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Defining the Roles of the National and State Governments in the American Federal System:
A Symposium

Richard E. Levy*
Stephen R. McAllister**

I. INTRODUCTION

Federalism is perhaps the unique American contribution to political and governmental theory.1 While it is broadly understood that the essence of federalism is a division of sovereignty between national and state governments,2 the proper relationship between national and state authority has been an unending source of debate since the framing and ratification of the United States Constitution. Although political trends and judicial decisions in the wake of the New Deal period appeared to have firmly

* Professor of Law, University of Kansas.
** Associate Professor of Law, University of Kansas.

1. See, e.g., Lopez v. United States, 115 S. Ct. 1624, 1638 (1995) (Kennedy, J., concurring) ("Federalism was our Nation's own discovery. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."). There were, of course, elements of federalism in the relationships among the ancient Greek city-states and, more directly relevant to the United States experience, among the native American tribes of the East Coast.

2. See, e.g., K.C. Wheare, FEDERAL GOVERNMENT 11 (1947). While this general understanding of federalism is widely shared, developing a more precise definition of federalism has proven to be especially elusive. See generally S. Davis, THE FEDERAL PRINCIPLE (1978) (discussing theories of federalism). Disagreement over the precise definition of federalism has led some scholars to wonder if there is such a thing as federalism. See William Riker, Six Books in Search of a Subject or Does Federalism Really Exist and Does it Matter?, 2 COMP. POLS. at 135 (1969).
established a virtually limitless national authority, recent developments have reopened this central question of the American constitutional system.

In the past few years, federalism has reemerged as a focal point of debate in the halls of Congress, the offices of the White House, and the chambers of the Supreme Court. Indeed, it is a central issue in current and important legislative policy discussions regarding areas such as tort reform, welfare reform, environmental protection, and criminal justice. This renaissance of federalism also has manifested itself in the constitutional jurisprudence of the Supreme Court. The first signs of a change came in New York v. United States, where the Court invalidated the "take title" provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on the ground that the provision "commandeered" the states by requiring them to implement federal policy through legislative action. Even more dramatically, in United States v. Lopez the Court (in a 5-4 vote) struck down the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a firearm on school property. In so doing, the Court ruled for the first time since the Depression that an area of activity was beyond the reach of congressional regulatory authority under the Commerce Clause. Finally, in Seminole Tribe v. Florida (in another 5-4 vote) the Court held that Congress lacks the power under the Commerce Clause to override the immunity from suit in federal courts that the Eleventh Amendment grants to the States. In so holding, the Court expressly overruled its plurality decision

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3. See infra notes 30-39 and accompanying text.
7. See, e.g., HENRY N. BUTLER & JONATHON R. MACEY, USING FEDERALISM TO IMPROVE ENVIRONMENTAL POLICY (1996); FIFE SYMQINGTON, A FEDERALIST'S APPROACH TO PROTECTING THE ENVIRONMENT, THE HERITAGE LECTURES, NO. 534 (June 19, 1995).
8. See, e.g., State Correctional Litigation Reform Act of 1995, H.R. 322, 104th Cong., 1st Sess. (providing that a single federal judge would lack the power to declare a prison condition unconstitutional and that no such condition in a state prison could be enjoined by a federal court until the State was given a fair opportunity to take remedial action).
to the contrary in *Pennsylvania v. Union Gas Co.* The Court’s movement toward limiting federal power and according states greater protection has not been uniform, however. In *U.S. Term Limits, Inc. v. Thornton*, for example, the Court (in another 5-4 vote) struck down state-imposed term limits on members of Congress.

The majority, concurring and dissenting opinions in these cases express some fundamentally opposing views regarding the basic structure of the federal system. Regardless of the ultimate significance of these recent decisions, there is no disputing that the current Supreme Court is more interested than any Court in recent history in reexamining and reconsidering “first principles” of our federal system. This renaissance of an interest in federalism may mark yet another significant period in American constitutional history.

