter at
holly@statebudgetsolutions.org

Messages

Powerful language to communicate the value of local decision-making and choice in the states.

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State and local lawmakers working with citizens to reinvigorate local decision-making to chart a coordinated effort for state sovereignty nationwide.



Collaboration

Work together to share opportunities, challenges, and victories to build 50 fronts for change.



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Choose winnable policy battles, evaluate the consequences of federal intervention, and make tangible gains for citizen rule.

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LOCAL

50 fronts
for change
mobilized to resist
federal control

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