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# Paging Dr. Derrida: A Deconstructionist Approach the Understanding the Affordable Care Act Litigation

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**PAGING DR. DERRIDA: A  
DECONSTRUCTIONIST APPROACH TO  
UNDERSTANDING THE AFFORDABLE CARE  
ACT LITIGATION**

**Laura A. Cisneros\***

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\* Associate Professor, Golden Gate University School of Law. This article benefitted from presentation and discussion at the Third Annual Constitutional Law Colloquium, Loyola University Chicago School of Law and the Loyola University of New Orleans College of Law Faculty Speaker Series. I am grateful to my family, friends, and colleagues for their continued encouragement and support.

## INTRODUCTION

On June 28, 2012, the Supreme Court of the United States issued its decision in *National Federation of Independent Business* (“NFIB”) *v. Sebelius*, perhaps better known as the Affordable Care Act (ACA) opinion.<sup>1</sup> Chief Justice Roberts authored the Court’s 5-4 decision, sustaining the ACA in its entirety save one exception.<sup>2</sup> The Court ruled that Congress did not have the power to revoke a state’s existing Medicaid funding as a penalty for that state refusing to participate in the ACA’s Medicaid expansion provisions.<sup>3</sup> Chief Justice Roberts agreed with the dissenting Justices’ conclusion that the individual mandate to purchase health insurance exceeded Congress’s Commerce Clause power.<sup>4</sup> And although many Court-watchers anticipated that such a finding would ring the death knell for the constitutionality of the entire ACA, the Chief’s willingness to characterize the individual mandate as a tax rather than a penalty for purposes of determining its constitutionality allowed the Court to hold that the mandate was a constitutional exercise of Congress’s power to tax.<sup>5</sup>

With respect to the ACA’s other hotly contested provision—the requirement that States expand their Medicaid coverage to continue receiving Medicaid funding—Chief Justice Roberts’ opinion determined that Congress had gone too far.<sup>6</sup> The Medicaid expansion provision operated like a “gun to the head” of the states, and coercion on such a level violates the Constitution.<sup>7</sup> Nevertheless, Chief Justice Roberts, joined by four other justices, held that the Court could and must sever the Medicaid expansion provision from the Act, to leave the remainder in place as valid law.<sup>8</sup>

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1. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

2. *Id.* at 2608.

3. *Id.*

4. *Id.* at 2598 (citing U.S. CONST. art. I, § 8, cl. 3 (“Congress shall have Power . . . [t]o regulate [c]ommerce . . . among the several States . . .”).

5. *See id.* (citing U.S. CONST. art. I, § 8, cl. 1 (“Congress shall have [p]ower [t]o lay and collect taxes . . .”).

6. *Id.* at 2633–40 (Chief Justice Roberts, joined by Justices Breyer and Kagan, concluded that the Medicaid expansion was constitutionally impermissible because the expansion permitted revocation of a State’s existing Medicaid funding if they declined to comply with the expansion.).

7. *See id.* at 2604–05.

8. *Id.* at 2638–42 (Roberts, C.J., for the Court, joined by Ginsburg, Breyer, Sotomayor, & Kagan, JJ.).

The ACA plurality, concurring, and dissenting opinions are full of history lessons, health care statistics, insurance argot, economic theories, and metaphors ranging from the bellicose to the agricultural. However, the ACA decision is not about cost-shifting, or healthcare services or the healthcare market, or even about broccoli.<sup>9</sup> It is about power. Specifically, it is about the protean allocation of decision-making power that gives life to American constitutional federalism and the dualistic tension between the Federal Government and the individual states.

There are two dominant federalism narratives, one grounded in sovereignty, the other in cooperation.<sup>10</sup> Sovereignty federalism posits that state autonomy is inviolable.<sup>11</sup> Advocates of this narrative argue that the success of federalism depends on strict adherence to the idea that the federal and state governments occupy separate regulatory spheres.<sup>12</sup> By contrast, cooperative federalism<sup>13</sup> emphasizes integration over autonomy.<sup>14</sup> Supporters of this narrative cast the states in a passive role as compliant implementers of federal policy.<sup>15</sup> Recent scholarship has explored more nuanced versions of cooperative federalism, arguing that states, though subordinate in this “master/servant” construction, can exploit their servant role

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9. See Transcript of Oral Argument at 13, *Dep’t of Health & Human Servs. v. Florida*, 132 S. Ct. 866 (2012) (No.11-398).

10. More recently, scholars have initiated a conversation about a third theory of federalism known as “dynamic” federalism. This scholarship focuses on the mechanisms that states can access to negotiate regulatory implementation and protect themselves from national breaches of state sovereignty. See, e.g., Robert B. Ahdieh, *Dialectical Regulation*, 38 CONN. L. REV. 863 (2006); Kirsten Engle, *Harnessing the Benefits of Dynamic Federalism in Environmental Law*, 56 EMORY L.J. 159, 176 (2006) (Dynamic federalism is “the recognition and even celebration, of real-world overlap and dynamic relationship between the state and federal authority.”); J.B. Ruhl & James Salzman, *Climate Change, Dead Zones, and Massive Problems in the Administrative State: A Guide for Whittling Away*, 98 CALIF. L. REV. 59 (2010).

11. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1492–96, 1498–1512 (1987) (book review).

12. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553–54 (2012).

13. See 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 (1998) (evaluating of cooperative federalism).

14. Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256, 1262 (2009).

15. *Id.*

through dissent, thereby exerting power and influence in the federal policymaking process.<sup>16</sup> Federalism along this model, however, inverts the power relationship that is central to the sovereignty narrative. That is, cooperative federalism, unlike sovereignty federalism, assumes that the Federal Government is preeminent and that the states, while given the freedom to dissent and impede through uncooperative methods, do not so much share power as react to it.

Sovereignty federalism and cooperative federalism represent the two dominant federalism narratives among Supreme Court justices and scholars. The Court consistently invokes formal protections to safeguard the states' right to preside over their own empires.<sup>17</sup> Sovereignty scholars tend to embrace this dualistic vision of federalism that locates federalism's success in the state's ability to exercise supreme policymaking authority within its own sphere of influence without federal interference.<sup>18</sup> By contrast, academics that lean toward cooperative federalism locate the states' power in their position as federal servants, not separate sovereigns.<sup>19</sup> Scholars have commented that even though these academics tend to resist the rigid *de jure* "separate spheres" approach, their *de facto* autonomy theories nevertheless reinforce the basic sovereignty notion that states possess distinct identities that allow them to function as sites of decision making power.<sup>20</sup> In this Article, I attempt to enter the conversation begun by others who argue that a polyphonic theory may allow us to better understand contemporary federalism.<sup>21</sup> To

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16. See, e.g., *id.*; see also Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2011).

17. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *New York v. United States*, 505 U.S. 144 (1992).

18. Heather K. Gerken, *Our Federalism(s)*, 53 WM. & MARY L. REV. 1549, 1553–54 (2012).

19. See Heather K. Gerken, *Of Sovereigns and Servants*, 115 YALE L.J. 2633, 2635 (2006). See, e.g., Daniel J. Elazar, AMERICAN FEDERALISM: A VIEW FROM THE STATES 162 (2d ed. 1972); Susan Rose-Ackerman, *Cooperative Federalism and Co-optation*, 92 YALE L.J. 1344, 1346 (1983); Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 668 (2001).

20. Heather K. Gerken, *Foreword: Federalism All the Way Down*, 124 HARV. L. REV. 4, 13 (2009) ("Even as scholars have rejected a sovereignty account, they remain haunted by its ghost. They continue to deploy narratives about power, jurisdiction, and identity that mirror those of sovereignty's champions.").

21. See Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91

that end, this Article discusses the defects of sovereignty federalism and cooperative federalism, both of which are (1) subspecies of the Court's long-standing dualist approach to federalism, and (2) given expression in the Court's ACA opinions.

Chief Justice Roberts' opinion in *NFIB v. Sebelius* mimics the sovereignty narrative.<sup>22</sup> It privileges the concept of dual federalism as inherited from those original framers of the Constitution who distrusted centralized power.<sup>23</sup> His analysis of the federal-state relationship emanates from a strict adherence to protecting structural federalism by preserving formalistic boundaries of state autonomy.<sup>24</sup> Conversely, Justice Ginsburg's concurring opinion is a robust defense of cooperative federalism.<sup>25</sup> Her power allocation analysis favors the Federal Government on all counts, implicitly affirming the subordinate function of the states as mere

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IOWA L. REV. 243, 248–49, 285–96 (2005).

In the polyphonic conception, federalism is characterized by the existence of multiple, independent sources of political authority. The scope of this political authority is defined by territory, not by subject matter. No kind of conduct is categorically beyond the boundaries of state or federal jurisdiction. The federal and state governments function as alternative centers of power. In the first instance, any matter is presumptively within the authority of the federal government and of a state government. Full concurrent power is the norm. A polyphonic conception of federalism thus resists the idea of defining enclaves of state power protected federal intrusion. . . . [P]olyphonic federalism rejects the dualist vestiges of dual federalism.

*Id.* at 285.

22. *See infra* Part III.B.1.

23. *See infra* Part III.B.1.

24. *See Nat' l Fed' n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578. (“State sovereignty is not just an end in itself: Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’ Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens’ daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy. The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’”) (internal citations omitted).

25. *Id.* at 2609–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

implementers of federal programs.<sup>26</sup> Underscoring Justice Ginsburg's rationale is the idea that the Federal Government is empowered to address problems of collective action affecting multiple states.<sup>27</sup> While Justice Ginsburg's opinion reads as less anachronistic than Chief Justice Roberts', it nevertheless remains stuck in a bygone era, namely the New Deal, when the exigencies of the Depression—and the states' widespread inability to address those exigencies—forced the Federal Government to take control of so many aspects of American political and economic life.<sup>28</sup>

Despite their differences as to where power originates and resides, how it is imposed, and who exercises it over whom, sovereignty federalism and cooperative federalism have one critical component in common: they express the relationship between the Federal Government and the states in terms of force; the language used is almost always violent.

Under the sovereignty framework, the States are cast as rivals of and challengers to the Federal Government in fields of policy where the States would like to claim (or reclaim) jurisdiction. The States operate as outsiders who retain power only through vigilance, assertion, and other forms of active self-preservation—all of which require an adversarial posture and a language of violence; they engage in a never-ending effort to police their perimeters and keep the Federal Government at bay.

Ironically, conflict and violent rhetoric also play a role in the "cooperative" federalism framework. When States are viewed as passive implementers of federal policy, they may be considered allies of the Federal Government, but they are still inferiors whose only recourse is rebellion expressed in active or passive resistance. This resistance, which is often implemented through a violent vocabulary, becomes more pronounced under the more nuanced conceptions of cooperative federalism offered by recent scholarship, for example, rhetorical and uncooperative federalism.<sup>29</sup> While

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26. See *infra* Part III.B.2.

27. See *infra* Part III.B.2.

28. See, for example, Ginsburg's discussion of New Deal legislation and Supreme Court cases at the beginning of Part II.D.1.b of her opinion. *Sebelius*, 132 S. Ct. at 2622 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

29. See, e.g., Bulman-Pozen & Gerken, *supra* note 14; see also Leonard, *supra* note 16.

still perceiving the States as allies of the Federal Government, both rhetorical and uncooperative federalism advocate that the States must use their position to challenge and dissent from within the system. Thus, even though the States enjoy insider status under this construction of the federal-state relationship, they are still limited to one of two courses of action: resistance or submission.

The problem with a federalism discourse (or any discourse) based on the exertion of force and expressed in violent language is that it has nowhere to go; it is static, with the players cemented into their respective positions. Just as war represents the ultimate termination and failure of diplomacy, bellicose language represents the end of productive dialogue. The rhetoric is incapable of moving anyone to a place where mutually acceptable solutions are possible.

