New Federalism

Introduction

Theodore W. Ruger*

One of the already evident legacies of the current Supreme Court is its imposition, or reimposition, of several judicially enforceable restraints on national governmental authority. In the past decade the Court has propounded a "new federalism" primarily through a limited cluster of related doctrines—arising from the Constitution’s Commerce Clause,¹ the Tenth and Eleventh Amendments,² and Section Five of the Fourteenth Amendments—³ in which it has found and applied meaningful limits on Congressional power. Chief Justice Rehnquist has described the Court’s project in these cases as delineating, and then policing, the "distinction between what is truly national and what is truly local."⁴

This federalism turn has been well-noticed and amply critiqued by the legal academy, as the Court’s opinions have spurred continued debate over the proper contours of state and federal sovereignty. The debate has been vigorous, and it has been voluminous: since Gregory v. Ashcroft⁵ in 1991 signaled the coming federalism revival, almost 1000 academic law journal articles have appeared with the word "federalism" in their titles (and many more have addressed the subject without such titular reference).

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* Assistant Professor, University of Pennsylvania Law School.

6. This figure was derived from a Westlaw search on July 21, 2004, in the "Journals and
For all of this existing discourse, several political and legal developments in the past two or three years have reinvigorated the debate about federalism in ways that complicate and may even invert opinions about the proper allocation of federal and state authority among those in the academy, on the bench, and in broader civic society. First, the terrorist attacks of September 11, 2001, and the national response to those actions have significantly altered the terms of the federalism debate. In terms of domestic security policy, the push toward integration of federal, state and local law enforcement functions has done much to undermine the *United States v. Lopez* Court's assertion that it is possible (and normatively desirable) to identify and segregate distinct zones of local and national authority. The Justices themselves are not immune from such influences, and it is difficult, for instance, to imagine that this Supreme Court would, in a case of first impression, issue an opinion like that of *Printz v. United States* today. In *Printz*, a 1997 case, the Court held that even a minimal, and temporary, mandate requiring state law-enforcement officials to assist in conducting background checks prior to gun sales constituted unconstitutional "conspeech[on]" by Congress, a formalism that is far removed from the more pragmatic, integrated norms of post-9/11 law enforcement.

A second notable development in the most recent few years has been the Supreme Court's own willingness to halt the momentum of its federalism jurisprudence. In *Nevada v. Hibbs*, a six-Justice majority brushed aside Nevada's sovereign-immunity defense to hold that Congress could authorize individuals to sue states to enforce the Family and Medical Leave Act. In a major decision in June 2004, the Court held that a federal statute (ERISA) preempted state tort lawsuits against managed care organizations, thus assuring that a major component of health law and policy was divorced from state control and left with Congress and the federal courts. To be sure,
politics. Most notable in this respect is the ongoing debate over same-
sex marriage, where arguments for individual states’ freedom to
define marriage in accord with local norms predominate the
opposition to federal proposals to define marriage as exclusively
heterosexual.\textsuperscript{14} States have taken the lead in regulating such pressing
health policy areas as prescription drug pricing and managed care,
and advocates for patients’ rights have urged greater state regulatory
autonomy against claims of statutory or Dormant Commerce Clause
preemption.\textsuperscript{15} The Supreme Court has agreed to review a case next
Term that asks whether medical marijuana grown solely for
medicinal use (not for sale) is beyond the federal Commerce Clause
regulatory power.\textsuperscript{16} The character of these new substantive claims
have invigorated the traditional federalism debates, and may lead
some academics—perhaps even some Justices—to modify the
positions taken in years past.

Taken together, all of these developments over the past three years
illustrate that there remain many open questions regarding the proper
scope of federal and state authority. This symposium reflects the
vitality of that ongoing debate, as participants draw on various
perspectives to address a diverse array of issues.

Erwin Chemerinsky’s essay takes note of one of the recent
developments described above—the Court’s apparent braking of its
push toward limited federal power in the 2003 Nevada v. Hibbs\textsuperscript{17}
decision. In Hibbs, the Court surprised many observers by holding
that Congress could, consistent with its powers under Section Five of
the Fourteenth Amendment, make states amenable to suits brought by
individual citizens in federal courts. Chemerinsky applauds the
Court’s result in Hibbs, but illuminates various problematic features
of its reasoning in that case and in related cases. The Court has

\textsuperscript{16} See Rauch v. Ashcroft, 312 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2040 (2004).
\textsuperscript{17} 123 S. Ct. 1972, 538 U.S. 721 (2003).
permitted Congress remedial authority over some kinds of
discrimination but not others, and in Chemerinsky’s view has not
adequately justified its categorical distinctions. In addition to its
skillful substantive critique of the Court’s doctrinal framework, the
essay reminds us that federalism cases, although nominally about
vertical (federal-state) allocation of authority, also present a
horizontal separation-of-powers question: which entity, the Court or
Congress, is the proper arbiter of the boundaries of federal power?
Despite support in the academy and among some dissenting Justices
for a deferential attitude toward congressional choices in this area, the
majority of the Court has cast itself as the ultimate authority on
the federal-state allocation of power, and nothing in Hibbs suggests
any change in this position.

