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AMERICAN CONSTITUTIONAL LAW

CONTROVERSIES IN AMERICAN FEDERALISM AND PUBLIC POLICY

EDITED BY

CHRISTOPHER P. BANKS

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Christopher P. Banks, Kent State University, USA, combines his research and teaching interests by studying the political behavior of the judiciary, constitutional law, the judicial process and civil rights and liberties. He has published books and articles relating to judicial policy-making, federalism, the legal profession, the judicial process, human rights, American politics, terrorism, *Bush v. Gore* (2000), the politics of court reform and the judicial politics of the DC circuit.

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1 The U.S. Supreme Court, new federalism, and public policy

John C. Blakeman and Christopher P. Banks

In 2017, the federal system of government in the United States turned 230 years old. For over two centuries federalism has served to balance power between the national government and the states. Federalism is an embedded part of the United States Constitution, and it has proven to be an enduring structure. As with most aspects of the Constitution, though, the interpretation and application of federalism has often been in dispute. Federalism theory and practice in the American constitutional tradition is historically contentious and infused with considerable political and philosophical debate over its meaning. Included in that debate are ongoing arguments over the appropriate and constitutional relationship between states and the national government, and those arguments have ranged widely across several historical eras. For example, federalism prior to the Civil War focused on protecting state autonomy from an encroaching national government. By the New Deal Era in the 1930s, a progressive interpretation of federalism had developed that allocated significant power to the national government to address economic and social ills, even if national power contravened state power in some policy areas.

New federalism is a recent variant of American federalism. Typically, it views the Constitution's relationship between the states and federal government as structural and procedural. In this understanding, the federal system of government preserves and protects state sovereignty from national power through a series of procedural mechanisms and constitutional provisions that, in total, create structural barriers that impede federal oversight of state policymaking. The structural approach to federalism is accomplished through the U.S. Supreme Court's interpretations of a wide range of constitutional provisions, including the national government's power to regulate interstate commerce in Article I, Section 8, of the Constitution, its implied powers in the Necessary and Proper Clause (also in Article I, Section 8), and the roles and powers of the states protected by the Tenth and Eleventh Amendments.

The intellectual foundations of new federalism started with President Richard M. Nixon's administration in 1968 and were further developed and given constitutional prominence by the U.S. Supreme Court under the leadership of Chief Justice William H. Rehnquist in the 1980s to 2005. With the support of the conservative administration of President Ronald Reagan, new federalism thinking was used by the Court to reinvigorate states' rights in several key cases. In this time period, the Court interpreted the Constitution to protect state sovereignty and thus establish limits on the federal government's power in several important policy areas. Indeed, the term "new federalism" is associated with the revival or reassertion of federalism principles that pre-date the Civil War and placed "aggressive and

affirmative constitutional limits on the central government while protecting the sovereignty, autonomy, or rights of state governments."[1]

To be sure, the Rehnquist Court was not fully consistent in its interpretation of federalism. While many federalism cases were closely decided, a majority of justices in the Rehnquist era nonetheless supported federal power over states in certain policy areas. Ironically, the Chief Justice himself may have been less consistent on state sovereignty than his jurisprudential leadership might indicate. However, a "federalism five" group of justices—albeit with a changing membership—emerged to sustain new federalism doctrine.[2]

New federalism's focus on state sovereignty did not reside solely with constitutional disputes in the federal judicial system. Although the Supreme Court is the primary institution that articulated more robust protections for states' rights, a wide range of institutions and actors now actively use new federalism principles to contest federal policymaking affecting the states and to protect state policymaking from federal interference. An increasing activism geared towards state sovereignty is embedded among state government institutions, such as governors, legislatures, and attorneys general. Interest groups too have become much more active in using federalism to limit federal power. Many policy disputes between states and the federal government are seemingly couched in terms of federalism and states' rights, so much so that substantive disagreements over policy outcomes are overshadowed by constitutional arguments over federalism.[3] An emerging state activism against federal policy has become part of a larger debate about the normative underpinnings and meaning of American federalism.

