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Donald E. Lively

West Virginia University College of Law

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FEDERALISM AND THE JUDICIAL FUNCTION: A CUTTING EDGE AMIDST PROFESSIONS OF RESTRAINT

DONALD E. LIVELY*

The concept of federalism pervades much discussion and debate over the Constitution, even as its actual wellspring and precise meaning tend to be obscured or elusive. Concern with perceived imperatives of federalism has influenced the development of principle across a broad spectrum of constitutional interests. Few areas of constitutional decision-making are immune from direct or indirect reference to federalism. Concern with federalism is a common analytical denominator that has helped define not only the scope of federal and state powers¹ but the contours of fundamental rights and liberties.²

Understanding a particular Court's vision and prioritization of federalism affords a meaningful basis for predicting general constitutional trends and developments. Review of nearly two centuries of constitutional case law supports the proposition that the higher the value attached to federalism, the less likely it is that the judiciary will broadly define national powers.³ Equally improbable is that a similarly

* William J. Maier, Jr. Chair of Law, West Virginia University College of Law; J.D. University of California, Los Angeles; M.S. Northwestern University; A.B. University of California, Berkeley.

1. Typifying concern with federalism is analysis of Congress' power to regulate commerce among the states in the form of law that also impacts local activity. Case law over the course of history has swung from an expansive charting of federal power (*e.g.*, *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824) (extending congressional authority to wherever commerce present)), to a narrow definition of commerce related strictly to transit and accentuating the Tenth Amendment (*e.g.*, *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that Congress may not regulate conditions of production)), and back to a generous accommodation of federal regulatory power (*e.g.*, *Wickard v. Filburn*, 317 U.S. 113, 120 (1942) (holding that Congress may regulate activities having close and substantial effect upon commerce)).

2. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 190 (1984) (holding that fundamental right to privacy does not include protection against legislative restrictions upon homosexual activity).

3. In less than two decades, for example, the Court vacillated between doctrine that

situated Court will reference enumerated rights and liberties or the amorphous concepts of due process or equal protection to defeat state interests.⁴

Like many of the literal terms of the Constitution that it is brigaded with for purposes of developing principle, federalism is not self-defining.⁵ It thus is a magnet for competitive theorizing and agenda-driven management. Stripped of the embellishments that may define its utility in ends-oriented fashion, the concept of federalism derives from the constitutionally directed division of authority between national and state governments. Although not textually designated, federalism has been classified as one “[o]f the various structural elements in the Constitution [along with] separation of powers, checks and balances, [and] judicial review” implied by the framers’ invention.⁶

Among the core values associated with federalism are “the promotion of state experimentation and local democracy.”⁷ Such considerations have had notable impact upon the coursing of constitutional law generally. In the post-Warren era, federalism has been an especially significant factor in relaxing federal constitutional constraints upon state criminal procedure. Accommodation of the diverse methods that might be concocted in state political laboratories accounts primarily for the half-century delay between adopting the exclusionary rule in federal courts and incorporating it through the Fourteenth Amendment.⁸ Simi-

narrowly, broadly, and again narrowly defined state immunity from federal regulation. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) (overruling *National League of Cities*); *National League of Cities v. Usery*, 426 U.S. 833 (1976) (overruling *Wirtz*); *Maryland v. Wirtz*, 392 U.S. 183 (1968). Criticism of those rulings stressed that federalism [respectively] was being disregarded and overindulged. *Garcia*, 469 U.S. at 568-77 (Powell, J., dissenting); *National League of Cities*, 426 U.S. at 856-80 (Brennan, J., dissenting); *Wirtz*, 392 U.S. at 201-05 (Douglas, J., dissenting).

4. See, e.g., *Michael M. v. Superior Court*, 450 U.S. 464 (1981) (accommodating state interest in statutory rape law applied only against males).

5. For a discussion of the vague and open-ended terms of the Constitution’s key provisions, see DONALD E. LIVELY, *FORESHADOWS OF THE LAW* xix (1992).

6. *United States v. Lopez*, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J., concurring).

7. Sheldon Nahmod, *State Constitutional Torts: Deshaney, Reverse-Federalism and Community*, 26 RUTGERS L.J. 949, 950 (1995).

