Federalism DA Answers – Table of Contents

**Uniqueness**
Not Unique – Federal Power Growing ........................................................................................................ 2-3
Not Unique – Federal Transportation Influence Growing .............................................................................. 4

**Link**
No Link – Supremacy Clause .......................................................................................................................... 5
No Link – Grants ............................................................................................................................................. 6
No Internal Link – Not Zero Sum ..................................................................................................................... 7

**Impact**
Strong Federal Government Good – Liberty ......................................................................................................... 9-9
Strong Federal Government Good – Tyranny .................................................................................................... 11
Strong Federal Government Good – Minority Rights ..................................................................................... 12
Strong Federal Government Good – Efficiency ............................................................................................... 13
No Impact – Tyranny ......................................................................................................................................... 14-14
Non-unique – Recent Supreme Court decisions have gutted federalism

Richard Peltz-Steele, professor of law at UMass Law School Dartmouth, 2012

Recent decisions from the Supreme Court delivered a one-two punch to American federalism. While media focus on the political impact of the immigration and healthcare decisions on the elections, our constitutional system is reeling from a blow of greater proportion. In the first high-profile decision, Arizona substantially lost its battle to maintain a state immigration enforcement system. The dispute arose from the gap between what the feds say and what they do, specifically the failure to police immigration to the satisfaction of Arizona taxpayers. The decision in Arizona v. United States was mostly about federal preemption of state law. And preemption law is notoriously fuzzy: “eye of the beholder” unfortunately characterizes the Court’s approach. The majority saw the Arizona case as an instance of Congress so thoroughly “occupying the field” that no room remained for state law. Justice Thomas, in a concise dissent, reasoned that Congress had not precluded state law such as Arizona’s, which merely echoes federal law. Whatever one thinks of Justice Scalia’s dissent, he got the facts right. The difference between majority and dissenter perceptions turns in part on whether the President’s inaction in enforcing federal immigration law has preemptive significance. And certainly, as Scalia wrote, the Framers would have abhorred this result; the states always have cherished their borders. One columnist wryly noted that the Framers would not have signed a constitution abolishing slavery. True, but that deficiency of our Constitution was addressed through amendment. No amendment yet has erased state borders. Preemption always poses a fuzzy question, but the Court’s ruling against Arizona takes a bite out of state power. Expansive federal inaction was read to displace a traditionally sound exercise of state police power that only sought to complement federal law—as written. The states now seem more than ever at the mercy of the federal government and its deep pockets to decide what is and is not the province of the state electorate. So what local policy decisions will next take up residence between Capitol Hill and K Street? Healthcare, it seems. In NFIB v. Sebelius, the Court substantially upheld the national healthcare initiative advanced by the President, including the controversial individual mandate. The Court majority rejected the mandate as an exercise of Commerce Clause power. But leaving academic jaws agape, the majority capitalized on a marginal, throw-it-at-the-wall-and-see-if-it-sticks Government argument that the penalty for failure to comply with the mandate was not a penalty at all—rather, a tax within the power of the Taxing Clause (as well as the Sixteenth Amendment, a further flimsy stretch). The majority’s use of the Taxing Clause dealt another blow to federalism.
Not Unique – Federal Power Growing

[___]

[___] Federal intrusion on the states now

Peter Harkness, founder and publisher emeritus of GOVERNING, 2012

In this atmosphere, the Obama administration has pursued a very unique mixture of collaborative and coercive strategies in dealing with states and localities, making it hard to define just what kind of federalism we’re seeing. The health-care, education and financial regulation reform bills, the climate change proposal and the massive financial stimulus bill all represented an aggressive use of federal power, some of it unprecedented and some pre-empting state regulations.
Growing federal role in transportation policy now and states like it