There is, however, an alternative. Jacques Derrida was one of the most prolific philosophers of the twentieth century. In his later works, he became increasingly concerned with paradoxes: specifically, the idea that the possibility and impossibility of a thing exist at the same time.<sup>30</sup> One of the objects of his study of this possible-impossible paradox was the concept of hospitality.<sup>31</sup> In *Of Hospitality*, Derrida contends that the very nature of hospitality is self-defeating because the host must surrender his home to the guest for the gesture to be complete.<sup>32</sup> With this in mind, Derrida differentiates between two notions of hospitality: “absolute” hospitality, which he considers impossible, and “conditional” hospitality, which, while possible, requires rules and agreed-upon parameters to limit the guest and his ever-gnawing hunger for power (for example, his desire to displace the host and take over the house).<sup>33</sup>

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30. See, e.g., JACQUES DERRIDA, GIVEN TIME: I. COUNTERFEIT MONEY 12 (Peggy Kamuf trans., Chicago: University of Chicago Press) (1992) (suggesting that a genuine gift is impossible because the notion of gift-giving implicitly carries with it a demand for and obligation of reciprocity); JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS 33 (Routledge, 2001) (arguing that according to its own internal logic, genuine forgiving must involve the impossible: that is, the forgiving of an ‘unforgivable’ transgression—e.g. a ‘mortal sin’).

31. JACQUES DERRIDA & ANNE DUFOURMANTELLE, OF HOSPITALITY 25 (Rachel Bowlby trans., 2000) [hereinafter, DERRIDA, OF HOSPITALITY].

32. *Id.* at 23, 25.

33. *Id.* at 25.

Derrida's notion of "hospitality," in both its absolute and conditional forms, provides a potent means of unpacking the federalism issues that shape the ACA debate and opinion. I assert that federalism takes on a different color when we seek to understand it in terms of Derridean hospitality. Our debates over federalism might actually move forward if we were to view the struggle between federal power and state sovereignty within the framework of hospitality. The host-guest framework would provide a new paradigm within which to address the dilemmas of coordinated government inherent in the federal-state relationship. Shifting the discourse into a new paradigm creates space for innovative approaches to resolve those dilemmas. Indeed, novel resolution strategies may be more compatible with the modern construction of the federal-state relationship and ultimately may result in more effective governance.

This Article argues that hospitality, as conceived by Derrida, offers an alternative language frame through which to construct a new federalism discourse: one of host and guest rather than rival and challenger. Derrida's principle of conditional hospitality, which protects the host's sovereignty by empowering him to establish boundaries and rules that govern his relationship with the guest, is a framework that stops short of violence and may initiate new and more effective modes of behavior. Borrowing from this framework, we can begin to construct a theory of Conditional Federalism, a federal-state relationship that similarly stops short of violence and offers the states more options than simply rebellion on one hand or submission on the other. By recognizing and protecting the sovereignty of the state, Conditional Federalism would protect those structural federalism values embraced by the sovereignty narrative, but it would do so without incorporating the posture of conflict that often takes shape within those values.

Moreover, by stopping short of violence and recognizing the power of both the host and guest, Conditional Federalism would allow for the creation of mutually acceptable conditions or pacts.<sup>34</sup> These pacts would facilitate a form of governance

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34. *Id.* at 5, 7, 21, 23, 25, 29. Much of Derrida's theories on hospitality are derived from the ancient Greek concept of the "foreigner" or *xeno*, as depicted in Plato's *The Sophist*, a dialogue in which Socrates discusses how to properly deal with a stranger. Derrida explores this issue in great depth in *Of Hospitality*,

that integrates the respective strengths of the state and federal authorities to achieve a mutually designed objective. Conditional Federalism can use hospitality to create and reinforce a federal-state relationship built on a commitment to governance, to the pact, which must be renewed each generation.<sup>35</sup> Moreover, that commitment assumes an aversion to violence. The hospitality paradigm displaces *rival* and *violence* with *partner* and *contractual limitation*. It incorporates the dominant components of the sovereignty and cooperative federalism narratives into a new federalism paradigm grounded in collaborative governance.

Part II of this Article introduces the basic principles of Jacques Derrida's theory of hospitality. Part III presents the dominant federalism theories, including some of their more nuanced offshoots. Part IV examines the Affordable Care Act opinion, especially the portion of it that addresses the forced expansion of Medicaid. After a brief summary of the case outcome, this part analyzes Chief Justice Roberts' and Justice Ginsburg's opinions and demonstrates how they illustrate various aspects of the traditional federalism narratives. Finally, Part V shows how Derrida's hospitality principles offer these federalism narratives a different framework through which to conceive a new federalism paradigm—what I call Conditional Federalism. In this part, I discuss the common structural defect of the dominant federalism discourse and offer hospitality as a new way of seeing and speaking about the relationship between States and the Federal Government. I also make an effort to show how the principles of hospitality allow us to read the ACA opinion differently, with a clearer idea of what is actually happening in the text. I conclude Part V with the following argument: the hospitality paradigm, by displacing the theme of violence underlying dominant federalism narratives, has the potential to create a federalism discourse of shared partnership, allowing for transformative and more productive interaction

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stressing the difference between a foreigner (*xeno*), with whom one can establish a workable relationship through a pact or *xenia*, and a barbarian, with whom no pact is possible. When extending an invitation of hospitality to a barbarian, the host must be prepared to grant his guest complete liberty and power within the house, and to allow the guest, the barbarian, to displace him as host. That is, he must be prepared to become a hostage in his own home. *Id.*

35. *Id.* at 21, 23.

and policymaking between the Federal Government and the States.

### I. DERRIDEAN PRINCIPLES OF DECONSTRUCTION AND HOSPITALITY

The aim of this Article is to show how the text of the Chief Justice and Justice Ginsburg's opinions in *Sebelius* can be deconstructed to reveal the ongoing debate between the two dominant federalism theories. This deconstruction means to highlight the gaps between those two normative positions and illustrate the inability of either theory to wholly serve as a platform for more productive policymaking between the Federal Government and the States. It is first necessary, however, to provide a working understanding of the purpose of a deconstructive technique. In so doing, we can begin to appreciate the benefits that a hospitality paradigm may have for moving beyond the impasse that the dominant federalism narratives create. Derrida spent nearly half a century introducing and developing his ideas about deconstruction.<sup>36</sup> While a full assessment of his ideas is beyond the scope of this paper, a brief explanation about the deconstructive approach is necessary to place Derrida's hospitality principles in context.

#### A. *Explaining Deconstruction: A Positive Mission*

A deconstructive technique intervenes and engages with a text with a view towards destabilizing its assumed or dominant meaning. It challenges passivity and invites one to pursue an active reading. Deconstruction began as a literary theory which, when applied, would allow one to engage with the great philosophers, like Plato and Aristotle, in a new way.<sup>37</sup> The idea was to read philosophical texts in a manner

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36. See, e.g., JACQUES DERRIDA, *WRITING AND DIFFERENCE* (Alan Bass trans., 1978) (collecting Derrida's essays written between 1959 and 1966 analyzing why and how metaphysical thinking excludes writing from its conception of language, ultimately arguing that metaphysics itself is constituted by this exclusion); JACQUES DERRIDA, *SPEECH AND PHENOMENA: AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS* (David B. Allison & Newton Garver trans., 1979); and JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 2d ed. 1998).

37. DECONSTRUCTION IN A NUTSHELL: A CONVERSATION WITH JACQUES DERRIDA 74–76 (John D. Caputo ed. with commentary, 1997) [hereinafter DECONSTRUCTION IN A NUTSHELL].

that challenged the basis of their claim to “true” philosophy without destroying wholesale, their contribution to modern thought: to challenge the idea of the “purity” (and therefore unassailability) of their philosophy without annihilating the ideas themselves.<sup>38</sup>

Overtime, deconstruction developed within other academic departments and became a way to confront not only political thinkers, but also politics itself.<sup>39</sup> Deconstruction gives us a way to break free of inherited paradigms and interpretations that stifle transformative thought. In fact, deconstruction assumes that these paradigm and interpretations are inherently unstable and contain within them the seeds of their own destruction, and that they persist only in a mask of strength, which, if pulled away, invites inevitable self-collapse. “Deconstruction suggests that texts and arguments with which we are most familiar contain hidden and unexpected reserves, points of inner resistance, dialogues, and alternatives.”<sup>40</sup>

Deconstruction is suspicious of ideals, of purity, of anything absolute. For Derrida, purity and origin are phantoms.<sup>41</sup> Thus, a desire to return to some ideal form or state is problematic.<sup>42</sup> First, it is unclear whether, if ever, such a pure form or state ever existed.<sup>43</sup> Second, if it is unclear whether a pure form or state ever existed, then we need to account for the difference between acceptable and unacceptable deviations.<sup>44</sup> That is not to say that one should not make deviations should. Rather, it is to suggest that instead of assigning blame based on an

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38. *Id.*

39. Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L. REV. 920 (Mary Quaintance trans., 1990) (In 1989 Derrida gave a lecture at a conference at the Cardozo Law School, the result of which was the publication of *The Force of Law*. In his lecture, Derrida turned to political philosophy and jurisprudence and associated his work with the critical legal studies movement. *The Force of Law* signified the clear political turn of deconstruction engaging itself with questions of political and ethical responsibility toward law and justice.).

40. PENELOPE DEUTSCHER, *HOW TO READ DERRIDA*, at xii (2006).

41. *Id.* at 3.

42. *Id.* at 2.

43. *See id.*

44. *See id.* at 3 (“A far more complex question is which drugs and which toxins, which interventions and modifications we will accept, which we will exclude, and on what grounds.”).

acceptable/unacceptable (insider/outsider) construction, we should question the justifications for and coherence of our notion of purity.<sup>45</sup> As Penelope Deutscher explains in *How to Read Derrida*:

[t]he elevation of an ideal is a kind of lazy shortcut. If the relevant ideal is open to question . . . we must grapple with a responsibility we might prefer to avoid. Derrida believes we should ask questions that probe the phantom ideals implicitly at work in specific cultural, historical, political or literary context. What kind of responsibility comes with acknowledging the impossibility of those ideals?<sup>46</sup>

Deconstruction is a way to break down and challenge our concept of purity and expose the instability of inherited hierarchies and constructions. The destabilization that a deconstructive critique produces is necessary to “provoke in us a new kind of ethics in which new obligations and decisions press on us.”<sup>47</sup>

As this last sentence indicates, deconstruction is not nihilistic.<sup>48</sup> Indeed, by destabilizing traditional hierarchies of thinking, a deconstructive technique opens up space to create new possibilities. That space can only be filled, however, by those willing to accept responsibility for new ways of thinking. It is through a deconstructive critique that we may consent to welcome not only the present dominant voice, but also the voice of the other.<sup>49</sup> Rather than nihilistic, this process is in fact, aspirational.<sup>50</sup> Deconstruction lives in the space between what we have (but are discontent with) and what we want.<sup>51</sup> It enables a frame of mind that can perceive

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45. *See id.*

46. *Id.*

47. *Id.* at 7.

48. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 49 (“[There is a] popular image of deconstruction as some sort of intellectual ‘computer virus’ that destroys . . .”).

49. *Id.* at 57 (“[D]econstruction is not . . . a destruction or demolition, but a way of releasing and responding, of listening and opening up, of being responsible not only to the dominant voices of the great masters, but also to other voices . . .”).

50. *Id.* at 70 (“Deconstruction is nourished by a dream of the invention of the other, of something to come . . .”).

51. *Id.* (“[D]econstruction . . . always inhabits the distance between something impossible . . . of which we dream and all the existing actualities and foreseeable possibilities, with which we are more or less discontent.”).

of aspiring to one state of being, while temporarily bound to another.<sup>52</sup> This inclusive frame of mind avoids chaos. What this means in the federalism context is that opening up to a paradigmatic shift in thinking about how to navigate the federal-state relationship does not necessarily require immediate (or ultimate) discard of the sovereignty and cooperative federalism paradigms.

Ultimately, deconstruction is positive and pragmatic. It invites skepticism of inherited constructions to force self-reflection in a way that opens us up to new possibilities. The purpose of this self-reflection is not destruction *per se*; rather, it is to force a defense of the status quo and press change where that defense cannot be justified.<sup>53</sup> That, according to Derrida, is how, through the process of challenging law, one can pursue justice.<sup>54</sup> Deconstruction is positive because it creates the conditions that enable us to aspire to a state of perpetual motion rather than to settle for a state of being. Although a state of being is attainable, it is problematic because it creates the false impression of purity and certainty and stability. “The very meaning and mission of deconstruction is to show that things—texts, institutions, traditions, societies, beliefs, and practices . . . do not have definable meanings and determinable missions, that they are always more than any mission would impose, that they exceed the boundaries they currently occupy.”<sup>55</sup>

Conversely, a state of perpetual motion seeks no ideal, has no destination because the moment one arrives at a destination or obtains an “ideal” (for example, a particular state of being) one creates limits, conditions that prohibit movement beyond. With the aspiration to a perpetual state of motion, there are no inhibiting static markers, only movement that constantly pushes against those limits to

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52. *Id.*

53. *Id.* at 18 (“That is what gives deconstruction its movement, that is, constantly to suspect, to criticize the given determinations of culture, of institutions, of legal systems, not in order to destroy them or simply to cancel them, but to be just with justice . . .”).