This symposium, held at the University of Kansas School of Law on September 26-27, 1996, is part of a broader scholarly discourse that has blossomed in the wake of the political and judicial renaissance of federalism. While a number of commentators and symposia have addressed particular decisions and their implications for constitutional doctrine, our goal in this symposium was to explore federalism at a more fundamental level, thereby contributing to a broader and deeper understanding of federalism itself. Thus, we asked participants to consider the underlying question of the proper roles of the national and state governments in our federal system. Although the participants focused their papers and presentations on addressing this fundamental question, we did not impose rigid constraints on the analytical methodologies they employed. Rather, we encouraged the participants to address the topic from a variety of perspectives, and they brought their particular talents and expertise to bear on the question of how to define the proper spheres

14. See, e.g., *U.S. Term Limits*, 115 S. Ct. at 1871 (“[T]he Framers’ understanding [was] that Members of Congress are chosen by separate constituencies, but that they become, when elected, servants of the people of the United States. They are not merely delegates appointed by separate, sovereign States; they occupy offices that are integral and essential components of a single National Government.”); *id.* at 1875 (Kennedy, J., concurring) (“There can be no doubt, if we are to respect the republican origins of the Nation and preserve its federal character, that there exists a federal right of citizenship, a relationship between the people of the Nation and their National Government, with which the States may not interfere.”); *id.* (Thomas, J., dissenting) (“The ultimate source of the Constitution’s authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.”).
15. Indeed, this term the Court is considering the implications of *New York v. United States* for the Brady Bill’s requirement that state officers conduct background checks on prospective gun purchasers. See Mack v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted sub nom.* Printz v. United States, 116 S. Ct. 2521 (1996).
of national and state authority, utilizing the analytical methods that they deemed appropriate for the topic.

Nonetheless, all of the participants addressed, either directly or indirectly, certain core questions regarding the division of authority between the national and state governments in the United States federal system. What factors or criteria are relevant to defining the proper scope of national and state authority? Does the current distribution of authority draw an appropriate balance between national and state governments? Should courts or the political process bear primary responsibility for determining the appropriate boundaries between national and state authority? These questions, of course, raised a host of subsidiary issues that the participants addressed and discussed.

While the papers consider these common questions from a variety of perspectives, the symposium was divided into three sessions, each with a distinctive focus. The first session took a primarily historical perspective on federalism, the second section focused on the political aspects of federalism, and the final session offered various theoretical perspectives on federalism. To provide context for the papers, we briefly introduce each of these perspectives and relate each paper to the broader themes addressed in each session.

II. FEDERALISM AND HISTORY

One session of the symposium addressed the history of federalism in the United States, and its implications for defining the roles of national and state governments. In this respect, there are at least three historical periods that would appear to be of central importance to any thorough assessment of the nature of “our federalism.”

First, the issue was important to the Framers of the Constitution, who developed the concept of federalism in part as a response to the real and perceived shortcomings of the Articles of Confederation. Through the Constitution, the Framers clearly intended to expand the national government’s power. Several of the Framers, for example, hoped to reduce state governments to mere “planets” orbiting the federal “sun.” The increase of national power was vitally important to figures such as Alexander Hamilton and James Madison. Indeed, Alexander Hamilton

16. Of course, the historical, political, and theoretical dimensions of federalism are inextricably intertwined, as the lively interchange each session among all the participants vividly demonstrated.
17. The moderator for this panel was Peter Mancall, Associate Professor of History, University of Kansas.
18. Such periods are sometimes referred to as constitutional moments by at least one well-known constitutional scholar. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991).
proposed that state governors be appointed by the President, and James Madison wanted Congress to have a veto power over state laws. Nonetheless, many of the Framers, including Madison, also believed that the Constitution granted only certain powers to the new national Congress, primarily those enumerated in Article I, section 8 of the Constitution. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." Moreover, the preservation of state autonomy was critical to important figures such as Patrick Henry and George Mason. Even such staunch Federalists as Hamilton and Madison defended state authority as a protection against federal tyranny and part of the division of governmental authority designed to protect against the effects of faction. Thus, for both the proponents and opponents of the Constitution, federalism issues generated considerable debate in the ratifying conventions. Certainly, many different views of the proper division between national and state authority are represented in the multitude of opinions expressed in print and in speech by prominent citizens during this time period.