American federalism, which shapes the roles, responsibilities, and interactions among and between the federal government, the states, and local governments, is continuously evolving, adapting to changes in American society and American political institutions. **The nature of federalism relationships in surface transportation policy has also evolved over time, with the federal government’s role becoming increasingly influential, especially since the Federal-Aid to Highway Act of 1956 which authorized the interstate highway system. In recent years, state and local government officials, through their public interest groups (especially the National Governors Association, National Conference of State Legislatures, National Association of Counties, National League of Cities, U.S. Conference of Mayors, and American Association of State Highway and Transportation Officials) have lobbied for increased federal assistance for surface transportation grants and increased flexibility in the use of those funds.**
No Link – Supremacy Clause

[___] No link – under the Supremacy Clause, federal law is preeminent

Erwin Chemerinsky, law professor at Duke, 2004
(BROOKLYN LAW REVIEW, Summer pp. 1316-7)

Article VI of the Constitution contains the Supremacy Clause, which provides that the Constitution, and laws and treaties made pursuant to it, are the supreme law of the land. **When a state law conflicts with federal law, the federal law controls and the state law bows under the principle of federal supremacy.** As the Supreme Court declared: "Under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." In Gade v. National Solid Waste Management Association, the Court summarized the tests for preemption: Pre-emption may be either expressed or implied, and is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose. Absent explicit pre-emptive language, we have recognized at least two types of implied pre-emption: field pre-emption, where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, and conflict pre-emption, where compliance with both federal and state regulations is a physical impossibility, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.
The plan will be voluntary grants given to the states that want them – doesn’t mandate anything

Washington Post 2012

From Alaska to Florida, from Hawaii to Maine, the Obama administration on Monday spread $787 million in grants to help repair and restore the nation’s transit systems. With $150 million already committed for that purpose to the Washington Metropolitan Area Transit Authority, the D.C. region was left out of the new round of funding, other than a $1.5 million grant to improve bus stations, shelters and real-time information. Baltimore received $40 million to replace a 65-year-old bus barn and Ocean City will get $2 million to replace aging buses. Virginia’s share of the federal largess is $2 million for paratransit vans in Hampton Roads and an additional $1 million for statewide transit management. Federal Transit Administrator Peter Rogoff said his agency received 836 applications for the money, requesting $4 billion. He called the grants a downpayment toward meeting the need for transit restoration and repair that has been deferred by transit systems in an era of tight budgets.
No Internal Link – Not Zero Sum

[___]

[___] No threshold – The federal government is nowhere near expanding power enough to threaten state governments

Ernest Young, Law Professor, University of Texas, 2003
(Texas Law Review, May, p. 1607)

One of the privileges of being a junior faculty member is that senior colleagues often feel obligated to read one’s rough drafts. On many occasions when I have written about federalism - from a stance considerably more sympathetic to the States than Judge Noonan's - my colleagues have responded with the following comment: "Relax. The States retain vast reserves of autonomy and authority over any number of important areas. It will be a long time, if ever, before the national government can expand its authority far enough to really endanger the federal balance. Don't make it sound like you think the sky is falling."

[___] No internal link – federalism is a concept, not a distribution of power – it’s not zero sum

Bradley Bobertz, Environmental Law Professor, 2003
(PACE ENVIRONMENTAL LAW REVIEW, pp. 88-9)

