Federalism and the Challenge for Human and Civil Rights

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Devolution of governmental power to sub-national constitutional entities is a growing trend operating in tension with the other major trends in international law and policy, human rights and globalization. While federalism speaks to local control and popular sovereignty, the other trends speak of integration across state boundaries of universal rights, multi-jurisdictional trade, and common currencies. Of course, the three trends are, in various ways equally at odds with one another. But federalism has the appeal of being purely structural, suggesting that it is value neutral, unlike the substantive rights of the human rights regime and the materialism of globalization. Federalism promises though structure to promote justice by giving the governed control over their lives, just what both human rights and globalism are said to take away.

But federalism is not so value neutral. Even if it was, it is a governmental system subject to manipulation and abuse. I have been asked to focus on the more problematic side of federalism – the legacy of states rights as an example from the United States of the more unsavory side of federalism. I wish to suggest that federalism is dangerous in certain context

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particularly to minority populations whose rights might be systematically abused, and which abuses might be insulated by a federal structure.

I. A Primer On the History of American Federalism

The history of the American federal system illustrates particular problems with federal systems. Fundamentally, federalism was birth in the effort to preserve black slavery, revived in order to revive many aspects of the slavery economy two decades after the American Civil War, and has been the main tool employed to limit Civil Rights law in recent years. These problems date to the very beginning of the United States and represent integral difficulties that any federal system must overcome. The longevity of this problem in the American experience and the particular nature of federalism's conflict with individual rights in this context will be the focus of my contribution, along with thoughts about the lessons that can be drawn from the American situation.

A. Federalism in the Early United States

In first eighty years of the U.S. Constitution, federalism disputes were apparent mostly in questions about the power of the federal government to create independent institutions and of the federal courts' power to review state court action. The U. S. Supreme Court in this period consistently affirmed the power of the federal government to create national institutions not mentioned in the Constitution. Prominently, it decided in *McCulloch v. Maryland*,[2] that the national government had the power to create a Bank of the United States and that the state of Maryland could not tax the bank. Subsequently, the Court would have to decide the scope of the

[2]17 U.S. (4 Wheat.) 316 (1819).

bank's legal character[3] and the scope of the Court's own jurisdiction to hear disputes involving the bank.[4] In each of these cases, the Court upheld the federal power against the state claims that federal authority was limited.

Conflicts between federal and state judicial power were also resolved in favor of federal power. In *Martin v. Hunter's Lessee*[5] the Court rejected a state supreme court argument that the national supreme court lacked jurisdiction to review its decisions. The Court found this authority internet in the Constitution. This power of review was also affirmed in application the state criminal convictions, thus cutting to the core of state sovereignty claims.[6]

The basic balance struck by the Court on both of these questions was to affirm that the Constitution vests great power in the national government while interpreting the exercise of that power (and the actual authority vested in courts and other institutions) relatively narrowly. These decisions, though significant in determining the structure of the American federal system, were not as disruptive of state authority as they might have seemed. The actually existing

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[3]Bank of United States v. Planters, 22 U.S. (9 Wheat.) 904 (1824).

[4]Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738 (1824).

[5]14 U.S. (1 Wheat.) 304 (1816).

[6]Cohens v. Virginia, 19 U.S. (Wheat.) 264 (1821). See generally, David Currie, the Constitution in the Supreme Court: The Powers of the Federal Courts, 1801-1835, 49 U. Chi. L. Rev. 646 (1982).

federal government during this period was quite small and most of the business of American government continued to occur at the state level for many more decades.

The biggest question of the period – the relation of power between the states and the national government to regulate or restrict slavery – was suppressed, however. The Constitution's ban of slave importation after 1808[7] and the complicated electoral apportionment system[8] were designed to maintain a balance of power between slave and non-slave states.[9] Federalism, in this way, made the union possible, but did so precisely by facilitating the continuation of slavery in Southern states.

[7]U. S. Constitution, Article I, Section 9.

[8]U. S. Constitution, Article I, Section 2, provides that slaves, who could not vote, would yet be counted as 3/5 of a person for the purposes of apportioning representative districts and assessing direct taxes. This system also had the consequence of determining the weight given votes for president under the Constitution's electoral college system. See U.S. Constitution, Article 2, Section 1(2), Amendments 12 & 23.

[9]See generally, Paul Finkelman, Slavery and the Founders: Race and Liberty in the Age of Jefferson (2001).