State activism against the federal government has taken on a partisan tint as well. States' rights arguments are often made by conservative states to halt the implementation of federal laws and regulations within their jurisdictions, whereas more liberal states likewise invoke states' rights to protect their socially progressive laws that might be in conflict with national law and policy. Several examples are readily apparent. State policymakers in conservative states opposed to the Patient Protection and Affordable Care Act (ACA) passed by Congress in 2010 enacted legislation and used litigation to halt the implementation of the ACA within their jurisdictions. Similarly, conservative states that were opposed to the Environmental Protection Agency's (EPA) expansive regulations during President Barack Obama's administration also adopted litigation and legislative strategies to block the impact of the EPA's regulations locally. Conversely, more liberal policymakers in progressive states—who viewed the federal government as too slow and unable to address certain social issues such as same-sex marriage or the legalization of marijuana—passed laws that advanced more progressive policies in their states. Policymakers relied on states' rights arguments as well to sustain their own state-level policies that seemed to defy or run counter to national policy. These developments suggest that federalism is malleable or opportunistic; accordingly, "invocations of federalism tend to be spurred by specific substantive concerns" about public policy and are less about theoretical or normative debates about the structure of federalism.[4] Thus, conservative red and liberal blue state views on federalism have emerged and are

1 Christopher P. Banks & John C. Blakeman, The U.S. Supreme Court and New Federalism: From the Rehnquist Court to the Roberts Court 6, 68–69 (2012).

2 *Id.*, 78–100.

3 John Kincaid, *State–Federal Relations: Obstructive or Constructive Federalism?* in The Book of the States 25–35 (Audrey Wall ed., 2015).

4 Austin L. Raynor, *The New State Sovereignty Movement*, 90 Ind. L.J. 614, 618 (2015).

conditioned more by specific policy issues and less by historical and normative views on states' rights versus national power.[5]

The evolution of the Supreme Court's new federalism jurisprudence is significant because its present-day application is much different than its political origin. As discussed next, new federalism was not necessarily destined to become a province of the judiciary. But, when it did take hold in the Rehnquist Court era, its ideological and conservative purpose was to reinvigorate state sovereignty. While individual justices may have had their own ideological motivations for coalescing around new federalism principles, the legacy of their doctrinal shift is now less of an enduring judicial approach to federalism (although new federalism precedents are still very much a part of American constitutional law). Instead, the legacy of new federalism is now, in large part, a statement about how far state sovereignty arguments can be inserted into contentious public policy debates that span a wide range of issues, a phenomenon that has in turn resulted in increasing activism by states and interest groups to advocate for states' rights and their own political interests in the judicial policymaking process.

The intellectual development of new federalism

New federalism's intellectual heritage originated in the Nixon administration as part of a larger strategy for bringing about political change in the late 1960s and early 1970s. One of its main purposes, for conservatives, is to scale back the federal government's role in administering economic and social policies vis-à-vis the states.[6] In its original formulation, President Richard Nixon's political advisors saw it as a tool for constructing a domestic policy agenda that reconciles "the contradictory demands of dual sovereigns trying to coexist in one polity."[7] Neither Nixon nor his principal advisors, though, considered that new federalism represented a strict separation of co-equal federal and state sovereign spheres, as some "dual federalism" advocates, and sometimes the Supreme Court, insist upon. Instead, it was more in line with the ideals of "cooperative federalism" because it sought to forge a partnership between federal, state, and local governments through block grants, revenue sharing, and improved intergovernmental information systems.[8] For William Safire (Nixon's special assistant and speech writer) and apparently for Nixon himself, new federalism replaced "true federalism" (decentralization) with a system of "administrative decentralization in which all significant policies will be made in Washington with their administration left in state and local hands."[9] For many conservatives in the Nixon administration new federalism was more about administering national policy by the most local level of government possible, and not so much an ideological, revolutionary change in constitutional doctrine.

5 Robert Shapiro, *Not Old or Borrowed: The Truly New Blue Federalism*, 3 Harv. L & Pol'y Rev. 33 (2009). See also Kathleen M. Sullivan, *From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court* 75 Fordham L. Rev. 799 (2006).