54. *Id.* at 16 (“[Derrida] make[s] a distinction between the law, that is the history of right, of legal systems, and justice. . . . You can improve law, you can replace one law by another one. There are constitutions and institutions. This is a history, and a history, as such, can be deconstructed. . . . But justice is not the law. Justice is what gives us the impulse, the drive, or the movement to improve the law, that is, to deconstruct the law.”).

55. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 31.

consider a step beyond. This push creates a state that is constantly transforming and therefore continually capable of cultivating, even celebrating difference by making space for possibility.

The experience and relentless pursuit of the impossible is what deconstruction is all about.<sup>56</sup> “Liberalism for [Derrida] is subjectivism, a philosophy in which everything turns on the ‘rights’ of the ‘autonomous subject,’ whereas deconstruction is a philosophy of ‘responsibility to the other,’ where everything turns on the turn to the other.”<sup>57</sup> “[I]t would not be a distortion to say that deconstruction is to be understood as a form of hospitality, that deconstruction *is* hospitality, which is the welcoming of the other.”<sup>58</sup> In the discussion below, however, we will see that welcoming the other has its risks.

As with virtually every Derridean principle, hospitality—the essential human act of being a host—is inherently unstable and therefore cannot be realized in any absolute or ideal form. This point will loom large when we return to the issue of American federalism, which, I argue, is itself founded on a “hospitality” or “host-and-guest” paradigm. American federalism, like unconditional hospitality, is impossible to attain in the pure or absolute sense. In recognizing this fact, however, we set ourselves free to explore the potential for a more attainable and effective form of federalism—Conditional Federalism.

### *B. Explaining Hospitality: Welcoming the Stranger*

The concept of “hospitality” is interesting because, as Derrida likes to point out, the word carries its own contradiction within it.<sup>59</sup> The word “hospitality” means to welcome in the “stranger.”<sup>60</sup> It derives from the Latin *hoses*, formed from the word *hostis*, originally meaning stranger.<sup>61</sup>

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56. *Id.* at 32 (citing Jacques Derrida, *Force of Law: The “Mystical Foundation of Authority”*, 11 CARDOZO L.REV. 920 (1990)).

57. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 109.

58. *Id.* at 109–10.

59. Jacques Derrida, *Hospitality*, 5 ANGELAKI: JOURNAL OF THE THEORETICAL HUMAN. 3, 5 (Barry Stocker & Forbes Morlock trans., 2000) (“Hospitality is a self-contradictory concept and experience which can only self-destruct <put otherwise, produce itself as impossible, only be possible on the condition of its impossibility>. . .”).

60. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 110.

61. *Id.*

The word “hospitality” developed by taking *hostis*, which evolved to mean enemy or “hostile” stranger (*hostilis*), and appending *pets* (*potis*, *poets*, *potentia*) meaning “to have power.”<sup>62</sup> Given this etymology, the two main characteristics of the word “hospitality” are welcoming and power.<sup>63</sup> These characteristics are interdependent. The welcoming of the guest, the stranger, immediately interposes risk and requires that the host be on guard lest he lose power and mastery over his premises.<sup>64</sup>

The two main characteristics of hospitality create an inherent tension in the concept of hospitality. This tension stems from the fact that hospitality requires the host to give a place to the stranger by welcoming him in while at the same time retaining control over the place in which the host has received the stranger. “There is an essential ‘self-limitation’ built right into the idea of hospitality, which preserves the distance between one’s own and the stranger, between owning one’s own property and inviting the other into one’s home. So there is always a little hostility in all hosting and hospitality . . . .”<sup>65</sup>

The idea that the host must retain mastery and ownership over the property is vital to the concept of hospitality. “A host is a host only if he owns the place, and only if he holds onto his ownership.”<sup>66</sup> The way that a host holds onto his ownership is by limiting the welcoming.

When the host says to the guest, ‘Make yourself at home,’ this is a self-limiting invitation. ‘Make yourself at home’ means: please feel at home, act as if you were at home, but remember, that is not true, this is not your home but mine, and you are expected to respect my property. When I say ‘Welcome’ to the other, ‘Come cross my threshold,’ I am not surrendering my property or my identity. . . . If I say, ‘Welcome,’ I am not renouncing my mastery . . . .<sup>67</sup>

The tension between host and guest carries within it latent animus and the potential for violence. And if the

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62. *Id.*

63. See DERRIDA, OF HOSPITALITY, *supra* note 31, at 53–55.

64. *Id.*

65. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 110.

66. *Id.* at 110. “[T]he host, he who offers hospitality, must be the master in his house, he . . . must be assured of his sovereignty over the space and goods he offers or opens to the other as stranger.” Derrida, *supra* note 59, at 14.

67. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 111.

host/guest relationship were permanently locked in this arrangement, violence would emerge as its chief feature. Worse, the state of imminent or actual violence would be permanent, un-transcendable. However, the characteristics of welcoming and power actually create two forms of hospitality: unconditional and conditional. Pure, unconditional, for example, absolute, hospitality is what emerges when the host is confronted not with a foreigner or *xeno* with whom the host shares certain familial or social ties, but with a barbarian, the absolute other.<sup>68</sup> Pure, unconditional hospitality does not require a pact or reciprocity of obligation, in part because only a host and guest who share certain social or familial customs can enter into a pact.<sup>69</sup> “[U]nconditional hospitality implies that you don’t ask the other, the newcomer, the guest to give anything back. . . . [T]he condition of unconditional hospitality [is] that you give up the mastery of your space, your home, your nation. It is unbearable.”<sup>70</sup> When Derrida says that pure hospitality is “unbearable,” he means that it cannot persist for more than a few moments, because as soon as the barbarian guest enters the house, he immediately moves to displace the host, who has stepped aside and allowed himself to become captive.<sup>71</sup> At that moment, hospitality is over.<sup>72</sup>

Therefore, to sustain itself, all hospitality must be conditional. The idea that absolute hospitality is impossible is key to Derrida’s consideration of the notion of hospitality within the possible-impossible paradox.<sup>73</sup> Given that absolute means without limitation, imagining hospitality in the extreme (i.e., without conditions) is unfeasible.<sup>74</sup> “This is not so much an ideal; it is an *impossible* ideal.”<sup>75</sup>

This impossibility is not, however, negative. “Like everything else in deconstruction, the possibility of hospitality is sustained by its impossibility . . . .”<sup>76</sup> In other words, the pursuit of hospitality begins with the sovereign’s

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68. DERRIDA, OF HOSPITALITY, *supra* note 31, at 23, 25.

69. *Id.* at 25–29.

70. DEUTSCHER, *supra* note 40, at 65.

71. *See* DERRIDA, OF HOSPITALITY, *supra* note 31, at 53, 55, 123, 125.

72. *See id.*

73. DEUTSCHER, *supra* note 40, at 68.

74. *Id.*

75. *Id.*

76. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 111.

welcome of the other and invitation they make themselves feel at home in the sovereign's property.<sup>77</sup> The invitation can only be made if the sovereign retains complete control of the property.<sup>78</sup> The guest can only truly feel at home in his or her own home.<sup>79</sup> The necessary predicates: (1) for the host to have the power to invite and (2) for the guest to truly feel at home cannot exist simultaneously.

Thus, for hospitality to occur, it is necessary for hospitality to go beyond [itself]. That requires that the host must, in a moment of madness, tear up the understanding between him and the guest, act with "excess," make an absolute gift of his property, which is of course impossible. But that is the only way a guest can go away feeling as if he was really made at home.<sup>80</sup>

This dilemma creates a positive dynamic because the only way to experience hospitality is through the pursuit of its impossibility, through the imperfect struggle with the responsibility of welcoming the other into one's home. The transformation comes when the host imposes limits on the guest so as to retain the host's sovereignty, and the guest reciprocates by accepting some of those limits and rejecting others. In this sense, the dynamic between host and guest becomes one of bargaining, of contracting, of building a pact.

Derrida's interest in exploring the tensions within "hospitality" is not aimed at cynically unmasking it as just more mastery and power. . . . On the contrary, he wants to show that hospitality is inhabited from within, inwardly disturbed by these tensions, but he does this precisely in order to open hospitality up, to keep it on guard against itself . . . to open—to push—it *beyond itself*. For it is only that internal tension and instability that keeps the idea of hospitality alive, open, loose. If it is not beyond itself, it falls back into itself and becomes a bit of ungracious meanness, that is, hostile."<sup>81</sup>

Impossibility, therefore, is not meaningless; impossibility produces transformation. Though impossible, pure, unconditional hospitality has a function; it gives conditional

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77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* (footnote omitted).

81. *Id.* at 112.

hospitality its purpose and meaning.<sup>82</sup> “Derrida argues that acts of conditional hospitality take place only in the shadow of the impossibility of their ideal version.”<sup>83</sup> This requires that the decision-maker push against the established limits and engage with the prospect of “more.” Impossibility resists producing phantom ideals of purity because it pushes us to create and justify limits and conditions. Each limit or condition creates a threshold, which sparks the imagination of those who contemplate the change of a step beyond it. The process of negotiating with impossibility to set limits and then contemplating pushing beyond them opens us up to possibilities of transformation. Thus, deconstruction and hospitality are a way to improve the law.

Before temporarily leaving Derrida and his ideas on hospitality, I must address the violence that is inherent in the host-guest relationship. At the beginning of this article, I stated that hospitality offered a way to transcend the current discourse on American federalism—a discourse I argue is paralyzed in the language of violence. Given the distrust that emerges the moment the host invites the guest into the house, it seems unlikely that hospitality provides a means of raising any discourse out of the cemented postures of battle. The difference is that hospitality, while recognizing that violence inheres naturally in the host-guest relationship, further recognizes that this same violence renders the goal of hospitality unattainable. It must therefore be transcended; swords are set aside in favor of pens and paper. In this way, hospitality moves beyond its absolute and impossible form. It moves toward a more pragmatic mode of being—a politics that is sustainable for an extended period of time. This, I argue, is the lesson that must be applied to the discourse on American federalism.

## II. DOMINANT FEDERALISM THEORIES

There are two dominant federalism theories that scholars and courts use to explain federal-state relations. Each one represents a distinct and separate vision of the concept of the state (as opposed to the Federal Government). The first is a concept of dual federalism and can be labeled the sovereignty

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82. See DEUTSCHER, *supra* note 40, at 68.

83. *Id.*

theory.<sup>84</sup> This theory frames the federal-state relationship in an adversarial posture depicting the states as rivals to federal policymakers.<sup>85</sup> This theory privileges the state's role as an autonomous policymaker.<sup>86</sup> The second theory is known as cooperative federalism.<sup>87</sup> This theory views the states primarily as implementers of federal policy.<sup>88</sup> Cooperative federalism frames the federal-state relationship in a united posture depicting the states as allies (albeit subordinate ones) to federal policymakers.<sup>89</sup> These two theories construct dual largely competing narratives of the federal-state relationship. The first is an external narrative that posits the states as existing outside the Federal Government. The second is an internal narrative that perceives of the states as insiders and passive implementers of federal policymaking.

#### A. Sovereignty Theory

This theory is grounded in respect for a state's autonomy to function as an independent policymaker. Under this model, state autonomy serves to accomplish the values underlying federalism, *i.e.*, creating laboratories of democracy<sup>90</sup>; diffusing power<sup>91</sup>; fostering choice<sup>92</sup>;

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84. Gerken, *supra* note 12, at 1553 & n.8.

85. See, *e.g.*, Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1236–37 (1994) [hereinafter Amar, *Five Views of Federalism*]; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1492–93 (1987) [hereinafter Amar, *Of Sovereignty and Federalism*] (urging states to rival and challenge the federal government but from the posture of sovereign power).