This Constitutional structure guaranteed that slave states would mostly control national government,[10] thus delaying mortal conflict over the issue until Northern states began to assert *their* claim to sovereignty by defying the Constitutional obligation to return escaped slaves to their owners.[11] Controversies related to perceived weak enforcement of the Fugitive Slave Acts of 1793,[12] and the controversial *Dred Scott v. Sandford* decision[13] triggered the ultimate march

[10]Southern states controlled the election of Presidents during the antebellum period. So great was the distortion to the electoral college system wrought by weighting southern votes according to 3/5 of the slave population that could not vote, that Northerners derisively called President Jefferson a more offensive version of "the Negro President." See Gary Wills, "The Negro President": Jefferson and Slave Power (2003).

[11]Article IV, Section 2(3) provides that "No person held to Service or Labour in one State, under the Laws thereof, escaping to another, shall, in Consequence of any Law or Regulation therein, be discharged from such Service or Labour, but shall be delivered up on Claim of the Party to whom such Service or Labour may be due."

[12]Cf. Prigg v. Pennsylvania, 41 U.S. (16 Pet. 539 (1842) (upholding Fugitive Slave Act in conflict with 1826 Pennsylvania statute criminalizing seizure of escaped slave).

[13]60 U.S. (How.) 393 (1857) (holding, inter alia, that black Americans were not citizens of any state, that their status was a question of state law, and that sojourn in free territory did not make a slave free).

to civil war. The irony of Southern states invoking *national power* during the fugitive slave controversy to enforce state independence to preserve slavery, is explained by the crisis created by territorial expansion of the United States westward. This expansion threatened to disrupt the balance of power between free and slave states. The resulting attempt of Southern states to secede from the Union and the Civil War to prevent the splintering of the government made it impossible to avoid the problems of conflict between federalism and individual rights.

B. Restoring Federalism in the Post-Bellum Period: The Unsavory use of Federalism

Respect for "state's rights," a slogan invoked prior to the Civil War in favor of states' sovereign authority to maintain slavery, became a signal of resistance to national consolidation after the war.[14] The ratification of the Fourteenth Amendment of the Constitution seemed to fundamentally change the federal structure of the United States in favor of enhanced national power. However, the Supreme Court of the late 19th Century resisted this view of the Fourteenth Amendment,[15] invalidating national legislation based upon the Fourteenth Amendment on the ground that the Amendment had not fundamentally altered the original federal structure.[16] The

[14]The Compromise of 1876, in which the Supreme Court participated – with Justice Bradley casting the deciding vote – and which brought and end to the post-war Reconstruction period and its efforts to protect the rights of newly freed slaves, was premised in restoring states' rights, and southern racism. Brent E. Simmons, The Invincibility of Constitutional Error: The Rehnquist Court's States' Rights Assault on Fourteenth Amendment Protections of Individual Rights, 11 Seton Hall Const. L.J. 259, 365-67 (2001).

[15]The Court read the Amendment very narrowly, reviving a robust federalism, doubt about which had been cast by the Fourteenth Amendment's apparent nationalization of civil rights and liberties. See, e.g., The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873).

[16]The Civil Rights Cases, 109 U.S. 3 (1883) (Congress without power to prohibit racial segregation in public accommodations under Fourteenth Amendment); United States v. Harris,

Court also reaffirmed the balance of power between states and the federal government in the context of relative judicial power[17] and the scope of federal judicial power.[18] Additionally, through the Court's substantive validation of state enforced racial segregation the Courts helped bring an end to the post-Civil War Reconstruction period.[19] By the end of the Nineteenth Century, the "state's rights" argument had prevailed, raising problems of federalism that would extend well beyond the context of individual civil and human rights.

C. The Civil Rights Period: Enforcing Rights and Preserving Federalism?

From the end of the 19th Century to the middle of the 20th Century the United States maintained a system of apartheid, commonly known as Jim Crow. Resistance to that system

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106 U.S. 629 (1882) (congress without power to punish private action under Fourteenth Amendment); United States v. Cruikshank, 92 U.S. 542 (1875) (federal criminal law punishing lynching beyond Congressional power granted by fourteenth amendment).

[17]E.g., Murdock v. City of Memphis, 87 U.S. (20 Wall) 590 (1875)(reading ambiguous grant of Supreme Court appellate review authority narrowly to exclude from Supreme Court Appellate power, decisions resting on "adequate and independent state ground.").

[18]Hans v. Louisiana, 134 U.S. 1 (1890)(affirming a broad view of state sovereign immunity from suit).

[19]See The Civil Rights Cases, 109 U.S. 3; Plessey v. Ferguson, 163 U.S. 537 (1896).

reveled limitations in federalism with respect to civil and human rights. Though the system of Jim Crow has been abandoned, the civil rights apparatus created to address its consequences continue to present conflicts with the presumptions of federalism.