8. The exclusionary rule was adopted at the federal level in *Weeks v. United States*, 232 U.S. 383 (1914). It was not extended to the states until *Mapp v. Ohio*, 367 U.S. 643 (1960).

lar deference to the imperatives of federalism explains the passage of two decades between the Court's insistence upon exclusion from federal trials of confessions, obtained during illegal detention, and its ruling that the Fifth Amendment privilege against self-incrimination applied to the states.⁹ Prior to the Warren Court's heightened emphasis upon defendant rights, federalism thus was a primary factor in the crafting of Fourth, Fifth, and Sixth Amendment guarantees pertinent to the criminal justice system. Even in stressing federal constitutional interests to account for police abuse or overreaching, case law reflected a wariness toward forcing particular methods of protection upon the states. Although acknowledging that Fourth Amendment textual guarantees passed through the Fourteenth Amendment, the Court in *Wolf v. Colorado*¹⁰ asserted that the method of protecting the constitutional interest presented a different question.¹¹ As Justice Frankfurter put it:

How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered so as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution.¹²

The utility of federalism in diluting constitutionally driven governance of state police practices is well-established. Regulation of crime, like control of public education, historically has been understood as an essentially local function.¹³ So strong is conventional understanding of the relationship between criminality and state interest that logic and even constitutional directive at times have been ignored. Federalism's utility in defeating rather than facilitating constitutional imperatives was seminally illustrated midway through Reconstruction. Soon after the Fourteenth Amendment and its statutory antecedent (the Civil Rights Act of 1866) were adopted,¹⁴ the Court in *Blyew v. United States*¹⁵

9. Exclusion of confessions obtained during illegal detention rested upon the Court's supervisory power over the federal judiciary. *McNabb v. United States*, 318 U.S. 332 (1943). A federal constitutional interest in statements obtained in the course of custodial interrogation eventually was asserted in *Malloy v. Hogan*, 378 U.S. 1 (1964).

10. 338 U.S. 25 (1949).

11. *Id.* at 28.

12. *Id.*

13. *United States v. Lopez*, 115 S. Ct. 1624, 1637 (1995) (Kennedy, J., concurring).

14. For a discussion of the Civil Rights Act of 1866 as the preordination of the Four-

revealed its functional resistance to the redefinition of federal and state powers to formally achieve the Reconstruction-mandated transfer of control over creating and protecting civil rights.¹⁶

At issue in *Blyew* was a federal prosecution of a white man charged with murdering a black woman.¹⁷ The proceeding commenced under the 1866 Act's provision empowering federal courts to hear all criminal and civil cases "affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the State, or locality, where they may be, any of the rights secured to them by the first section of the act."¹⁸ Because all witnesses to the incident were black, and state law prohibited cross-racial testimony, the state had refused to prosecute.¹⁹ Notwithstanding the circumstances, the Court concluded that neither the witnesses nor the deceased were "affected persons."²⁰ The result, as Justice Bradley noted, was "[t]o deprive a whole class of the community of this right, . . . to brand them with a badge of slavery[,] . . . to expose them to wanton insults and fiendish assaults[,] . . . leav[ing] their lives, their families, and their property unprotected by law."²¹

If not a further indication of slighting constitutional reality, the Court's most recent excursion into federalism and the criminal justice system suggests the possibility of a similarly protectionist instinct in favor of potentially obsolete structures. Striking down a federal law prohibiting firearms in areas surrounding schools, in *United States v. Lopez*²² the Court evinced concern with traditional order and political

teenth Amendment, see HAROLD HYMAN, A MORE PERFECT UNION (1973).

15. 80 U.S. (13 Wall.) 581 (1871).

16. *Id.* at 581. The redistribution of power over the terms of American citizenship and the contours of civil rights is discussed in DONALD E. LIVELY, THE CONSTITUTION AND RACE 48-56 (1993).

17. *Blyew*, 80 U.S. at 591.

18. *Id.* (quoting the Civil Rights Act, ch. 31, 14 Stat. 27 (1866)). The Act prohibited discrimination on the basis of race with respect to contracts, suing, giving evidence, property rights, civil and criminal proceedings, and punishment. CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

19. *Blyew*, 80 U.S. at 591.

20. *Id.*

21. *Id.* at 599 (Bradley, J., dissenting).