86. Gerken, *supra* note 12, at 1553.

87. *Id.* at 1556.

88. See, *e.g.*, Rose-Ackerman, *supra* note 19, at 1346; Philip J. Weisner, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L. REV. 1692, 1695–97 (2001); Weiser, *supra* note 19, at 668; see generally Joseph F. Zimmerman, *National-State Relations: Cooperative Federalism in the Twentieth Century*, 31 PUBLIUS: THE JOURNAL OF FEDERALISM 15, 20–22 (Spring 2001) (discussing the relationship between states and the Federal Government in the cooperative federal system).

89. See Gerken, *supra* note 19, at 2635 (noting that in the cooperative paradigm states draw their power from their insider position as federal servants rather than from their autonomous power as separate sovereigns).

90. See *New State Ice Co., v. Liebmann*, 285 U.S. 262, 311 (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE*, 103 (1995); Amar, *Five Views of Federalism*, *supra* note 85, at 1233–36; Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 528 (1995); McConnell, *supra* note 11, at 1493.

safeguarding individual rights<sup>93</sup>; and enhancing democratic participation by the citizenry.<sup>94</sup> Under this model, the states interact with the Federal Government through resistance, and dissent.<sup>95</sup> Because the States retain a separate and distinct sphere of power, they are by definition rivals of the Federal Government and often feel compelled to challenge federal power.<sup>96</sup> This dissent is viewed as necessary to maintain the integrity of the federal scheme.<sup>97</sup> This narrative finds support in the general idea underlying the Framers' constitutional design, which held that a certain amount of resistance and deliberative political conflict in government was desirable.<sup>98</sup> More specifically, it finds expressive force in those scholarly writings and judicial opinions that emphasize the Framers' intent to grant only enumerated powers to the Federal Government, leaving all other powers to the individual states.<sup>99</sup> On the Derridean "hospitality" continuum, sovereignty federalism would represent that point where the host has invited the guest through the door and is now on guard against his—the guest's—irresistible desire to take over every room in the house.

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91. See, e.g., Amar, *Five Views of Federalism*, *supra* note 85, at 1236–40.

92. McConnell, *supra* note 11, at 1493.

93. See, e.g., Amar, *Of Sovereignty and Federalism*, *supra* note 85, at 1440–41.

94. See, e.g., Chemerinsky, *supra* note 90, at 527; Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 511 (2002); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 7 (1988); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1, 58–59 (2004).

95. See, e.g., CASS R. SUNSTEIN, WHY SOCIETIES NEED DISSENT 145 (2003); ("American founders' largest contribution consisted in their design of a system that would ensure a place for diverse views in government.").

96. See generally Gerken, *supra* note 12; Amar, *Of Sovereignty and Federalism*, *supra* note 85.

97. Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745, 1749 (2005) ("[D]issent . . . contributes to the marketplace of ideas, engages electoral minorities . . . , and facilitates self-expression.") (emphasis omitted); Merritt, *supra* note 94, at 5–6 (asserting that states may act as lobbyists and litigants to challenge federal policies and programs).

98. See THE FEDERALIST NO. 70, at 426–27 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[D]ifferences of opinion, and the jarrings of parties . . . often promote deliberation and circumspection, and serve to check excesses in the majority.").

99. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution . . . , are reserved to the States respectively, or to the people.").

*B. Cooperative Federalism Theory*

Opposing the sovereignty federalism theory is cooperative federalism.<sup>100</sup> This theory recognizes the practical necessity of embracing a federal-state relationship that acknowledges that federal policymaking power in the modern age is broad in scope and now penetrates deeply into local fields of governance.<sup>101</sup> This theory shifts emphasis from autonomy to integration.<sup>102</sup> Under this model, the states interact with the Federal Government as supportive allies and faithful agents implementing federal policy.<sup>103</sup> Although allies, the states do occasionally chafe under the yoke of federal power and make attempts at rebellion.<sup>104</sup> To the extent that these efforts are successful, they tend to change only the content of the directive from the Federal Government, not the power structure, which makes that directive possible.

Like sovereignty federalism, cooperative federalism has an analog on the continuum of Derridean hospitality. It exists at a point well past the initial moment of contact

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100. For scholarship discussing cooperative federalism, see, for example, DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 162 (2d ed. 1972); MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (Daniel J. Elazar ed., 1966); John Kincaid, *The Competitive Challenge to Cooperative Federalism: A Theory of Federal Democracy*, in *COMPETITION AMONG STATE AND LOCAL GOVERNMENTS: EFFICIENCY AND EQUITY IN AMERICAN FEDERALISM* 87 (Daphne A. Kenyon & John Kincaid eds., 1991); Rose-Ackerman, *supra* note 19; Weiser, *supra* note 19; Zimmerman, *supra* note 87. For a historical perspective, see, for example, Harry N. Scheiber, *American Federalism and the Diffusion of Power: Historical and Contemporary Perspectives*, 9 U. TOL. L. REV. 619 (1978).

101. Weiser, *supra* note 19, at 665 (arguing that because so many federal regulatory programs are heavily dependent on state implementation, it is a mistake to “view[] each jurisdiction as a separate entity that regulates in its own distinct sphere of authority”).

102. Gerken, *supra* note 18, at 7 (discussing cooperative federalism scholarship’s location of state power in integration and interdependence with the federal government rather than autonomy and independence from it).

103. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1550 (2007) (noting that while cooperative federalism programs “typically involve a federal statute that regulates a risk or addresses a social ill or need” but “do not depend solely on federal actors for their implementation and enforcement”); Rose-Ackerman, *supra* note 19, at 1346 (illustrating how Medicaid exemplifies the states’ role in implementing a federal program).

104. Gerken, *supra* note 18, at 35–40 (arguing that the states possess a vertical checks and balances power on the federal government by virtue of their servile position within the cooperative federalism model).

between the host and guest, beyond even that moment when they move around each other uneasily, testing each other's resolve. Instead, cooperative federalism assumes that the guest has already taken over the house, displaced the host, and made him a servant. The original host, now held in an inferior position, can assert himself only through subterfuge, which is risky and, even if successful, will never return him to "head of the house."

### III. THE AFFORDABLE CARE ACT OPINION

*NFIB v. Sebelius* operates as a point of intersection between the legal discourse of federalism and the philosophical discourse of hospitality. As a bridge between the two, the Affordable Care Act case provides points of illustration of both the problems inherent in the dominant federalism narratives as well as the opportunities for engaging in a new way of speaking about the federal-state relationship. After summarizing the main legal points of *Sebelius*, this section focuses on key language from both Chief Justice Roberts' opinion and Justice Ginsburg's opinion. This textual focus illustrates the dominant federalism narrative to which each relied as the normative underpinning to their analysis, for example, sovereignty and cooperative federalism respectively.

#### A. ACA Case Summary

In March 2010, President Obama signed the Patient Protection and Affordable Care Act (ACA) into law.<sup>105</sup> Lawsuits challenging the constitutionality of the comprehensive healthcare reform measure immediately followed.<sup>106</sup> In March of 2012, the Supreme Court in consolidated cases *National Federation of Independent Business v. Sebelius*<sup>107</sup> heard six hours of oral argument over three days concerning the constitutionality of four aspects of

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105. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

106. See *Liberty Univ. Inc. v. Geithner*, 671 F.3d 391 (4th Cir. 2011); *Virginia ex rel. Cuccinelle v. Sebelius*, 656 F.3d 253 (4th Cir. 2011); *Thomas Moore Law Ctr. v. Obama*, 651 F.3d 529 (6th Cir. 2011); *Seven-Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011); *Florida ex rel. Bondi v. U.S. Dep't. of Health & Human Servs.*, 648 F.3d 1235 (11th Cir. 2011).

107. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012).

the ACA: (1) whether Congress has the power to enact an individual mandate that requires nearly all Americans to purchase health insurance or pay a fine;<sup>108</sup> (2) whether the Act's expansion of Medicaid eligibility amounts to unconstitutional federal coercion of the states; (3) whether, if found unconstitutional, the individual mandate is severable, allowing the rest of the health care law to stand; and finally; (4) assuming the individual purchase mandate constitutes a tax, whether the Anti-Injunction Act<sup>109</sup> prohibits the Court from hearing the issue before the tax laws take effect.

On June 28, 2012, the Court issued its 5-4 decision upholding the ACA, the central legislative achievement of the Obama Administration, with Chief Justice Roberts siding with four of the Court's more liberal members.<sup>110</sup> The Court also held that the Anti-Injunction Act was not applicable to the ACA's individual mandate provision and therefore, did not prevent the Court from exercising jurisdiction.<sup>111</sup>

Chief Justice Roberts joined by Justices Breyer, Ginsburg, Sotomayor, and Kagan upheld the individual mandate as a constitutional exercise of Congress's power to tax.<sup>112</sup> Despite the fact that the ACA labeled the fine triggered by failure to purchase health insurance a "penalty,"<sup>113</sup> the Chief Justice explained that labels were not

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108. 26 U.S.C. § 5000A (2013) (requiring non-exempt individuals to maintain "minimum essential" health insurance coverage or pay a fine).

109. *Id.* § 7421(a) (providing that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." In other words, those subject to a tax must first pay it and then sue for a refund). The Supreme Court itself stated that "taxes are the life-blood of government, and their prompt and certain availability an imperious need." *Bull v. United States*, 295 U.S. 247, 259 (1935).

110. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2608.

111. *Id.* at 2584. The AIA was arguably relevant to the ACA because the individual mandate does not go into effect until 2014 and therefore no citizen would be required to pay a penalty for failure to purchase insurance until 2015. *Id.* at 2580. The ACA litigation sought to prevent collection of the fine from those individuals who decided not to purchase health insurance according to the terms of the individual mandate provision. *Id.* at 2582. The Court held that the Congress did not intend for the payment to be treated as a tax for purposes of the AIA, and while the label did not control for purposes of determining constitutionality, it was dispositive in terms of determining whether the AIA applied. *Id.* at 2584.

112. *See id.* at 2598; *see generally* U.S. CONST. art. I, § 8, cl. 1 ("Congress shall have the Power to Lay and collect Taxes.").

113. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2594.

dispositive.<sup>114</sup> Instead, he referenced a well-settled prudential rule of constitutional adjudication requiring that “if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.”<sup>115</sup> Because “every reasonable construction must be resorted to, in order to save a statute from unconstitutionality,”<sup>116</sup> the Chief Justice continued, the question was not whether the payment was a tax under the most natural reading of the Act, but whether it was a “fairly possible”<sup>117</sup> one.<sup>118</sup> A majority of the Court held that it was.<sup>119</sup>

Although failing to produce a single opinion, the Chief Justice joined the dissenters in concluding<sup>120</sup> that the individual mandate was not a proper use of Congress’ power under the Commerce Clause<sup>121</sup> and the Necessary and Proper Clause.<sup>122</sup> The Chief’s opinion approvingly cited to the activity/inactivity distinction, which had permeated the health care debate:

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially

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114. *See id.* at 2594–95.

115. *Id.* at 2593 (“No court ought, unless the terms of an act rendered it unavoidable, to give a construction to it which should involve a violation, however unintentional, of the constitution.” (quoting *Parsons v. Bedford*, 3 Pet. 433, 448–49 (1830))). Moreover, “the rule is settled that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the Act.” *Id.* (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (Holmes, J., concurring)).

116. *Id.* at 2594 (quoting *Hooper v. California*, 155 U.S. 648, 657 (1895)).

117. *Id.* (citing *Crowell v. Benson*, 285 U.S. 22, 62 (1932)).

118. *Id.*

119. *Id.* at 2598 (“Our precedent demonstrates that Congress had the power to impose the exaction in [section] 5000A under the taxing power, and that [section] 5000A need not be read to do more than impose a tax. That is enough to sustain it.”).

120. *See id.* at 2593.