6 Beverly Takahaski, *A New Paradigm for the Labor Movement: New Federalism's Unintended Consequences* 17 Int'l J. Pol., Cul. & Soc. 261 (2003).

7 Banks & Blakeman, *supra* note 1, at 51.

8 David b. Walker, the Rebirth of Federalism: Slouching Towards Washington 24 (2nd ed.1995).

9 Editor's Introduction, 2 Publius: J. of Federalism 95–97 (1972).

Safire's reform ideas were debated internally in the Nixon administration a series of internal unpublished "new federalist" papers.[10] Critics included "Cato," a pseudonym adopted by Tom Huston (a lawyer and special assistant) and "Publius" (Wendell Hulcher, Assistant Director of the Office of Intergovernmental Relations). Neither found administrative decentralization attractive, favoring instead classical notions of federalism, and both, tellingly, opted to leave the Nixon administration after the debate was settled.[11] While their voices were heard, the debate was ultimately resolved by the White House when it embraced the viewpoints of Safire and "Johannes Althusius" (or Richard P. Nathan, who wrote the essay under this pseudonym while in the Office of Management and Budget). Thus, the ideas of "Publius" and "Althusius" are a baseline for understanding new federalism's genesis because Safire ultimately became a principal voice in articulating Nixon's domestic agenda, while Nathan later served as Under Secretary for the Department of Health, Education and Welfare (the agency in charge of effectuating welfare reform), a defining administrative component of Nixon new federalism policy practice.[12]

In Publius' view, federalism cannot be characterized as a simple debate over centralized versus decentralized power. Instead, federalism was a more complex arrangement of public administration. In fact, new federalism was conceived as a type of "national localism," or a system of administrative decentralization that recognized the reality of centralization while returning power and governing decisions back to the states and its local citizens. Similarly, divisive claims of states' rights were dampened in order to highlight notions of state obligations that are fulfilled in a unified national interest; and, he hinted that the distribution of federal monies was an important element in preserving national unity and the diversity underlying state and local governance. As he explained, new federalism is:

> A sea-change in the approach to the limitation of centralized power- part of what is "new" in the new Federalism-is that "States' rights" have now become rights of first refusal. Local authority will now regain the right to meet local needs itself, *and gain an additional right to Federal financial help*; but it will not regain the right it once held to neglect the needs of its citizens. *States' rights are now more accurately described as States' duties*; this is a fundamental change in Federalism, removing its great fault without undermining its essential local-first character, and provides the New Federalists with two of their prime causes: the cause of regaining control, and the cause of fairness.[13]

As Nixon put it, "The essence of New Federalism is to gain control of our national destiny by returning control to the States and localities; [that is,] power, funds, and authority are channeled increasingly to those governments closest to the people."[14] Relatedly, under new federalism a national conscience, or "what most people" in the nation "believe is 'only fair'" emerges when administrative services are rendered in the states not only in accordance with local needs, but also national purposes and goals.[15]

10 *Id.*, 96.
11 *Id.*, 97. See also Cato, *Federalism: Old and New*, 2 PUBLIUS: J. OF FEDERALISM 116 (1972), and Publius, *In Support of Strengthening the American Federal System*, 2 PUBLIUS: J. OF FEDERALISM 138 (1972).
12 Editor's Introduction, *supra* note 9, at 96–97.
13 Publius, *New Federalist Paper No. 1*, 2 PUBLIUS: J. OF FEDERALISM 98, 99–100 (1972) (emphasis added).
14 *Id.*, 100.
15 *Id.*, 100–106.