Such judicial supremacy does not exist in the subconstitutional
context of statutory interpretation, where Congress is free to revise,
or outright overrule, the Supreme Court’s construction of a statute.
But as David Schwartz’s symposium essay underscores, such
statutory decisions can have a profound impact on the federal-state
balance of power. A vast amount of individual and commercial
behavior in the United States is concurrently regulated by both states
and the federal government. A federal statute that preempts related
state regulation effectively strips the state of a component of its
active sovereignty vis-à-vis applied to that field. And although the decision
to preempt by statute is formally vested in Congress, many federal
laws contain preemption clauses that are vague and contradictory,
such that federal courts have great interpretive latitude in deciding
the preemptive effect of a national regulatory scheme. With particular
focus on the Federal Arbitration Act, Schwartz assesses this
subconstitutional dimension of the Court’s federalism jurisprudence,
and finds—as others have—that this Court and other federal courts
have been significantly less solicitous of state sovereignty in
preemption cases than in more prominent constitutional decisions. In

15 See, e.g., Ruth Colker & Kevin Scarlet, Dying States? Involution of State Action
During the Rehnquist Era, 88 N. Y. L. Rev. 1401, 1543-45 (2002); Daniel J. Mitchell, The
Schwartz’s account, it fails to state judges to more robustly protect state regulatory autonomy when questions of preemption arise.

Both Professor Chemerinsky and Professor Schwartz critique the choices the Justices have made in specific federalism cases. Central to such normative critique is the idea that the Justices, in those cases and others, possessed meaningful interpretive discretion to choose a different (and better) result. Occasionally defenders of the Court’s choices, even the Justices themselves, will point to a reading of the original choices the Constitution’s Framers made as requiring a certain judicial result. Such originalist claims, which deny meaningful contemporary discretion by judges, rest on two related propositions—first that there is a clear historical intent on the issue at hand, and second that if clear intent exists modern judges are obliged to follow it. Whatever one’s position on the second point, Conrad Weiler’s essay casts significant doubt on the former in the context of the federalism debate. In his detailed survey of Framing-era conceptions of such terms as “commerce,” and “economic” power, Weiler illustrates how contested and unclear historical attitudes on these questions were. And as Weiler’s account shows, to the extent any clear eighteenth-century consensus on these issues is discernable at all, the Court’s jurisprudence is unsheltered from those original assumptions.

These first three contributions, and most discussion of federalism generally, relate in one way or another to the allocation of authority between two different sovereignties—state and federal governments. This is neither surprising nor inappropriate, as both the Court’s jurisprudence and the Constitution’s sparse textual commands speak of an allocation of authority between two different kinds of sovereignties. John Brigham’s paper reminds us, however, that federalism-style concerns are relevant even in the allocation of decisional power within a single unitary sovereignty spread over a large enough area. Stripped from the specificities of the American constitutional tradition, several of the most persuasive abstract justifications for federalism would support a degree of decentralized decision-making in the administration of national power. In a polity where preferences are heterogeneous and distributed in uneven geographic fashion, devolution of authority to smaller local units may increase overall policy satisfaction. Moreover, as famously noted by
Justice Brandeis, disaggregation of regulatory authority permits small-scale policy experimentation and innovation at relatively low social cost. Both of these theoretical considerations apply full well in the dual sovereignty context, and are often invoked in support of state power, but their normative support for decentralized authority is not dependent on a dichotomous governmental structure.

The benefits of decentralization have long been evident with respect to individual United States Attorney’s offices, which historically have had wide independent latitude to make their own investigation, charging, and sentencing decisions in most cases. Professor Brigham’s paper takes up this concern with respect to the ultimate prosecutorial decision—whether or not to seek the death penalty. As he notes, the coupling of a new federal death penalty with a centralized push for uniform application from the Department of Justice has resulted in a clash of norms. The federal death penalty is now being sought and applied even in regions of the country where local preferences—clearly expressed in state law and practice—are against the death penalty. His essay raises a number of interesting possibilities about how this clash of sovereignties might play out in the context of American federalism.

Taken together, the contributions to this symposium demonstrate that several intriguing and difficult questions about the federal-state allocation of power remain even as we apparently near the end of the particular Rehnquist Court’s federalism initiative. New Justices on the Court and new initiatives by federal and state elected officials in the future will reshape this debate in ways that are perhaps unexpected and currently unforeseen. That the essays here are topically and methodologically diverse exemplifies the variety of this ongoing debate, which promises to continue throughout the next decade and beyond.