121. U.S. CONST. art. I, § 8, cl. 3 (giving Congress the power to “regulate Commerce . . . among the several States”).

122. U.S. CONST. art. I, § 8, cl. 18 (giving Congress the power to “make all Laws which shall be necessary and proper for carrying into Execution” the powers enumerated in the Constitution).

vast domain to congressional authority.<sup>123</sup>

Stating that the Commerce Clause was not a “general license [permitting Congress] to regulate an individual from cradle to grave,” the Chief Justice concluded that the mandate exceeded the scope of Congress’s power to regulate commerce.<sup>124</sup>

As to the Government’s Necessary and Proper Clause argument, the Chief’s opinion declared that precedent confined the scope of the clause to sanction only those laws that “involved exercises of [Congress’s] authority derivative of, and in service to, a granted power.”<sup>125</sup> Here, the Chief stated, “[t]he individual mandate . . . vests Congress with the extraordinary ability to create the necessary predicate to the exercise of an enumerated power.”<sup>126</sup> Thus, the Chief concluded, even if the individual mandate was “necessary” to the ACA’s insurance reforms, it was not a “proper” means of enacting them.<sup>127</sup>

A majority of the justices also agreed that another challenged provision of the Act, a significant expansion of Medicaid, was not a valid exercise of Congress’ spending power, as it would coerce states to either accept the expansion or risk losing existing Medicaid funding.<sup>128</sup> The Spending Clause authorizes Congress to “pay the Debts and provide for the common Defense and general Welfare of the United States.”<sup>129</sup> Although the spending power permits Congress to incentivize state participation in federal programs by conditioning receipt of federal funding on compliance, the conditions must permit a State to voluntarily and knowingly accept the terms of any such program.<sup>130</sup> The spending power, the Chief stated, does not permit “the Federal Government [to] compel the States to enact or administer a federal regulatory program.”<sup>131</sup>

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123. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2587.

124. *See id.* at 2591.

125. *Id.* at 2592.

126. *Id.*

127. *Id.*

128. *See id.* at 2605, 2666 (Scalia, Kennedy, Thomas, Alito JJ., dissenting).

129. U.S. CONST. art. I, § 8, cl. 1.

130. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2574 (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981)).

131. *Id.* at 2601 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992)).

The ACA included an expansion provision that directed states to adjust their Medicaid eligibility rules to cover all people with income less than 133% of the federal poverty line.<sup>132</sup> The ACA authorizes the Secretary of Health and Human Services to revoke Medicaid funding from those states that decline to expand coverage.<sup>133</sup> As written, the Act permits the Secretary to revoke both funds for the expansion as well as funding for existing state Medicaid programs.<sup>134</sup> In his opinion, the Chief Justice differentiated the existing Medicaid program from the Medicaid expansion, observing that the “original program was designed to cover medical services for four particular categories of the needy: the disabled, the blind, the elderly, and needy families with dependent children,”<sup>135</sup> whereas the expansion changed Medicaid “into a program to meet the healthcare needs of the entire nonelderly population with income below 133 percent of the poverty level.”<sup>136</sup> This “shift in kind,” the Chief stated, means that “[Medicaid] is no longer a program to care for the neediest among us, but rather an element of a comprehensive national plan to provide universal health insurance coverage.”<sup>137</sup> The Chief concluded, “A State could hardly anticipate that Congress’s reservation of the right to “alter” or “amend” the Medicaid program included the power to transform it so dramatically.”<sup>138</sup> The Chief Justice found that the withholding—not the granting—of federal funds was incompatible with the Spending Clause.<sup>139</sup> Thus, in a narrow decision, the Court upheld the Medicaid expansion as available to any State that willingly chose to participate, but precluded the Secretary from applying section 1396c to withdraw existing Medicaid funds from states that decided not to participate.<sup>140</sup>

The Court did not reach the severability issue as it related to the individual mandate because it found that the mandate was a constitutional exercise of Congress’s taxing

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132. 42 U.S.C. § 1396a(a)(10)(A)(i)(VIII) (2013).

133. *Id.* § 1396c.

134. *Id.*

135. Nat’l Fed’n of Indep. Bus, 132 S. Ct at 2605–06.

136. *Id.* at 2606.

137. *Id.*

138. *Id.*

139. *See id.* at 2607.

140. *See id.* at 2608.

power.<sup>141</sup> The Court did, however, discuss severability as it related to the Medicaid expansion.<sup>142</sup> Although Justices Ginsburg and Sotomayor were of the view that the Spending Clause did not prevent the Secretary from withdrawing existing Medicaid funds from any state that declined to participate in the Medicaid expansion, they nevertheless agreed with the Chief Justice's conclusion that the Medicaid Act's severability clause<sup>143</sup> determined the appropriate remedy "[i]f any provision of [the Medicaid Act], or the application thereof to any person or circumstance, is held invalid, the remainder of the chapter, and the application of such provision to other persons or circumstances shall not be affected thereby."<sup>144</sup>

Concluding that Congress would have wanted the rest of the ACA to stand had it known that the States would have a genuine choice as to whether to participate in the Medicaid expansion, the other provisions of the ACA were not affected.<sup>145</sup>

Justices Scalia, Kennedy, Thomas, and Alito dissented, arguing that the individual mandate was unconstitutional because it exceeded the scope of Congress's Commerce Clause power.<sup>146</sup> They also argued that the constitutionality of the mandate could not be sustained by reclassifying it as a tax rather than a penalty.<sup>147</sup> The Justices contended that to reclassify the penalty as a tax was not interpreting the statute, but rewriting it.<sup>148</sup> Finally, the dissenters argued that because both the individual mandate and the withdrawal of existing Medicaid funds from those states that declined to participate in the Medicaid expansion exceeded Congress's constitutional authority, the ACA should be deemed inoperable and struck down in its entirety.<sup>149</sup>

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141. *See id.* at 2598.

142. *See id.* at 2607–08.

143. 42 U.S.C. § 1303 (2013).

144. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2607 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

145. *Id.* at 2607–08.

146. *See id.* at 2644 (Scalia, Kennedy, Thomas, Alito JJ., dissenting).

147. *See id.* at 2650–56.

148. *Id.* at 2655.

149. *Id.* at 2643.

*B. ACA Opinion Illustration of Dominant Federalism Theories*

The ACA litigation raises two separate federalism claims. The first was whether the statute's individual mandate exceeded Congress's Commerce Clause power by "completely obliterating the Constitution's distinction between national and local authority."<sup>150</sup> The second was whether the Medicaid expansion violated the tenth Amendment by compelling the states to accept it.<sup>151</sup> Although the two claims challenged different sources of Congress's power (the individual mandate was grounded in the Commerce Clause power or alternatively Congress's taxing power, whereas the Medicaid expansion was grounded in Congress's exercise of its Spending Clause power), the underlying question driving the opinions' rationale in *Sebelius* was the same: do the principles of federalism allow Congress to exercise federal power in this way? While conducting separate doctrinal analyses to determine whether Congress had exceeded the scope of any one power (commerce, taxing, spending) the question about the proper conception of federalism drove each of those analyses. Even though the opinions' analytical outcomes differed, as did their reliance on separate theories of federalism to support those outcomes, the opinions' were nevertheless framed in the same discourse: violence.

*1. Chief Justice Roberts and the Sovereignty Theory of Federalism*

Chief Justice Roberts began his opinion by reiterating traditional values of federalism: restraining power,<sup>152</sup>

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150. *United States v. Morrison*, 529 U.S. 598, 615 (2000).

151. *See Nat'l Fed'n of Indep. Bus.*, 132 S. Ct at 2601–09.

152. *Id.* at 2577–78.

[T]he Constitution did not initially include a Bill of Rights at least partly because the Framers felt the enumeration of powers sufficed to restrain the Government. As Alexander Hamilton put it, 'the Constitution is itself, in every rational sense, and to every useful purpose, A BILL OF RIGHTS.' And when the Bill of Rights was ratified, it made express what the enumeration of powers necessarily implied: 'The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.' The Federal Government has expanded dramatically over the past two centuries, but it still must show that a constitutional grant of power authorizes each of its actions. *See, e.g., United States v. Comstock*, 560 U.S. 126 (2010).

enhancing democratic rule by providing government that is closer to the people,<sup>153</sup> and decreasing the likelihood of federal tyranny.<sup>154</sup> This reiteration signals the dominant federalism theory Roberts uses to support his doctrinal outcomes: sovereignty. While the majority of this paper focuses on how Roberts' and Ginsburg's opinions address the Medicaid expansion, analysis of the Chief Justice's treatment of the individual mandate is in order because it operates within the same violence framework that dominates his Spending Clause analysis. As to both doctrinal analyses—whether the individual mandate exceeds Congress's Commerce Clause power and whether the Medicaid expansion compels states under Congress's Spending Power—the Chief Justice's opinion is framed in the discourse of conflict, of turf wars, of violence. This discourse of conflict represents an approach consistent with Derrida's notion of absolute hospitality—it describes the point where the guest has pushed the host to near-surrender.

Roberts' analysis of the individual mandate begins with the first order inquiry: at what point does inertia become activity? As indicated in the preceding section, the Chief's opinion held that although the individual mandate was unconstitutional as an exercise of Congress's Commerce Clause power, it *was* a constitutional exercise of Congress's taxing power.<sup>155</sup> Rather than rely on the customary allocation

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*Id.* (quoting THE FEDERALIST NO. 84 (Alexander Hamilton); U.S. CONST. amend. X; and citing *U.S. v. Comstock*, 560 U.S. 126 (2010)). See also *New York v. United States*, 505 U.S. 144, 181 (1992) (“State sovereignty is not just an end in itself: ‘[r]ather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

153. See *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2578 (“Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed. The Framers thus ensured that powers which ‘in the ordinary course of affairs, concern the lives, liberties, and properties of the people’ were held by governments more local and more accountable than a distant federal bureaucracy.” (quoting THE FEDERALIST NO. 45 (James Madison))).

154. *Id.* (“The independent power of the States also serves as a check on the power of the Federal Government: ‘By denying any one government complete jurisdiction over all the concerns of public life, federalism protects the liberty of the individual from arbitrary power.’” (quoting *Bond v. United States*, 131 S. Ct. 2355, 2364 (2011))).

155. *Id.* at 2598.

of subject matter authority between the federal government and the states, which, for example, identifies criminal law, family law, and education, as traditional subjects of state regulation,<sup>156</sup> Roberts instead focused on the nature of the regulated conduct defined in terms of activity and inactivity:

The individual mandate, however, does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain to congressional authority.<sup>157</sup>

To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers[.]<sup>158</sup>

The Framers gave Congress the power to *regulate* commerce, not *compel* it, and for over 200 years both our decisions and Congress's actions have reflected this understanding. There is no reason to depart from that understanding now.<sup>159</sup>

The Commerce Clause is not a general license to regulate an individual from cradle to grave, simply because he will predictably engage in particular transactions. Any police power to regulate individuals as such, as opposed to their activities, remains vested in the States.<sup>160</sup>

Although each of these passages expresses and/or reinforces the same idea—that Congress's commerce power is limited to actual commercial activity and does not extend to a person's decision not to enter a particular market—I want to

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156. See *United States v. Morrison*, 529 U.S. 598, 615–16 (2000) (“Petitioners’ reasoning, moreover, will not limit Congress to regulating violence but may, as we suggested in *Lopez*, be applied equally well to family law and other areas of traditional state regulation since the aggregate effect of marriage, divorce, and child rearing on the national economy is undoubtedly significant.”); see also *id.* at 618 (“The regulation and punishment intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.”).

157. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2587.

158. *Id.* at 2589.

159. *Id.*

160. *Id.* at 2591.

focus on Roberts' statement that "[t]he Framers gave Congress the power to *regulate* commerce, not *compel* it . . . ."<sup>161</sup> The sentence fits the Derridean hospitality formula almost perfectly. It poses the Framers (representing the People through the States) as the original hosts and Congress as the guest invited in to assist with the running of the house (the new nation, the United States). In this invitation, the host gives the guest certain powers, among them the power to *regulate* commerce among the several states, whose sovereignty exists *a priori*. But something has happened along the way: the *xeno*—the foreigner/guest, Congress—has moved to increase his power beyond the original grant and is no longer content to *regulate* commerce but now wishes to *compel* commerce, which conveniently would give the guest the ability to bring virtually every human decision within its *original* grant of power. If the host—the Framers, the states—were to accept this graft upon the guest's initial power to regulate commerce, all sovereignty would be lost, thus manifesting Derrida's notion of the impossibility of hospitality.<sup>162</sup>

Roberts' word choice is also telling and reflects mimetically the violence that has now invested the host-guest relationship. "Regulate," while hardly passive, is a word that signals oversight of activities already in progress, activities freely chosen by the participants. The regulator's power is undeniable but latent and limited, exercised only to ensure a smooth flow of trade. "Compel" is different. To compel is to force someone to do something he or she otherwise refuses to do. It involves pressure, overwhelming and irresistible pressure. It is not surprising, then, that Chief Justice Roberts and the four other "sovereignty" federalists on the Court could not abide Congress's wish to drive each American adult into the health insurance market, where he or she will

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161. *Id.* at 2589.

162. DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 111 (noting, "for hospitality to occur, it is necessary for hospitality to beyond hospitality. That requires that the host must, in a moment of madness, tear up the understanding between him and the guest, act with 'excess,' make an absolute gift of his property, which is of course impossible."). Beginning with his famous 1963 lecture on Foucault, Derrida repeatedly invoked the "moment of madness" line from Kierkegaard, often translated from his French as "the instant of decision is madness" (L'Instant de la De'cision est une Folie). DERRIDA, WRITING AND DIFFERENCE, *supra* note 36, at 31.

be regulated by the Federal Government until death.

Roberts' decision to uphold the individual mandate provision under Congress's taxing power can be reconciled with the Court's decision not to apply the Anti-Injunction Act given the different parameters of a statutory (for example, the application of the Anti-Injunction Act to the "shared responsibility payment") versus constitutional (for example, the scope of Congress's taxing power authority) interpretation. What is interesting, however, is the way Roberts' position coincides with the ideas inherent in sovereignty federalism, in that it reinforces the hierarchical relationship between the states and the federal government. Perhaps in recognition of Congress's ability to enact a "single-payer" national health insurance system, in which the states would play no decision-making role at all, Roberts found a way to preserve the individual mandate while exposing it as a top-down use of federal power, *i.e.*, a federal tax imposed on the citizens. Not only does this lock the federal and state governments in a clash over policy, it foments dissent among individuals because it characterizes Congress's action as a "tax," which is arguably among the most contemptible words in American political parlance. To put this in Derridean "hospitality" terms, the host, seeing he cannot resist by direct means the guest's intrusion into yet another domain previously outside the guest's reach, attempts to poison it by calling it the one thing most likely to generate political opposition—in this case, a tax.<sup>163</sup> Through this process, with all of its language queues, Roberts continues to operate within a system that perpetuates the master/slave relationship: a relationship that reinforces government power through violence rather than cooperation.

Although implicit in the Chief Justice's analysis of the individual mandate, the discourse of violence becomes explicit when the Chief's opinion turns to the Medicaid expansion and Congress's authority under the Spending Clause. Roberts began by framing the issue as a threat. "[The States] claim that Congress is coercing the States to adopt the changes it wants by threatening to withhold all of a State's Medicaid

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163. In this analogy, Chief Justice Roberts give voice to the host-states. In a sense, the states are "speaking" the only way a state can speak in a judicial opinion, through a member of the Court.

grants, unless the State accepts the new expanded funding and complies with the conditions that come with it.”<sup>164</sup>

What is interesting is that initially Roberts acknowledged that the Court’s jurisprudence provided a nonviolent framework through which to discuss productive federal-state relations in terms of policymaking and implementation. In fact, what he described rather resembles Derrida’s concept of the “hospitality” pact. Roberts wrote, “[w]e have repeatedly characterized . . . Spending Clause legislation as ‘much in the nature of a contract.’”<sup>165</sup> But almost immediately after this preliminary statement, the Chief disregarded non-violent discourse and expressly reverted back to a bellicose language plan: an attack has been launched, a threat has been issued, battle lines have been drawn, and the States must defend.

So who is it that the states are defending themselves against? This may seem like a simple question to answer given that the Medicaid expansion is a part of the federally enacted ACA. The obvious answer, the federal government, however, misses the point of the question. The question more precisely is this: how does Roberts *describe* whom it is that the states are defending themselves against? How does he characterize the federal government in this situation? It would be fair to say that the Chief’s opinion tells the story of the States defending themselves against an attack by an armed “thug”<sup>166</sup>—a bully. Roberts referred to the Medicaid expansion as a “weapon[] of coercion, destroying or impairing the autonomy of the States,”<sup>167</sup> and then described the financial inducement it offers to the States as “a gun to the head”<sup>168</sup> wielded under the threat of “[y]our money or your life.”<sup>169</sup> This is not the language one uses to frame a judicial decision about the proper federal-state policy-making/implementing relationship; this is the language one uses in a police report to describe a “stick-up.” In this way, what Roberts described corresponds to that moment in

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164. *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2601.

165. *Id.* at 2602 (quoting *Barnes v. Gorman*, 536 U.S. 181, 186 (2002)).

166. *Id.* at 2605 (“The threatened loss of over [ten] percent of a State’s overall budget is economic dragooning . . .”).

167. *Id.* at 2603 (quoting *Steward Machine Co. v. Davis*, 301 U.S. 548, 586 (1937)).

168. *Id.* at 2604.

169. *Id.* at 2605 n.12.

Derridean hospitality, when the violent, usurping behavior of the guest actually displaces the host.<sup>170</sup> “Anyone who encroaches on my ‘at home,’ on my *ipseity*, on my power of hospitality, on my sovereignty as host, I start to regard as an undesirable foreigner, and virtually as an enemy. This other becomes a hostile subject, and I risk becoming their hostage.”<sup>171</sup>

It is the possibility of the states becoming hostage to the federal Medicaid program that is driving Roberts to use phrases like “gun to the head” and “your money or your life.” He is responding to a federal posture that is, in his opinion, coercive in the extreme. What is especially galling to Roberts is that the federal government has for decades allowed the states to incorporate Medicaid deeply into their own health services and fiscal programs, effectively making the states dependent on Federal Medicaid funding.<sup>172</sup> With that dependency in place, Congress is now demanding that the states expand their Medicaid services or lose *all* funding, a consequence so devastating that it makes dissent near-impossible.<sup>173</sup> “The threatened loss of over [ten] percent of a State’s overall budget . . . is economic dragooning that leaves the States with no real option but to acquiesce in the Medicaid expansion.”<sup>174</sup> For Roberts, such strong-arm tactics must be resisted.

The Chief’s opinion exemplifies two main features of the sovereignty theory of federalism. The first is that it privileges state autonomy as a dominant federalism value.<sup>175</sup> Second, it construes the general nature of the federal-state

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170. Derrida tracks this inversion of the power relationship etymologically, as the “host” becomes the object of “hostility” and is ultimately transformed into a “hostage.” See DERRIDA, ON HOSPITALITY, *supra* note 31, at 53, 55.

171. *Id.*

172. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2605.

173. See *id.*

174. *Id.* The verb “dragoon” was coined in the aftermath of the English Civil War and means “to subjugate or persecute by harsh use of troops” or “to force or attempt to force into submission by violent measures.” MERRIAM-WEBSTERS COLLEGIATE DICTIONARY 351 (10th ed. 1995).

175. See, e.g., *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2592 (“[W]e have . . . carried out our responsibility to declare unconstitutional those laws that undermine the structure of government established by the Constitution. Such laws . . . are, ‘in the words of The Federalist, merely acts of usurpation which deserve to be treated as such.’” (quoting *Printz v. United States*, 521 U.S. 898, 924 (1997))).

relationship as one grounded in competition where the states are rivals and challengers to federal policymaking and vice-versa. “In the typical case, we look to the States to defend their prerogatives by adopting ‘the simple expedient of not yielding’ to federal blandishments when they do not want to embrace the federal policies as their own. The States are separate and independent sovereigns.”<sup>176</sup> Moreover, “Congress may not simply ‘conscript state [agencies] into the national bureaucratic army.’”<sup>177</sup>

Although the distinct spheres of federal versus state sovereignty are not couched in terms of traditional subjects of integral or exclusive state regulation (a framework which has proved unworkable given its indeterminacy),<sup>178</sup> the Chief’s opinion defends that wall separating “what is truly national and what is truly local.”<sup>179</sup>

## 2. *Justice Ginsburg and the Cooperative Theory of Federalism*

Justice Ginsburg’s opinion, on the other hand, champions the principles of cooperative federalism.<sup>180</sup> Underscoring her analysis—both on the individual mandate and the Medicaid expansion—is a conviction that the Framers of the Constitution intended article I, section 8 to empower Congress to address problems of collective action involving multiple states.<sup>181</sup> Following the American Revolution, the

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176. *Id.* at 2603 (quoting *Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923)).

177. *Id.* at 2606–07 (quoting *FERC v. Mississippi*, 456 U.S. 742, 775 (1982) (O’Connor, J., concurring in the judgment in part and dissenting in part)).

178. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

179. *United States v. Morrison*, 529 U.S. 598, 617–18 (2000) (quoting *United States v. Lopez*, 514 U.S. 549, 568 (1995)).

180. See *Nat’l Fed’n of Indep. Bus.*, 132 S. Ct. at 2609–42 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

181. *Id.* at 2615 (“The Commerce Clause, it is widely acknowledged, ‘was the Framers’ response to the central problem that gave rise to the Constitution itself.’” (quoting *EEOC v. Wyoming*, 460 U.S. 226, 245 n.1 (1983) (Stevens, J., concurring))). Under the Articles of Confederation, the Constitution’s precursor, the regulation of commerce was left to the States. This scheme proved unworkable, because the individual States, understandably focused on their own economic interests, often failed to take actions critical to the success of the Nation as a whole. See James Madison, *Vices of the Political System of the United States* No. 5, in JAMES MADISON: WRITINGS 69, 71 (Jack N. Rakove ed., 1999) (arguing that as a result of the “want of concert in matters where common interest requires it,” the “national dignity, interest, and revenue [have] suffered.”).

states acted individually, discriminating against commerce coming from other states, when they needed to act collectively.<sup>182</sup> The Articles of Confederation left Congress powerless to solve these problems.<sup>183</sup> Thus emerged the Constitution, establishing a federal government equipped to address these collective action problems under its authority to tax, borrow money, raise and support a military, and regulate interstate commerce.<sup>184</sup> Against this background justification for congressional authority, Justice Ginsburg analyzes the scope of federal power as exercised in the ACA.<sup>185</sup>

After reading through the Chief Justice's opinion with its recurrent use of battle language, where war and violence are explicit, one might be under the impression that Justice Ginsburg's use of phrases like "retain[ing] a robust role for . . . state governments,"<sup>186</sup> "empower[ing the] states,"<sup>187</sup> "offer[ing] States an opportunity,"<sup>188</sup> and "gave the States the opportunity to partner"<sup>189</sup> render her opinion devoid of violent themes. This, however, is not the case.

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182. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2615 n.3 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("Alexander Hamilton described the problem this way: '[Often] it would be beneficial to all the states to encourage, or suppress[,] a particular branch of trade, while it would be detrimental . . . to attempt it without the concurrence of the rest.'" (quoting Alexander Hamilton, *The Continentalist No. V*, in 3 THE PAPERS OF ALEXANDER HAMILTON 75, 78 (Harold C. Syrett ed., 1962))).

183. See, e.g., JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 24–28, 47–48, 102–08, 167–68, 188–89 (1996) (discussing various failures of the Articles of Confederation).

184. See, e.g., Letter from James Madison to Edmund Randolph (Apr. 8, 1787), in 9 PAPERS OF JAMES MADISON 368, 370 (Robert A. Rutland & William M. E. Rachal eds., 1975) (expressing the need for a "national Government . . . armed with a positive [and] complete authority in all cases where uniform measures are necessary."); see also Letter from George Washington to James Madison (Nov. 30, 1785), in 8 PAPERS OF JAMES MADISON 428, 429 (Robert A. Rutland & William M. E. Rachal eds., 1973) ("We are either a United people, or we are not. If the former, let us, in all matters of general concern act as a nation, which ha[s] national objects to promote, and a national character to support."); see also *Baldwin v. G.A.F. Seeling, Inc.*, 294 U.S. 511, 523 (1935) (stating that the Constitution "was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division.").

185. *Nat'l Fed'n of Indep. Bus.*, 132 S. Ct. at 2612 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("States cannot resolve the problem of the uninsured on their own.").

186. *Id.*

187. *Id.* at 2632.

188. *Id.* at 2629.

189. *Id.* at 2633.