Professor Martin S. Flaherty, of the Fordham Law School, addressed in some detail the Revolutionary War Period and the years leading up to the Founding in terms of that time period's significance for the Framers' concept of federalism. In particular, Professor Flaherty agrees with Professor Akhil Reed Amar's assertion that a full constitutional understanding of federalism requires examination of the fundamental issues of the American Revolution. Professor Flaherty suggests that, because the American commitment to federalism predated the Constitution, the history of the American revolutionary period is critical to understanding the Framers' understanding of the concept. Professor Flaherty's examination

22. The Federalist No. 45 at 292-93 (James Madison) (Clinton Rossiter ed., 1961); see also Larry Kramer, Understanding Federalism, 47 Vand. L. Rev. 1485, 1495 n.18 ("Certainly the argument that Congress was given limited power is uncontroversial. This was, after all, one of the critical compromises that made the Constitution possible.").
25. See The Federalist No. 10 (James Madison).
and analysis of that revolutionary history leads him to conclude that federalism was not a concept of primary importance to the strongest proponents of the Constitution. Indeed, he suggests that it was a concept most ardently espoused by those opposed to the ratification of the Constitution. From this analysis, Professor Flaherty concludes that federalism properly should have only limited relevance and vitality today.

A second period of importance to any examination of federalism is the Civil War era, a time during which notions and understandings of federalism were a serious source of conflict. Issues such as slavery, control over economic affairs, and taxation find roots, at least in part, in the nature of federalism itself. Arguably, much of the resentment of the Confederate states toward the national government was based on the opinion that certain matters simply were not the business of the national government. For the Civil War and Reconstruction Era, as for the Founding Era, there is considerable evidence to support differing views of the effect those events, including the ratification of the Fourteenth Amendment, had or were intended to have on the division of national and state authority. At the least, the historical evidence may support an argument that this time period fundamentally altered the nature of federalism, although the evidence also may support the contrary conclusion.

Professor Robert J. Kaczorowski, of Fordham Law School, addresses the federal fugitive slave laws as they existed prior to the Civil War and the implications that could be drawn from the existence and nature of those laws in determining whether the Civil War dramatically altered the American concept of federalism. Professor Kaczorowski uses the examples of the national bank and the fugitive slave laws, and judicial responses to federal legislation dealing with those topics, to illustrate what he believes was an understanding of broad congressional power in the early days under the Constitution. He argues that, indeed, these broad assertions of congressional power were confirmed by the Reconstruction Era amendments which followed the conclusion of the Civil War. Thus, in Professor Kaczorowski’s view, the Civil War was not necessarily a dramatic shift in American conceptions of federalism but, rather, a confirmation of an earlier understanding that congressional power was not to be limited in significant ways by assertions of state sovereignty. The ultimate irony, Professor Kaczorowski concludes, is that the Supreme


Court’s post-Reconstruction analysis of federal authority abandons this pre-Civil War understanding and embraces a narrower conception of congressional power.

A third historical period of importance, and one in which the Supreme Court’s view of federalism and the scope of congressional power underwent dramatic changes, is the New Deal period. After the Supreme Court on several occasions struck down national legislation and President Roosevelt responded with the infamous “court-packing” plan, the Court abruptly switched direction and began upholding against constitutional challenge national legislation more sweeping than any previously enacted. This important shift in constitutional doctrine perhaps reached its zenith in Wickard v. Filburn, where the Supreme Court upheld a federal law that regulated the production and consumption of homegrown wheat in a case involving the owner of a small farm who raised wheat for his own use on that farm. In so doing, the Court ushered in the modern era of expansive federal commerce power, which has resulted in the passage and constitutional validation of many important federal statutes, including the major civil rights statutes of the 1960s.

Thus, for the past fifty years, federalism generally has meant whatever Congress decided it meant, and has been enforced only by congressional reluctance to regulate areas of traditional state authority. The result has been a considerable expansion of federal legislation regulating activity that might be viewed as within the traditional prerogative of the States. For example, there are now federal statutes criminalizing or imposing civil penalties for carjacking, domestic violence, arson, interference with access to abortion clinics, the failure to pay child support, the liberation of research animals, and the destruction of wetlands.