With the conceptual framework set, Publius addressed specific policy areas where new federalism might be implemented. Welfare reform, and especially grants-in-aid and revenue sharing, were policy targets for New Federalist thinking, as was unemployment insurance and tax policy.[16] Following Publius, Althusius likewise defended new federalism principles and showed how it would work in practice. After first observing that President Nixon first used the term "new federalism" in the context of referencing the administration's revenue sharing plan in an August 1969 television address, Althusius wrote that the federal government is responsible for the type of welfare reform that allows for the transfer of income to those who need it in an equitable and need-based fashion, ostensibly through legislative proposals such as family assistance, food stamps, and a family health insurance plan. For its part, the federal government assumes a predominant role in regulating the post office, the draft, student aid, and environmental pollution control. In contrast, states manage areas of "responsible decentralization" that primarily fall into the realm of traditional state functions involving government services and policymaking. These include, among others, education, manpower, and public health. For example, under one Nixon initiative in 1969, the Comprehensive Manpower Act, federal authority is consolidated into the federal Department of Labor, but state governors and local mayors are given more control to plan for, coordinate, and administer manpower programs with "flexible [federal] funding, sensitive to State and local needs." Finally, new federalism embraces a robust revenue sharing component, a reform proposal that uses a refined federal income taxes and grants-in-aid program to give the states flexibility in determining it administrative policymaking priorities.[17] President Nixon echoed this sentiment when he said to the nation's governors that, "It's not only what we spend that matters, it is the way we spend it."[18]

Notably, Nixon's new federalism was designed to be pragmatic and not ideologically divisive. It was meant to encourage policymaking that met the needs of individuals—especially the poor and minorities—through national policies administered by state governments. New federalism was to merge national policy priorities with local concerns and, as such, opposed the "the artificial construction of regional, ideological, or ethnic blocs." Instead, it sought to "fuse two elements: a greater respect for conscience deeply examined, and a more compassionate understanding of the concerns of the individual in its local application."[19] Policies set by the national government can be applied by states and localities in ways that best fits their unique circumstances, thus facilitating the functions the federal government does well—like raising or borrowing money and managing foreign affairs—while persuading states to respond flexibly in deciding how to administers services—like implementing crime control and educational programs—that are attentive to national goals as well as local circumstances.[20] In an important sense, new federalism was set to be a relatively neutral mechanism for policy cooperation and implementation by national and state governments. Under a new federalism paradigm, the "old liberal-conservative and centralist-localist calibrations will lose meaning when applied to a fusion of certain elements of liberalism and conservatism, of central concern and local consent."[21]

16 *Id.*
17 Johannes Althusius, *New Federalist No. 3*, 2 PUBLIUS: J. OF FEDERALISM 133, 134–137 (1972).
18 Publius, *supra* note 13, 100.
19 Publius, *supra* note 13, 104–106.
20 *Id.*, 100.
21 *Id.*, 113.

The Nixon administration provided the intellectual heft and impetus for a rethinking of American federalism, and a more conservative Supreme Court provided the constitutional legitimacy. Several key appointments to the Court between 1969 and 1991 by Presidents Nixon, Reagan, and George H.W. Bush, including Justice William Rehnquist who was appointed by Nixon in 1972 and elevated to Chief Justice by President Reagan in 1986, created a critical bloc of justices who were inclined to interpret federalism in light of state sovereignty. Guided by Chief Justice Rehnquist, newly appointed Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas could often be relied upon to form a "federalism five" core of justices who were willing to protect state sovereignty. Other more liberal justices, such as John Paul Stevens and Stephen Breyer would occasionally provide votes in favor of new federalism outcomes too.

While changes to the Court's personnel were critical to establishing new federalism doctrine, its development was also bolstered in the 1980s by the Reagan and Bush administrations, which perceived it more as a political ideology and constitutional doctrine that protected states' rights. In contrast, Nixon thought federalism was a vehicle to achieve pragmatic, flexible governance.[22] Thus, as the Court was developing new federalism constitutional doctrine, the Reagan and Bush administrations provided support by heightening the ideological stakes through policy goals that sought to roll back federal power and that emphasized state autonomy and sovereignty.

The economic context of new federalism

Much of the Court's development of new federalism took place in the context of economic policymaking by Congress. Beginning with the New Deal, Congress has long sought to use its plenary powers over interstate commerce to regulate policy areas that traditionally fall under the states' police powers. The Court validated this approach in several New Deal era cases in which it upheld Congress' use of its commerce power to regulate labor relations, child labor, and agricultural production, among other things. For the Court, the power over interstate commerce was very broad when Congress used it to regulate activities within states that impeded national commerce. From the mid-1930s to the mid-1990s, the Court's expansive reading of commerce and federalism dominated constitutional doctrine until the Rehnquist Court began to place limits on the reach of federal interstate commerce power, especially if it affected the broad police powers of the states.