Although Justice Ginsburg's opinion is couched in less obviously violent language, the principle theme of violence persists in the structure of her argument. Her rationale proceeds from the underlying premise that the states are incompetent to respond in any meaningful way to the health care issues the ACA addresses, and that this incompetence renders the states displaceable:

States cannot resolve the problem of the uninsured on their own.<sup>190</sup>

The Framers' solution was the Commerce Clause, which, as they perceived it, granted Congress the authority to enact economic legislation "in all Cases for the general Interests of the Union, and also in those Cases to which the States are separately incompetent."<sup>191</sup>

States that undertake health-care reforms on their own thus risk "placing themselves in a position of economic disadvantage as compared with neighbors or competitors . . . ." <sup>192</sup> Congress' intervention was needed to overcome this collective-action impasse.<sup>193</sup>

Far from trampling on States' sovereignty, the ACA attempts a federal solution for the very reason that the States, acting separately cannot, meet the need.<sup>194</sup>

[T]he minimum coverage provision, along with other provisions of the ACA, addresses the very sort of interstate problems that made the commerce power essential in our federal system. The crisis created by the large number of U.S. residents who lack health insurance is one of national dimension that States are "separately incompetent" to handle.<sup>195</sup>

Based on this major premise of incompetency, Ginsburg's argument asserts the consequent minor premise that the Court must privilege pragmatics over abstract generalities when assessing the scope of Congress's power, particularly regarding Commerce Clause power.<sup>196</sup> In other words,

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190. *Id.* at 2612.

191. *Id.* at 2615 (quoting 2 RECORDS OF THE FEDERAL CONVENTION OF 1787 ¶8, at 131–32 (Max Farrand ed., rev. ed. 1966)).

192. *Id.* at 2612 (quoting *Helvering v. Davis*, 301 U.S. 619, 644 (1937)).

193. *Id.*

194. *Id.* at 2628.

195. *Id.* (citation omitted).

196. *Id.* at 2616 ("Consistent with the Framers' intent, we have repeatedly emphasized that Congress' authority under the Commerce Clause is dependent

practical considerations should trump arbitrary theoretical restrictions: “We afford Congress the leeway ‘to undertake to solve national problems directly and realistically.’”<sup>197</sup>

With competence clearly establishing the authority for and scope of federal power, Justice Ginsburg’s opinion goes on to illustrate the federal-state relationship according to the principles of cooperative federalism. It is a testament to how engrained these federalism narratives are in our judicial and political psyche, however, to note that even though Ginsburg’s argument is grounded in the cooperative federalism narrative, she still finds it necessary to engage, albeit briefly, with the sovereignty narrative.<sup>198</sup>

It is precisely because Ginsburg’s opinion establishes from the outset the federal-state hierarchy, as well as state subservience within that hierarchy, that one cannot easily see the violence discourse underlying her analysis of the Medicaid expansion. It is hidden in the subtlety of a language-frame of state empowerment. Her opinion even goes so far as to describe Medicaid as *the* classic example of federal-state cooperation:

Medicaid is a prototypical example of federal-state cooperation in serving the Nation’s general welfare. Rather than authorizing a federal agency to administer a uniform national health-care system for the poor, Congress offered States the opportunity to tailor Medicaid grants to their particular needs . . . .<sup>199</sup>

[A]ny fair appraisal of Medicaid would require acknowledgment of the considerable autonomy States enjoy under the Act.<sup>200</sup>

Subject to its basic requirements, the Medicaid Act empowers the States to “select dramatically different levels of funding and coverage, alter and experiment with different financing and delivery modes, and opt to cover

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upon ‘practical’ considerations, including ‘actual experience.’” (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937)).

197. *Id.* (quoting *Am. Power & Light Co. v. SEC*, 390 U.S. 90, 103 (1946)).

198. *Id.* at 2628 (“It is more than exaggeration to suggest that the minimum coverage provision improperly intrudes on ‘essential attributes of state sovereignty’ . . . . [T]he Affordable Care Act does not operate ‘in [an] are[a] such as criminal law enforcement or education where States historically have been sovereign.’” (quoting *United States v. Lopez*, 514 U.S. 549, 564 (1995))).

199. *Id.* at 2629.

200. *Id.* at 2632.

(or not cover) a range of particular procedures and therapies. States have leveraged this policy discretion to generate a myriad of dramatically different Medicaid programs over the past several decades.”<sup>201</sup>

Despite the fact that Ginsburg’s opinion adopts an overt discourse of state empowerment and opportunity, the preceding statements actually perpetuate the underlying discourse of violence associated with the federal-state relationship by assuming the battle has already been fought, and the states have lost. They are, in a word, conquered. It is because the states have already been defeated that they must assume the role of subjugated servant—the faithful implementer of federal policies. Thus, for all of Ginsburg’s talk about state autonomy and discretion, that autonomy and discretion is confined to choices within the acceptable range set forth by the federal program itself. For Ginsburg, modern federalism works because there really is no more room for plausible dissent. The states have not only been displaced as hosts, as sovereigns, their status as servants is such that they should feel grateful for what limited and local powers the federal government allows them: “States have no entitlement to receive Medicaid funds; *they enjoy only the opportunity to accept funds on Congress’ terms.*”<sup>202</sup>

Similarly, under the guise of declaring the importance of the States’ role as partners, the opinion instead reinforces the impotency of the States vis-à-vis the Congress:

Congress could have taken over the health-insurance market. . . . Instead, of going this route, Congress enacted the ACA, a solution that retains a robust role for private insurers and state governments.<sup>203</sup>

The alternative to conditional federal spending, it bears emphasis, is not state autonomy but state marginalization. In 1965, Congress elected to nationalize health coverage for seniors through Medicare. It could similarly have established Medicaid as an exclusively federal program. Instead, Congress gave the States the opportunity to partner with the program’s administration

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201. *Id.* (quoting Theodore W. Ruger, *Of Icebergs and Glaciers: The Submerged Constitution of American Healthcare*, 75 LAW & CONTEMP. PROBS. 215, 233 (2012) (footnote omitted)).

202. *Id.* at 2630 (emphasis added).

203. *Id.* at 2612.

and development. Absent from the nationalized model, of course, is the state-level policy discretion and experimentation that is Medicaid's hallmark; undoubtedly the interests of federalism are better served when States retain a meaningful role in the implementation of a program of such importance.<sup>204</sup>

The preceding statements contain a (not so) veiled threat: "do as you are told or get left out altogether." These statements reflect the idea that the states serve only by the generosity and at the pleasure of the federal government. And at any moment, it can all be taken away.<sup>205</sup>

Justice Ginsburg's opinion represents the cooperative theory of federalism grounded in three related ideas: (1) the Constitution established a comprehensive federal government endowed with the power to solve problems of collective action affecting the states; (2) this power creates a hierarchical federal-state relationship, which subordinates the states to the will of the federal government; and (3) the states must serve as faithful implementers of federal policies and programs.

#### IV. HOSPITALITY PARADIGM SHIFTS FEDERALISM DISCOURSE FROM VIOLENCE TO PRODUCTIVE GOVERNANCE

The drafting and ratification of the Constitution represented a deliberate unification in which the States and the newly formed Federal government had to relate to one another in a novel power-sharing arrangement.<sup>206</sup> Derrida discusses this idea of two distinct beings coming together in one space as "hospitality." Understanding Derrida's notion of hospitality creates an opportunity to unsettle the taken-for-granted relationship between host and guest in the context of American-style federalism.

Hospitality is, in Derrida's understanding, ultimately about ethics.<sup>207</sup> Taken to the extreme, hospitality—the opening up of one's home to a stranger—is *the* fundamental

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204. *Id.* at 2632–33 (footnote omitted) (citation omitted).

205. *Id.* at 2633 n.16 ("In 1972, for example, Congress ended the federal cash-assistance program for the aged, blind, and disabled. That program previously had been operated jointly by the Federal and State Governments, as is the case with Medicaid today. Congress replaced the cooperative federal program with the nationalized Supplemental Security Income (SSI) program.")

206. *See generally* THE FEDERALIST PAPERS (Clinton Rossiter ed., 1961).

207. *See* DERRIDA, OF HOSPITALITY, *supra* note 31, at 135, 137.

act of ethics and of receptivity to the other.<sup>208</sup> As social beings, the activity of welcoming and receiving others into our space may be the most “human” thing we do. He terms this ethical dimension of hospitality an “unconditional hospitality”—a hospitality that makes no demand on the other and welcomes the other without knowing in advance who or what the other might be.<sup>209</sup> The ethos of hospitality, at least in its absolute form, is dangerous and rather quickly becomes untenable.<sup>210</sup> Because it implies a total welcome, absolute—or unconditional—hospitality places the host in the unenviable position of inviting the guest to displace him as master of the house.<sup>211</sup> Once that happens, the host no longer has anything to offer and he ceases to be a “host.” He becomes the captive of his own ethic; he becomes a hostage.

Derrida does not exalt this ethic as some practical objective to which all hosts should strive. On the contrary, he recognizes that, as an ethic, unconditional hospitality, despite the lovely “human-ness” of the initial invitation to the stranger, is self-defeating and perhaps even fatal.<sup>212</sup> Instead, Derrida tackles this dilemma inherent in unconditional hospitality, by introducing the parallel concept of conditional hospitality.<sup>213</sup> While unconditional hospitality represents the *ethical* dimension of hospitality, conditional hospitality represents its *political* dimension: the right to welcome and be welcomed according to agreed-upon limits and obligations. This political dimension involves judicial principles and institutional arrangements. The two understandings of hospitality correspond to the tension between ethics and politics in the current dominant federalism discourse, which can be formulated as two contradictory but (at least to their advocates) equally justified imperatives.

Just as the two notions of hospitality—the ethical absolute version and the political rule-governed version—must coexist, so too must the principles that underlie the theories of sovereignty federalism and cooperative federalism.

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208. *See id.*

209. *Id.* at 135.

210. *See id.* at 25, 27.

211. *Id.* at 125; *see also* Mark W. Westmoreland, *Interruptions: Derrida and Hospitality*, 2 KRITIKE 1, 6 (2008).

212. *See* DECONSTRUCTION IN A NUTSHELL, *supra* note 37, at 111.

213. Jacques Derrida, *The Principle of Hospitality*, 11 PARRALLAX 6–9 (2005).

It is between these two that decisions must be made. Derrida refers to this search for a middle path as the quest for “intermediate schema.”<sup>214</sup> While current federalism arguments require one to be chosen over the other, hospitality shows us that the two forms are always present. The ethics and politics of hospitality do not exclude one another. To the contrary, each needs the other to exist; they are metaphysically and practically symbiotic. Thus, it should not be that we select one over the other; rather, we should acknowledge the need for the two approaches to relate more to each other. In the federalism context, conditional hospitality corresponds to a respect for institutional sovereignty subject to regulative forces, while unconditional hospitality corresponds to the welcoming based on a feeling of responsibility for others.

#### *A. Defects of Dominant Federalism Theory Paradigms*

The dominant federalism theory paradigms are defective, at least to the extent they are viewed as exclusive and complete. When claims of sovereignty federalism and cooperative federalism are mired in violence, they no longer provide an adequate construct to meaningfully debate federal-state regulatory authority. Chief Justice Roberts and Justice Ginsburg’s opinions in *Sebelius* exemplify the extent to which violence continues to dominate the discourse that governs the relationship between the Federal Government and the States. The Court’s homage to traditional federalism values is incomplete because it places the States and the Federal Government in a relationship, which, by its very structure, is adversarial. It suggests that power is a zero-sum game played by the host (the States) and the guest (the Federal Government) from the moment of initial contact; and whatever the former cedes to the latter tends necessarily to make the latter stronger and more insatiable. But like most antinomic relationships, this one is false, or at least capable of being upended, despite its claim to primacy and permanence. As Theodore Ruger pointed out in an article published just after the ACA opinion came down, “the ACA litigation’s suggestion of an oppositional or mutually

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214. DERRIDA, OF HOSPITALITY, *supra* note 31, at 147.

exclusive federalism is misleading.”<sup>215</sup>

The Court’s articulation of federalism is also unproductive. In *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion, and the Norm of Engagement*, Professor Charlton Copeland points to the role separation of the States and the Federal Government plays in current federalism discourse.<sup>216</sup> He claims that the current dominance of separation as the underlying component safeguarding breaches of federalism should be replaced by endowing subsequent implementation of federal policy with significance.<sup>217</sup> He argues that this turn from separation to engagement will provide a more effective basis for judging the balance of power (and level of coercion, if any) in the federal-state relationship.<sup>218</sup>

To illustrate his point, Professor Copeland critiques the Chief Justice and Justice Ginsburg’s use of the clear statement rule in their coercion analysis.<sup>219</sup> The clear statement principle has been identified as one of the most important of the *Dole* factors in spending clause analysis because it requires that state knowledge and voluntary acceptance of conditions to federal funding can only exist when the terms of the conditions are explicit and unambiguous.<sup>220</sup>

Professor Copeland condemns both Roberts and Ginsburg’s Spending Clause analysis, for having “collapsed the clear statement requirement into their discussion of the

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215. Theodore W. Ruger, *Of Icebergs and Glaciers: The Submerged Constitution of American Healthcare*, 75 LAW & CONTEMP. PROBS. 215, 224 (2012).