30. See, e.g., A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down federal regulations that fixed the hours and wages of individuals employed by an intrastate business because the activity affected interstate commerce only indirectly).
Professor Nelson Lund, of the George Mason University School of Law, critiques the Supreme Court's twentieth-century role in federalism matters. Ultimately, he concludes that the Supreme Court's current prominence in debates over, and the resolution of, individual rights issues is an inappropriate role for the Court under a meaningful system of federalism. Rather, Professor Lund contends that the Supreme Court should essentially get out of the business of protecting civil liberties from intrusions by state governments, and thus abandon its current Fourteenth Amendment incorporation doctrine. He suggests that the Supreme Court simply is not the entity best-positioned to resolve the competing demands of public discipline and private liberty.

III. FEDERALISM AND THE POLITICAL PROCESS

The second session of the symposium considered the relationship between federalism and the political process. This extraordinarily rich and complex relationship can be explored from a variety of perspectives. At one level, federalism itself is a political process in which states have distinctive roles, as reflected in the constitutional structure of government. The importance of this political process in the design of federalism in turn raises questions regarding the respective roles of political and legal institutions in safeguarding the division of authority between the states and the national government. Ultimately, moreover, federalism is part of the broader political system of the Constitution and must be understood in this broader political context.

Because the political structure of government is an essential element of any federal system, analysis of that structure reveals important insights into the scope of national and state power. Indeed, it has been suggested that the "political safeguards of federalism" are the principal or perhaps only means of enforcing the constitutionally envisioned relationship between state and federal power, although this notion is, of course, highly controversial. In any event, analysis of the operation, practices and procedures of political institutions may further our understanding of federalism in significant ways.

In this regard, Professor Elizabeth Garrett, of the University of Chicago School of Law, analyzes the Unfunded Mandates Reform Act to

40. The moderator for this panel was Burdett Loomis, Professor of Political Science, University of Kansas.
42. Indeed, the Supreme Court has suggested that this political structure is the primary control on the national government. See Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 550-51 (1985).
43. See generally Kramer, supra note 22.
illuminated how federalism questions are raised in the legislative process in Congress and whether alternative procedures can ensure serious congressional attention to legitimate federalism interests. Noting that legal scholars tend to focus most of their attention on the federal judiciary’s role in a federal system, Professor Garrett attempts to illuminate what she refers to as the “congressional black box” in which the legislation that frequently is at issue in federalism debates originates. Professor Garrett argues that advocates of a stronger role for the States should pay more heed to the processes and procedures of Congress, and should seek the adoption of political safeguards for the States’ interests. In particular, Professor Garrett suggests further study of political institutions, politicians and interest groups as their conduct and activities relate to federalism issues. Ultimately, she seeks to illuminate some of the strengths and weaknesses of process-based protections that either exist or might be implemented to protect the States’ sovereignty interests.

Conversely, since federalism is in many respects a political construct, one may interpret federalism in light of underlying political theories of the Constitution, such as promoting political accountability, or furthering liberal, egalitarian principles, or protecting individual rights. Indeed, while recent Supreme Court decisions have sought to protect the interests of states in our federal system, the Court has never really tied the protection of state interests into any broader theory of the political structure of the constitution.

Professor Tom Stacy, of the University of Kansas School of Law, addressed the question of whose interests federalism protects. Noting that there is now an unavoidable conflict between the Tenth Amendment’s conception of a national government of limited powers and Congress’s virtually limitless commerce power in the pervasively integrated modern society, Professor Stacy suggests that a resolution of the federalism question cannot be found in either the text or the history of the Constitution. Instead, he argues that the debate over federalism should be guided by an examination of its purposes, and a consideration of who or what federalism is supposed to protect or serve. He concludes that federalism should be understood as primarily protecting the interests of political

44. See, e.g., JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).
45. See, e.g., RONALD DWORKIN, LAW’S EMPIRE (1986).
47. Of course, Madison tied the structure of federalism into his theory of faction and the Court has at various times articulated a number of justifications for federalism, such as encouraging experimentation by states or promoting local accountability for local problems, but establishing a deeper political understanding of federalism has proven elusive.
majorsities, rather than as protecting political minorities against oppressive majorities or protecting state governments or governmental entities. For that reason, Professor Stacy adopts the position that the definition of the relationship between state and federal power essentially should be left to the political process.