A few representative cases stand out. In several concurring and dissenting opinions as an associate justice, Rehnquist set the "long fuse" for new federalism in the 1970s, up to his appointment as Chief Justice of the United States Supreme Court in 1986.[23] In a series of contentious cases that addressed the constitutionality of extending the federal minimum wage to state and local government employees, Rehnquist orchestrated a more assertive role for the Court (and lower federal judges) that sought to protect state sovereignty. In *National League of Cities v. Usery* (1976)[24] the Court struck down Congress' attempt to force states to pay their workers the federal minimum wage. Then-Associate Justice Rehnquist, building

22 Banks & Blakeman, *supra* note 1, at 75.

23 Mark Tushnet, A Court Divided: The Rehnquist Court and the Future of Constitutional Law 277 (2005).

24 426 U.S. 833 (1976).

off of his lone dissent in *Fry v. United States* (1975)[25] (an earlier federal wage case), argued that federalism protects "traditional" state functions from federal control, and judges have the authority to delineate what those are in federalism litigation. Put differently, Congress overreached by passing a law that interfered with state functions and policy choices that were an inherent part of their sovereignty. The minimum wage issue arose again in 1985 when the *Usery* case was overturned by a very divided Court in *Garcia v. San Antonio Metropolitan Transit Authority* (1985).[26] This time, with Rehnquist in the minority, the Court ruled that since the "traditional state functions" approach to federalism was unworkable, states are best able to protect their interests through the national political process. *Garcia* emphasized what became known as the "political safeguards" approach to federalism, which was premised on the states' abilities to represent their own interests directly and indirectly in Congress and the executive branch.

Even though the Court's internal disagreements over federalism lingered throughout the 1980s and 1990s, shortly after *Garcia* was decided it became clear that enough justices were willing to return to Rehnquist's more robust protections for state sovereignty, *Garcia* notwithstanding. Thus, in a series of cases that concerned Congress' use of its plenary powers of federal spending or interstate commerce as means of regulating state policy, the Court gradually returned to a jurisprudence that more aggressively protected state sovereignty. One important case, *South Dakota v. Dole* (1987),[27] concerned Congress' use of its spending clause power to condition the receipt of federal highway monies by the states according to their adoption of a minimum drinking ages for alcoholic beverages to 21. Although seven justices approved of the constitutionality of the policy, several justices in the majority and dissent made clear that Congress could not use the receipt of federal money to coerce states into following federal policy. Thus, the Court concluded that Congress retained broad prerogatives over federal spending; yet those prerogatives were at some point limited by antifederalist notions of state sovereignty and state decision-making. *South Dakota* may not have been the clear-cut new federalism decision that conservative Court watchers hoped for, but subsequent cases certainly moved in that ideological direction.

Several cases after *South Dakota* the Court addressed other issues of state sovereignty and federalism. One, for example, concerned Congress' use of federal mandates to implement federal policy priorities through its interstate commerce power that regulated policy areas which historically fell under the realm of broad state police power. Thus, in *New York v. U.S.* (1992)[28] the Court struck down a provision of the Low-Level Radioactive Waste Policy Act of 1985 that forced states to take title to all low-level waste generated within the state, unless they entered a regional compact with other states to dispose of the waste collectively. For the Court, the Tenth Amendment prohibited Congress from using its interstate commerce powers to commandeer states to take ownership of nuclear waste. *New York's* anti-commandeering principle was extended in *Printz v. U.S.* (1997)[29] when the Court invalidated a provision in the Brady Handgun Violence and Prevention Act that forced states to administer temporarily background checks for firearm purchases pending the creation and implementation of federal process for conducting the checks. In other

25 421 U.S. 542 (1975).
26 469 U.S. 528 (1985).
27 483 U.S. 203 (1987).
28 505 U.S. 144 (1992).
29 521 U.S. 898 (1997).