216. See Charlton Copeland, *Beyond Separation in Federalism Enforcement: Medicaid Expansion, Coercion and the Norm of Engagement*, 15 U. PA. J. CONST. L. 91, 91 (2012) (arguing that the focus of current federalism discourse on separation defined at a singular point in time between the federal and state governments to determine coercion does not appropriately account for the significant level of engagement between the two governing systems needed to successfully enforce, protect, and advance cooperative governance).

217. *Id.* at 100.

218. *Id.* at 100–01.

219. *Id.* at 158.

220. See, e.g., David E. Engdahl, *The Contract Thesis of the Federal Spending Power*, 52 S.D. L. REV. 496, 496 (2007) (arguing that the clear statement rule reinforces the contract metaphor of the federal-state relationship, which relies on explicitly stated terms as an effective exercise of state voluntariness and sovereignty).

coercion claim.”<sup>221</sup> He claims that their reliance on the clear statement rule to analyze coercion in federal-state Medicaid relationship misses the point.<sup>222</sup> Instead of looking at the totality of the federal-state Medicaid relationship for coercion, both Roberts and Ginsburg relied on a simplistic analysis of notice to determine the nature of the relationship.<sup>223</sup> While focusing on different temporal aspects of the relationship as significant, both opinions remained mired in the dominance of separation as the vital component for exercises of state sovereignty and federalism protection.<sup>224</sup>

In addition to their focus on the clear statement principle, the Chief Justice and Justice Ginsburg’s treatment of the Medicaid program’s inception in 1965 illustrates how focus on a temporal point in a relationship informs one’s recognition of violence. Roberts points to the investment that states have made over the last 47 years in developing “intricate statutory and administrative regimes over the course of many decades to implement their objectives under existing Medicaid.”<sup>225</sup> In doing so, he suggests that the manner in which the federal-state relationship develops over the life of a federal program is a significant (if not determining factor) in establishing the respective rights and obligations under that program. But then Roberts veers. Rather than finish his argument that context should inform whether a proposed change in a federal program is unduly coercive he changes tack and concludes that the Medicaid expansion is coercive because it constitutes an entirely new program.<sup>226</sup> This decision to bifurcate the expansion from the original program creates a new battlefield on which the states and federal government can wage war. A war that the Chief Justice concludes the states should win.

Justice Ginsburg’s treatment of the subsequent implementation of the Medicaid program fares little better. While acknowledging that the Medicaid program has undergone significant changes over time,<sup>227</sup> Justice Ginsburg

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221. Copeland, *supra* note 216, at 158.

222. *See id.*

223. *Id.*

224. *See id.* at 158–61.

225. Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2604 (2012).

226. *Id.* at 2605–06.

227. *See id.* at 2631 (Ginsburg, J., concurring in part, concurring in the judgment in part, and dissenting in part).

denies that any of those subsequent changes affect the nature of the relationship between the federal and state governments for purposes of determining coercion.<sup>228</sup> Instead, Ginsburg defends the Medicaid expansion provision's constitutionality in terms of whether notice of authority to change the program was given at the beginning of the federal-state Medicaid relationship.<sup>229</sup> Given that the original 1965 act provided notice to the states that Congress had the authority to change the program from time to time, Justice Ginsburg concluded the expansion provision was not coercive.<sup>230</sup> Justice Ginsburg's analysis seeks to identify merely whether the technical requirements of notice have been met. It limits the jurisprudential understanding of notice to the singular moment when the federal-state relationship as to a particular federal program begins. For Ginsburg, the bargaining table instantiates the entire relationship between the parties for all time. Each side must negotiate all aspects of the relationship, known and unknown, over the life of the relationship at the initial enacting moment, *i.e.*, a battle once fought and lost cannot be refought.

While Roberts' opinion framed the federal-state relationship as a series of battles, each presenting a new opportunity for victory and defeat, and Ginsburg framed it as one battle fought long ago forever cementing the federal-state relationship, recent scholarship has emphasized a more nuanced approach to the dominance of separation in federalism discourse.<sup>231</sup> Much of this scholarship stresses the ability of states to influence federal policies through mechanisms of resistance. For example, in *Uncooperative Federalism*, Professors Jessica Bulman-Pozen and Heather Gerken argue that states in the role of servant can exercise power against the federal government via dissent to federal

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228. *Id.* at 2633–34 (stating, “Congress’s authority to condition the use of federal funds is not confined to spending programs as first launched. The legislature may, and often does, amend the law, imposing new conditions grant recipients henceforth must meet in order to continue receiving funds.”).

229. *See id.* at 2638.

230. *Id.*

231. *See, e.g.*, JOHN D. NUGENT, SAFEGUARDING FEDERALISM: HOW STATES PROTECT THEIR INTERESTS IN NATIONAL POLICYMAKING (2009); Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Erin Ryan, *Negotiating Federalism*, 52 B.C. L. REV. 1 (2011); Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111 (2011).

policy.<sup>232</sup> The authors argue that state dissent, in various forms such as opting-out of federal programs, litigation to challenge federal policy as unconstitutional, and enacting conflicting state legislation, can in some instances compel the federal government to be more open to state concerns and desires, thus stimulating a more productive dialogue between the federal and state governments.<sup>233</sup> According to these scholars, this dialogue enables states to play a role in federal policymaking.<sup>234</sup>

Similarly, in *Rhetorical Federalism*, Professor Elizabeth Weeks Leonard argues that a larger, more radical menu of state-driven dissent may be necessary to effect a positive change in federal policy.<sup>235</sup> She describes “rhetorical federalism” as “state-centered dissent to federal programs in the form of refusing to implement new federal legislation, challenging the constitutionality of federal laws, resisting federal mandates, ignoring federal precedent, and even threatening to secede from the Union.”<sup>236</sup> Professor Leonard explains, “like uncooperative federalism, rhetorical federalism finds value in states not simply falling in line with federal authorities.”<sup>237</sup> She concludes that state-centered dissent, whether based on concerns about structural allocation of power or opportunistic desire for political benefit, is valuable to federal policymaking and federal-state relationships because it: (1) brings transparency to the task of implementing comprehensive laws, (2) educates the electorate by distilling the law to discrete issues, (3) gives voice to minority views, (4) depoliticizes highly charged issues, (5) codifies dissent, and (6) highlights the increased role of government in health care delivery.<sup>238</sup>

These approaches are acutely insightful. They offer viable options for states to participate more fully in the federal policy making process by suggesting ways states can exploit their subordinate posture. Nevertheless, these

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232. See Bulman-Pozen & Gerken, *supra* note 231, at 1262.

233. See *id.* at 1271–80.

234. See *id.* at 1263, 1265.

235. See Elizabeth Weeks Leonard, *Rhetorical Federalism: The Value of State-based Dissent to Federal Health Reform*, 39 HOFSTRA L. REV. 111, 112–13 (2011).

236. *Id.*

237. *Id.* at 162.

238. *Id.* at 162–67.

arguments about the empowerment of state-based resistance remain grounded in the violence discourse that frames our dominant federalism theories: a discourse that I have argued truncates meaningful development of a federal-state partnership. Although state-centered dissent reconceives the states' options for participation, it does so within the same constraints of the master/servant paradigm. Instead of displacing this paradigm, state-centered dissent emphasizes the hierarchy by limiting state action to the contrarian power of the servant, the power merely to say "no." This limitation reifies the inherited ideal of violence as the operating norm for establishing and developing federal-state relations. This is, however, a better alternative.

*B. From Unconditional to a Conditional Welcome*

The hospitality paradigm offers the opportunity to transcend the impasse of the current federalism debate by providing a balance between the two dominant theories. As is indicated by Chief Justice Roberts' ACA opinion, too much emphasis on the structural justifications of the sovereignty theory will tip the balance too far in favor of the states. As Justice Ginsburg's ACA opinion indicates, too much emphasis on the political justifications of cooperative federalism will tip the balance too far in favor of the federal government. Each approach is skewed and continually reinforces the operation of violence within the federal-state relationship. Although hospitality acknowledges violence, it goes beyond that violence to consider balanced cooperation through mutually-agreed upon conditions. Hospitality reconciles these divergent theories of federalism by requiring respect for sovereignty while recognizing the significance of the actual federal-state relationship developed through implementation of government regulatory programs. Thus, the hospitality norm is capable of reorienting the debate about federalism.

Hospitality is often taken for granted as something we do to be kind to others. However, as discussed in this article, it is an ambiguous notion full of contradictions. Derrida demonstrates how the head of the house, to offer hospitality and welcome a stranger through the door, must maintain control and ownership of the home—*i.e.*, sovereignty. It requires the right to a particular place and it involves power and inequality in the relation between the host and the

guest—the very things that are anathema to pure, absolute, *ethical* hospitality. Even if the initial welcome is framed as unconditional, Derrida shows how welcoming someone into your home can challenge your sovereignty over that place and the feeling of being sidelined as the host can change your attitude toward the guest. Being a host implies a temporary relationship and when the guest does not leave, the attitude towards the guest tends to change. This feeling of losing control over one's home makes it necessary to reassert control. For Derrida, this double imperative of hospitality means that the relationship with the other takes place in the tension between conditional and unconditional hospitality.

The Derridean principle of hospitality exposes the weakness of much of the current dominant federalism discourse and offers an alternative. Violence does not have to be the primary frame for federalism discourse. Derrida's principles of hospitality provide a framework through which to conceive a discourse of Federalism that accounts for but is not dominated by violence. Absolute/unconditional hospitality accounts for violence by acknowledging that the guest may overtake the host because the host cannot set limits. In this sense, achieving unconditional hospitality is impossible because hospitality requires the host to retain sovereignty. Conditional hospitality, however, occurs in the pursuit of this "impossibility." Conditional hospitality is achieved by allowing the host to set limits on the guest, thereby retaining sovereignty, yet allowing for mutually beneficial interaction between host and guest. In a very real sense, power allocation becomes reciprocal from the very beginning of the discourse.

Similarly, while either theory of federalism in the absolute would destroy federalism because it would require either the federal government or the states to relinquish their sovereignty, conditional federalism would account for violence, but displace it from its primary status. This displacement, which acknowledges violence only in a secondary sense, would instead privilege the political relationship and power allocations indicated by the provisions of the federal programs themselves. The political relationships and power allocations could be construed using the host/guest discourse. The host/guest language-frame allows for acceptance of entry, retention of sovereignty, and

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the right to establish (negotiate) conditions on access. The host/guest language frame enables federalism analysis to take place within a dialogue of shared partnership rather than one of subjugation and violence.

## CONCLUSION

Thinking of federalism as a form of “hospitality” requires that states become active participants in the federal policymaking process. From Derrida’s discussions of hospitality we can learn that hospitality engagements should take place as a double imperative of unconditionality and conditionality. Allowing for the negotiations between conditional and unconditional hospitality, and for both understandings of sovereignty and collective action problems to prevail requires opening up the different approaches to federalism analysis. Conflicts between federal and state regulatory authority are unlikely to abate. The traditional federalism discourse is no longer adequate to sustain a debate about the operation of the federal-state relationship. The hospitality paradigm has the potential to unsettle the inherited understanding of that relationship and reorient our conception of federalism in a way that is meaningful to assessing government regulation addressing twenty-first century problems.