22. 115 S. Ct. 1624 (1995).

ramifications. Without some meaningful limiting principle for the commerce power, the Court stressed, it may prove impossible “to identify any activity that the States may regulate but Congress may not.”²³ Notwithstanding the simple reality etched by Justice Stevens, that “[g]uns are both articles of commerce and articles that can be used to restrain commerce,”²⁴ decisional rhetoric suggests an interest in crafting principle responding to the Court’s own sense of exigency and idealism.

Attentive to the implications of the republic’s evolution from disaggregated economic units to a national market, the *Lopez* Court departed from a six decade long tradition of deference to Congress’ competence, judgment and reach under the commerce power.²⁵ The divergence was not without some acknowledgment “of much uncertainty respecting the existence, and the content of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers.”²⁶ Nor has it avoided claims of abandoning “a paradigm of judicial restraint.”²⁷ Especially if critical perceptions are accurate, and the Court’s exercise is merely a variant of noninterpretivism,²⁸ federalism may be viewable as the analytical anti-christ to substantive due process review.

Aggressive referencing of federalism over the past quarter century in the criminal justice context, for instance, reflects a significant political inspiration. During the 1968 presidential election, the constitutional output of the Warren Court emerged as a dominant issue. Richard Nixon’s campaign priorities included a pledge to appoint Supreme Court justices who would reverse the trend of expanding defendant’s

23. *Id.* at 1632.

24. *Id.* at 1651 (Stevens, J., dissenting).

25. As Justice Souter noted, since the Court’s decision in *United States v. Carolene Products Co.*, 304 U.S. 144, 147-48 (1938), “deference to legislative judgments on commercial regulation [has been] the powerful theme under both the Due Process and Commerce Clauses.” *Lopez*, 115 S. Ct. at 1653 (Souter, J., dissenting).

26. *Lopez*, 115 S. Ct. at 1635 (Kennedy, J., concurring).

27. *Id.* at 1651 (Souter, J., dissenting) (quoting *FCC v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993)).

28. Noninterpretivist review touts the legitimacy of the judiciary referencing values that are not grounded in constitutional text. Noninterpretivist theory is exemplified and amplified in MICHAEL PERRY, *THE CONSTITUTION, THE COURTS AND HUMAN RIGHTS* (1982).

rights.²⁹ After being elected, President Nixon fulfilled his promise to nominate persons disfavoring usage of the Constitution as a cutting edge against state criminal processes.³⁰ Nixon appointees, including Chief Justice Burger and Justices Rehnquist, Blackmun, and Powell, helped erect significant curbs upon doctrine inherited from the Warren Court. Despite accepting the exclusionary rule, the Burger Court initiated a constitutional counterinsurgency generating among other things good faith concepts that excuse police from otherwise binding constitutional requirements.³¹

A significant instrumentality in negating the work of the Warren Court also has been federalism. Proceeding on a parallel track with redefinitive principles comprehending both federal and state practices, such as the good faith exception, federalism has played a more subtle and discrete role in redacting the Warren legacy. It has been a primary reference point in diminishing the functionality of federal habeas corpus rights. By largely denying retroactive application of new constitutional rules in such cases,³² the modern Court largely has transformed habeas relief into a formalism.³³ Downsizing the role of the exclusionary rule has been justified in significant part on grounds that states may provide alternative forms of relief that do not so heavily encumber prosecutorial interests.³⁴ The continuing vitality of *Miranda*

29. HENRY ABRAHAM, JUSTICES AND PRESIDENTS 4, 12 (1974); BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 159-61 (1979).

30. The criteria for Nixon's Supreme Court nominees, and their performance once confirmed, is discussed in DONALD E. LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED: ACTIVIST WAYS AND POPULAR ENDS 138 (1990).

31. Each of Nixon's appointees endorsed adoption of the good faith exception to the exclusionary rule. See *United States v. Leon*, 468 U.S. 897 (1984).

32. *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). Exceptions to nonretroactivity are the rare instances in which a habeas petitioner demonstrates that a new rule is so fundamental as to be "implicit in the concept of ordered liberty" or that the conduct resulting in conviction was constitutionally protected. *Id.* at 307-08 (O'Connor, J., plurality opinion) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *Penry v. Lynaugh*, 492 U.S. 302, 313-14 (1989).