Let us begin by demystifying the word "federalism." Federalism, itself, simply refers to any system of power-sharing in which authority is distributed between what is typically a larger political unit, such as the United States, and what are typically smaller political subdivisions, such as the states, which are a part of, but at least partially independent from, the larger body. The European Union and its constituent nations are an example of federalism, as were the Articles of Confederation that the Constitution supplanted. Federalism, in other words, is a structural notion that has no meaning independent of its particularizing details. Under any given system of federalism, the larger political body can have a great deal more power than its political subunits, as is the case in some European nations, or the subunits can wield comparatively more power than the larger political unit, as was the case under the Confederate Constitution during the American Civil War. In normal usage, then, the term "federalism" is agnostic as to how power is distributed. "Federalists" of the founding generation favored a strong national government in
relation to the states, while the modern Federalist Society appears to favor the diminishment of national power vis-a-vis the states
Thus, although federalism contemplates the division of power to protect "liberty," I shall treat this conventional use of the word as a kind of synecdoche that names only one part of the broader notion of achieving, or creating the conditions that enable citizens to achieve, a substantively desirable way of life. Under this broad definition of liberty, the national government of the United States contributes to and protects the liberty of American citizens in at least three distinct ways: (1) by using its affirmative powers in pursuit of the good, (2) by practicing self-restraint, and (3) by restraining state governments from impairing the ability of citizens to achieve the good. First and foremost, the national government protects liberty by using its affirmatively granted powers for the good of the citizenry. This conception of governmental power is broad enough to embrace any conception of the state, from a minimalist, night-watchman state to the contemporary European-style social welfare state. Whatever version of the state a society chooses to adopt, a government must exist and must possess certain powers that enable the polity collectively to achieve the goals that it sets for itself. Under the U.S. Constitution, the national government has many powers that fit this description. The commerce power, spending power, and various military powers have all been used many times to achieve through direct action by the national government objectives that the American polity has collectively decided will make it better off. The commerce power alone, for example, has given us environmental regulation; social, health, and welfare programs; most of the administrative state; and even much of our civil rights legislation, to name only a few of its principal uses.
And changing times demand a national response – problems are now national, not local

Evan Caminker, Law Professor, University of Michigan, 2001
(ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, March, p. 88-9)

Madison was right; over the course of two centuries, we have become a unified nation with primarily national rather than state affiliations and loyalties. The prevailing early sentiment that states were better guardians of individual liberty was substantially repudiated in the Civil War era, with the opposite sentiment being reflected in the Reconstruction Amendments' broad grants of congressional power to enforce individual rights against states. The prevailing early sentiment that states were primary and better repositories of the general police power was substantially repudiated in the New Deal era, when Congress acquired concurrent authority to exercise a good deal of the modern police powers. Indeed, the domestic issues most prominently addressed by national politicians today include education, crime, medical care, and welfare--the staples of the states' traditional police powers. Finally, modern developments in transportation and communication technologies have enabled a physical mobility and communicative connectedness that, by and large, lead us to perceive ourselves as national citizens first and state citizens second.
Strong Federal Government Good – Tyranny

[___]

[___] Turn – federal power is necessary to check state power

James Gardner, Professor of Law, State University of New York, 2003
(GEORGETOWN LAW JOURNAL, June p. 1010-11)

The multiplicity of power centers in the American scheme can create the impression that the system is chaotic—a pure, Hobbesian war of all against all without any purpose other than the accumulation of power. This is not the case—or at least need not be the case. In the Framers’ view, what unifies the dispersion of governmental power is the people, for the entire system is designed to assure as far as possible that their wishes be done and their liberties left intact. “The Federal and State Governments,” Madison observes, “are in fact but different agents and trustees of the people, instituted with different powers, and designated for different purposes.” Federalism is thus more than a passive institutionalization of social conflict; it is a dynamic system that is designed to be manipulated by the people to produce results they desire. Hamilton put this point clearly: In a confederacy the people, without exaggeration, may be said to be entirely the masters of their own fate. Power being almost always the rival of power; the General Government will at all times stand ready to check the usurpations of the state governments; and these will have the same disposition towards the General Government. The people, by throwing themselves into either scale, will infallibly make it preponderate. If their rights are invaded by either, they can make use of the other, as the instrument of redress.
Federalism DA Answers – Middle School

Strong Federal Government Good – Minority Rights

[___]

[___] Federalism destroys individual rights and democracy

Mitchell Crusto, Associate Professor, Loyola University New Orleans, 2000
(16 Ga. St. U.L. Rev. 517, SPRING)

The essence of the federalism paradox is that the Court's new pro-state government orientation purports to protect state governments from an overbearing central government; but, ironically, it does not purport to protect the people from overbearing state governments. The federalism paradox refers to the inevitable tension between majority rule and protection of minority and individual rights. Federalism that promotes states' rights arguably promotes democracy, which is by definition majority rule. However, majority rule can lead to oppression of minority interests and individual rights. Many of those rights are constitutionally protected. Hence, federalism encroaches upon constitutionally-protected rights.