Insofar as federalism is itself a political process that is connected with the broader political structure of the Constitution, federalism interacts with other constitutional doctrines concerning the political process. Analysis of the interaction between federalism and these other political doctrines will be increasingly important as federalism takes an increasingly important role in the political and legal arenas. Pending cases involving the Brady Bill, for example, raise the question whether "no-commandeering" rule of New York v. United States applies to the use of state administrative or executive officials to implement federal law. As recent scholarship has suggested, this "federalism" question, however, also implicates separation of powers concerns regarding the principle of the "unitary executive" insofar as state administration of federal laws may by limit presidential oversight of the execution of the laws.

Professor Evan Caminker, of the University of California Los Angeles School of Law, critiqued the concept of the unitary executive as it bears on federalism issues, using the federal Brady Bill regarding handgun regulation as an illustrative example. Assuming the basic validity of the unitary model, Professor Caminker considers both the scope of the theory and the remedy that should result in the event that an unsupervised state administration of federal law is unconstitutional. With respect to remedy, he concludes that the federal law itself should be invalidated, rather than the President having the authority to supervise state officials. He also concludes that the unitary executive theory should apply, at most, only to state officials administering federally-defined law, and not to the state administration of state laws designed to serve federal purposes.

IV. FEDERALISM AND LEGAL THEORY

The final session of the symposium explored theoretical approaches to defining the concept of federalism in the United States. Methodologies available for analyzing the question of how to define the roles of the national and state government are virtually limitless and might include

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48. This interaction was evident, for example, in U.S. Term Limits, Inc., v. Thornton, 115 S. Ct. 1842 (1995).
49. 505 U.S. 144 (1992) (holding that Congress may not compel states to legislate to implement federal law).
50. See supra note 49.
51. The moderator for this panel was The Honorable Deanell Reece Tacha, United States Court of Appeals for the Tenth Circuit.
economic theory, critical legal studies, critical race studies, feminist theory, political theory, institutions theory, and constitutional theory. Likewise, there is a growing economic literature on federalism that provides a foundation for analyzing both the underlying structure of federalism and the practical effects of allocating authority to either the national or state governments. Thus, one might employ game theory and other tools of economic analysis to explore the purposes and functions of federal structures, and define the roles of national and state governments accordingly. Or one might test empirically the arguments advanced in favor of national or state power, such as the value of state experimentation versus the so-called race to the bottom.

As legal scholars, our approach to federalism tends to be predominantly a legal one. We focus on the constitutional provisions defining the federal structure and seek to interpret those provisions. This theoretical approach, however, gives only a limited understanding of federalism because it tends to ignore (or at least minimize) other aspects of federalism. To gain a more complete understanding of federalism, we must also consider how and why federalism works in practice.

53. See, e.g., Debra Jones Merritt, Three Faces of Federalism: Finding a Formula for the Future, 47 VAND. L. REV. 1563 (1994) (rejecting "territorial" and "federal process" models of federalism in favor of an "autonomy" model based on the Guarantee Clause, rather than the Tenth Amendment or Article I).
56. For example, when legal scholars address the political dimensions of federalism, it is typically only in connection with the issue of whether the judiciary should enforce the constitutional provisions limiting federal power, or to resolve other interpretive questions regarding the Constitution. See, e.g., U.S. Term Limits, Inc. v. Thornton, 115 S. Ct. 1842 (1995).
57. See, e.g., K.C. Wheare, supra note 2, at 21-22.