33. The Court has determined that a rule is new if reasonable minds could differ over the meaning of preceding decisions. *Butler v. McKellar*, 494 U.S. 407 (1990). Avoiding the new rule trap for retroactivity in habeas cases thus is vexing to the extent that constitutional litigation typically is begotten by reasonable differences of opinion.

34. To the extent that alternative remedies have been touted, such as tort actions and community pressure, analysis mirrors some of the basic premises of *Wolf v. Colorado*, 338

requirements,³⁵ even if narrowly deployed by the Burger and Rehnquist Courts,³⁶ may attest less to federalism's dilution in the Fifth Amendment context than to recognition that the rules are minimally intrusive upon state practice.³⁷

Beyond the context of the Fourth, Fifth, and Sixth Amendments, accommodation of death penalty statutes over the past two decades has been grounded partly in federalism.³⁸ Even case law that comports with national constitutional values in some instances is better understood as the product of federalistic impulses. The determination that cameras in the courtroom are not a *per se* violation of due process,³⁹ for example, is consonant to a significant degree with an outcome that would be generated by First Amendment analysis. The Court in *Chandler v. Florida*,⁴⁰ however, emphasized that its holding was driven not by First Amendment considerations but by an interest in affording breathing room to the differing methods and priorities of the states. In the Court's words, the "concept of federalism . . . must guide our decision."⁴¹ The meaning of that concept, adverted to by the Rehnquist Court, thus appears to be as elusive, malleable and assailable as the "implicit in the concept of ordered liberty" or "rooted in the nation's traditions" standards enshrined in fundamental rights analysis.⁴²

U.S. 25 (1949).

35. When "a person in custody is to be subjected to interrogation," police are required first to warn of the right to remain silent, that anything said can and will be used against the individual in court, that there is a right to have counsel present during interrogation and that a lawyer will be appointed if the person can afford one. *Miranda v. Arizona*, 384 U.S. 436 (1966).

36. *Miranda's* post-Warren legacy is discussed in STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 525-74 (4th ed. 1992).

37. The proposition that *Miranda* has had negligible impact upon police practices is set forth in OTIS H. STEPHENS, *THE SUPREME COURT AND CONFESSIONS OF GUILT* (1973).

38. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 333-34 (1989) (rejecting an "emerging national consensus against execution of the mentally retarded").

39. *Chandler v. Florida*, 449 U.S. 560, 578-79 (1981).

40. 449 U.S. 560 (1981).

41. *Id.* at 578-79.

42. *See, e.g.*, *Roe v. Wade*, 410 U.S. 113, 152 (1973).

As the common thread that has woven a constitutional fabric rubbing state criminal processes less abrasively than the Warren Court's doctrinal cloth, federalism has demonstrated its utility. Less certain is whether it has established its legitimacy. Debate over the points that the judiciary may reference in trumping legislative output now is essentially where it was two centuries ago when Justices Iredell and Chase argued the issue in *Calder v. Bull*.⁴³ Staking out the interpretivist position, Justice Iredell maintained that the judiciary exceeds its power when it adverts to values beyond the four corners of the Constitution.⁴⁴ The counterpoint to Iredell's position was Justice Chase's noninterpretivist premise that democratic values are furthered rather than retarded when the Court referenced natural law principles.⁴⁵

Controversy over the Court's intellectual resources for "say[ing] what the law is"⁴⁶ has been supported and facilitated by a cottage industry of academic debate generating endless volumes of commentary on the subject.⁴⁷ Conventional wisdom has tended to cast the Warren Court and Rehnquist Court as competing role models. Such characterizations may be valid insofar as they only read results. To the extent the judicial role is at issue, however, such a focus is misleading. Constitutional outcome may be redirected not because the model of review has changed but because different values have become primary analytical reference points. To the extent political or ideological considerations are prime, methodologies of review — associated with the Rehnquist Court's emphasis upon federalism and Warren Court's attention to fundamental rights — are theoretically indistinguishable.

43. 3 U.S. (3 Dall.) 386 (1798).

44. *Id.* at 398-400 (Iredell, J., concurring).

45. *Id.* at 386-88.

46. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

47. See generally ALEXANDER BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1970); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1993); JOHN H. ELY, *DEMOCRACY AND DISTRUST* (1980); Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 *YALE L.J.* 1063 (1980); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 *HARV. L. REV.* 781 (1983); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 *HARV. L. REV.* 1 (1959).