[___] Qualified sources conclude our way

Mitchell Crusto, Associate Professor, Loyola University New Orleans, 2000
(16 Ga. St. U.L. Rev. 517, SPRING)

Critiquing the Court's new federalism doctrine, one celebrated liberal constitutional scholar, Harvard law professor Laurence Tribe, raises concerns that the Supreme Court's "new" federalism unduly victimizes the oppressed. 77 Another noted liberal constitutional scholar, Georgetown professor Mark Tushnet, identified the importance of a federal system that preserves or enhances value-pluralism over one that merely administers power. 78 Hence, many important constitutional scholars recognize that the federalism paradox must be addressed in order to develop an effective federalism doctrine, one that does not derogate individual and minority rights.
Federalism leads to ineffective responses to a variety of crucial problems

Stephen M. Griffen, Professor in Constitutional Law, Tulane School, 2007

And so it is still the case that when natural disasters strike, the divided power of the federal structure presents a coordination problem. The kind of coordination that had to occur to avoid the Katrina disaster requires long-term planning before the event. The American constitutional system makes taking intergovernmental action difficult and complex. The process of coordinating governments can take years. In many ways, the government was just at the beginning of that process at the time of Katrina, although we are now four years distant from the terrorist attacks of September 11, 2001 that set the latest round of disaster coordination in motion. Suppose, however, that we don’t have the luxury of taking the time to satisfy every official with a veto. This is the key point of tension between what contemporary governance demands and what the Constitution permits. The kind of limited change that occurred in 1927 can take us only so far. What Hurricane Katrina showed was that even after decades of experience with natural disasters, the federal and state governments were still uncoordinated and unprepared. The reasons they were unprepared go to the heart of the constitutional order. Unless we learn some lessons, Katrina will happen again. It may be a massive earthquake, an influenza pandemic, a terrorist attack, or even another hurricane, but the same ill-coordinated response will indeed happen again unless some attention is paid to the constitutional and institutional lessons of Katrina. We need to "stop federalism" before it kills again. That is, we need to stop our customary thinking about what federalism requires in order to prevent another horrific loss of life and property.
The mere existence of the states prevents the impacts

Evan Caminker, Law Professor, University of Michigan, 2001
(ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, March, p. 88-9)

The allocation of significant regulatory authority to the states within a federal system is frequently defended as serving the following structural values: enhancing the responsiveness of government to the specific interests of members of a heterogeneous society, both by decentralizing decision making and by generating competition for a mobile citizenry; enabling states to act as laboratories experimenting with diverse solutions to economic and social problems; and stimulating the development of democratic skills and attitudes by increasing citizen participation in self-governance. Moreover, the mere existence of states as independent institutions serves as a structural check against the risk that Congress will either assert power that does not lawfully belong to it or wield the power it does lawfully enjoy too frequently or indiscriminately. As observed by Alexander Hamilton, The State legislatures . . . will constantly have their attention awake to the conduct of the national rulers, and will be ready enough if anything improper appears, to sound the alarm to the people, and not only to be the VOICE, but, if necessary, the ARM of their discontent.
[___] Public pressure prevents the impact

Ilya Somin, Ph.D. Candidate, Department of Government, Harvard University, 2001
(GEORGETOWN LAW JOURNAL, January, p. 485)

The problem of transparency that Justice O'Connor detected in the case of federal commandeering is much more serious in the case of federal subsidies to state governments. **State officials faced with commandeering statutes and other unfunded mandates from the federal government have an obvious incentive to publicize their complaints and use their lobbying power to mobilize opposition. Indeed, such opposition has resulted in numerous state-government-initiated lawsuits to curtail such mandates and even in the passage of the Unfunded Mandates Reform Act of 1995, a federal statute intended to curb them. Although this activity is unlikely to completely negate deeply rooted voter ignorance, it may at the very least diminish it to some degree.**