For it must be stressed that if we are looking for examples of federal government, it is not sufficient to look at constitutions only. What matters just as much is the practice of government. A country may have a federal constitution, but in practice it may work that constitution in such a way that its government is not federal. Or a country with a nonfederal constitution may work it in such a way that it provides an example of federal government.
Professor Larry Kramer, of New York University School of Law, has been at the forefront of efforts to expand the scope of legal scholarship on federalism, emphasizing the importance of mediating institutions in understanding the operation of federalism.\textsuperscript{58} During the symposium session on the theory of federalism, Professor Kramer employed this institutional perspective to discuss Madison’s theory of faction as it relates to federalism. Professor Kramer suggested that Madison’s argument that a larger polity reduces the influence of faction is flawed, and that federalism could not have been successful without the evolution of mediating institutions such as political parties.\textsuperscript{59}

Of course, addressing the underlying interpretive questions raised by the constitutional provisions regarding federalism remains an essential function of legal scholarship in this area, and developing theories about the purposes of federalism may provide useful insights into these interpretive questions. The final two speakers during the session, Professor Erwin Chemerinsky of the University of Southern California and Professor Richard E. Levy of the University of Kansas, each approached the theory of federalism by addressing its underlying purposes.

Professor Chemerinsky responded to the recent judicial and scholarly emphasis on limiting federal power by suggesting that federalism should be understood as a means of empowerment. This empowerment theory rests on three major propositions about federalism. First, Professor Chemerinsky observes that federalism historically has been viewed as a debate over limiting federal power in order to protect state sovereignty. Second, he contends that the federalism debate should be about the proper allocation of power between the federal and state governments. Finally, however, he asserts that the goal in resolving the debate should be to achieve effective government. Thus, Professor Chemerinsky concludes that federalism should not be viewed as a debate over the limits imposed on any level of government but, rather, an effort to empower every level of government to solve difficult social problems.

Professor Richard E. Levy, of the University of Kansas School of Law, analyzed federalism from a collective action perspective, arguing that this understanding of federalism illuminates the founding and has important implications for various doctrinal issues that have been raised in the renewed debate over federalism. Professor Levy’s theory of federalism rests on the premise that the problems that arose under the Articles of

\textit{Id.}

\textsuperscript{58} See Kramer, supra note 22.

\textsuperscript{59} Although Professor Kramer’s paper could not be published with the other papers in the symposium because of prior arrangements, we are grateful for his presentation and for the many valuable insights he offered during the discussions that followed all the sessions.
Confederation were, in essence, collective action problems. These problems arose, according to Professor Levy, because the Articles did not respond effectively to forces that give rise to such problems, and the Framers responded to the defects of the Articles by adopting a more integrated federal structure in the new Constitution. Professor Levy then uses this understanding of federalism to evaluate recent and recurrent issues of federalism.

V. CONCLUSION

The Honorable Patrick Higginbotham, United States Court of Appeals for the Fifth Circuit, was the symposium’s keynote speaker. Judge Higginbotham, in his aptly entitled address “The Continuing Dialogue of Federalism,” discusses the nature of the federalism debate and the factors that influence our understanding of the concept. He emphasizes that any discussion of federalism must keep two important factors in sight. First, the federal system “is a dialogical system,” and “has been so from the beginning.” Second, federalism has “a skeleton, a bone of structure.” Judge Higginbotham acknowledges that history is important in the debate, but cautions that it is difficult to rely upon history for definitive answers regarding such a complex concept. Ultimately, he concludes that the federal courts should be cautious in policing the concept of federalism and the allocation of federal and state power. He recognizes, however, that the courts are the referees of this constitutional struggle and do have a significant role to play.

Indeed, as Judge Higginbotham’s essay demonstrates, federalism is an issue of American government that in a very real sense always will be current. As Chief Justice John Marshall presciently observed more than 175 years ago,


[[the federal government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist.]


Our hope is that the 1996 “Federalism in the Twenty-First Century” symposium held at the University of Kansas School of Law, by drawing together for two wonderful days a number of bright and talented legal scholars to address the concept of federalism, will contribute in some measure to the ongoing debate. The University of Kansas School of Law is proud to have played a role in producing the following final results of the participants’ efforts and exchanges.