One jurist has noted that “[e]very justice has been accused of legislating and everyone has joined in that accusation of others.”⁴⁸ Some critics already have cited the Rehnquist Court for violating the ethos of restraint for which it is a self-proclaimed guardian.⁴⁹ The Court’s reliance upon federalism in redefining the relationship between the Constitution and state criminal procedure, therefore, at least has reached the point of rousing suspicion that a tool of convenience rather than principle is at work. Further casting doubt upon judicial motive is an emphasis upon history possibly disengaged from historical perspective. In stressing concern with obliterating the “distinction of what is national and what is local,”⁵⁰ the Court has opened a window into its institutional mind. Lurking therein is apparent concern with preserving existing structures from the forces of politically driven response to evolving imperatives.⁵¹

Such an agenda, if real, is at minimum incongruous. Chief Justice Rehnquist, the architect of the *Lopez* opinion, typically has been among the quickest to point a finger when perceiving that the Court ignores history and impedes legislative response to the challenges of a society.⁵² Responding to arguments that a national economic emergency required the Court to jettison its formalistic sense of commerce six decades ago, Justice Sutherland asserted that “the meaning of the Con-

48. ROBERT JACKSON, *THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT* 80 (1955).

49. Particularly in the realm of substantive due process review, the Rehnquist Court has touted the imperatives of judicial restraint. It thus has crafted a body of case law that, for instance, acknowledges reproductive freedom but countenances regulatory schemes that steer the decision-making of economically disadvantaged women. *E.g.*, *Harris v. McRae*, 448 U.S. 297 (1977). A contrary result, from the Court’s perspective, would represent an exercise in judicial overreaching. *Id.* at 298. To guard against such adventurism, Justice Scalia has advocated determining whether a right is fundamental based upon examination of the interest at a high level of specificity rather than abstraction. *Michael H. v. Gerald D.*, 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion) (holding that biological father’s interest in establishing a relationship with his child, when reduced from an abstraction to the specific circumstances of parenthood arising from an extramarital affair is not a fundamental right).

50. *United States v. Lopez*, 115 S. Ct. 1624, 1632 (1995).

51. *See supra* notes 21-27 and accompanying text.

52. Rehnquist has characterized the Court’s development of privacy rights, as a function of substantive due process review, as “closely attuned to . . . the majority opinion in *Lochner* and similar cases.” *Roe v. Wade*, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting).

stitution does not change with the ebb and flow of economic events.”⁵³ If federalism itself has become a formalistic tool to shape results for the sake of their outcome, history may condemn the Court not only for disregarding the lessons of history but for a conspicuous exercise in hypocrisy.

Having resculpted the constitutional context in which state criminal procedure functions, and now limiting Congress in reaching criminal activity, the burden rests with the exponents of federalism to convince their audience that principle is logically ordained by the Constitution rather than the work of another judicial excursion. Justice Kennedy has illuminated the challenge confronting the Court in squaring its legacy with its own standards for the judiciary’s function. Noting the widespread uncertainty regarding the existence and nature of criteria governing the deployment of federalism as a check on national power,⁵⁴ Kennedy at least has acknowledged that the Court is operating in a danger zone.

In a system hinged to consent of the governed, legitimacy is best secured when ruling institutions convincingly explain their decisions.⁵⁵ The Court’s work over the past couple of decades reflects a significant blunting of the Constitution’s impact upon state criminal procedure. Much of the Court’s work on that front has been explained as the invariable function of a system of dual sovereignty. With new evidence that the concept of federalism is poorly understood and necessary standards unclarified, it becomes logical and fair to question the underpinnings of relevant post-Warren case law. For purposes of discerning whether post-Warren revisionism has been driven by dogmatic or democratic imperative, amplification of concepts, premises and standards — essential for critical assessment of performance — has emerged as the missing link to doctrinal and institutional insight.

53. *West Coast Hotel v. Parrish*, 300 U.S. 379, 402 (1937) (Sutherland, J., dissenting).

54. *Lopez*, 115 S. Ct. at 1637-38 (Kennedy, J., dissenting).

55. See generally LIVELY, JUDICIAL REVIEW AND THE CONSENT OF THE GOVERNED, *supra* note 30, at 127.