In 1954 the United States Supreme Court embarked on a renewed effort to enforce civil rights under the Constitution. It had made meager efforts to enforce civil rights before 1964,[20] but in *Brown v. Board of Educ.*,[21] its efforts changed in form and scope. For the next twenty years, the Supreme Court would create a system allowing individuals subjected to discrimination, deprived of life, liberty or property without due process of law, or curtailed in the exercise of religious freedom, free speech, or the right to privacy, to enforce their rights against government agents and sometimes private parties.

This regime challenged state sovereignty in at least three significant ways. First, it allowed suits against state and local officers, municipal governments, and sometimes the state itself, that required payments from the public fisc, enjoined the operation of often popular government programs, and in some cases put federal courts in direct control of state government institutions. Second, the causes of action permitted by the Supreme Court tended to supplant

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[20]Consider, e.g., Shelley v. Kramer, 334 U.S. 1 (1948)(invalidating judicial enforcement of discriminatory restrictive covenant); Hill v. Texas, 316 U.S. 400 (1942)(prohibiting discrimination in selection of juries); Yick Wo v. Hopkins, 118 U.S. 356 (1886)(prohibiting discriminatory application of municipal zoning ordinance); and Strauder v. West Virginia, 100 U.S. 303 (1879)(prohibiting discrimination in selection of jury).

[21]347 U.S. 483 (1954).

overlapping state law, depriving states of traditional exclusive authority over areas like education, property rights, and criminal law. And third, the Court was forced to sometimes abandon traditional notions of comity in its relationship with state courts it suspected were antagonistic to rights enforcement.

Though the Court's decisions had a significant impact on state sovereignty, the Court was, throughout this period, deeply concerned with the threat to the federal balance its decisions represented. It sought to balance federal rights and state sovereignty by relying on Congressionally authorized grants of rights and causes of action as the basis for its action.[22] However, this system proved insufficiently restrictive of federal judicial power according to its critics[23] (and it didn't even address Congress' broad power under this system to broadly preempt state law). Rather, discussion came to be focused on methods of interpreting Constitutional norms that might restrict the powers of the Courts.[24]

It is in this context that the Court has recently Constructed a "New Federalism," characterized by greater deference to state authority, newly recognized limitations on Congressional power, and, ironically, greater assertion of authority by the Supreme Court in interpreting the Constitution. Given the legacy of states' rights in American history, many have

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[22]I have written extensively on this effort. See John Valery White, Vindicating Rights in a Federal System: Rediscovering 42 U.S.C. § 1985(3)'s Equality Right, 69 Temple L. Rev. 145 (1994). See also, John Valery White, Foreword: Is Civil Rights Law Dead?, 63 La. L. Rev. 609 (2003); John Valery White, The Activist Insecurity and the Demise of Civil Rights Law, 63 La. L. Rev. 785 (2003); and John Valery White, Brown v. Board of Education and the Origins of the Activist Insecurity in Civil Rights Law, 28 Ohio N. L. Rev. 303 (2002).

[23]Consider the discussion in, Frederick P. Lewis, The Context of Judicial Activism: The Endurance of the Warren Court Legacy in a Conservative Age 55-72 (1998).

[24]Id.

come to regard the New Federalism as a specific threat to civil rights and civil liberties protection by the federal government.[25]

II. Federalism and Individual Rights

Federalism, like any system of government organization is subject to being used in the advancement of other governmental aims. The benefits attributed to federalism, then, must be understood alongside the potential abuse of that system to achieve counter-productive ends. Indeed, there are structural and systemic limitations to a system of federalism that present problems in its operation. The American experience implies a major one – the tension between rights enforcement and popular sovereignty – but there are others, perhaps inherent to the operation of federalism in certain contexts.

A. Areas of Conflict

[25]See, e.g., Victor Andres Rodriguez, Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance? Section 5 of the Voting Rights Act of 1965 After Boerne: The Beginning of the End of Preclearance? 91 Cal. L. Rev. 769 (2003).

The problems of federalism can be categorized as structural, systemic, and substantive. **Structural problems** are boundary maintenance problems – when are specific issues reserved to the local government, or when can the national government articulate substantive rules. In the line of cases beginning with *Erie Railroad v. Tompkins*[26] in 1939 the Supreme Court struggled to limit the national role in private law, despite a Constitutional grant of jurisdiction over such disputes. At root, these disputes reflect a conflict between federalism and the "scientific" conception of private law, whether associated with a civil code or common law. That is, the notion that there is a unified body of substantive law that transcends jurisdictions is at odds with federalism which implies that jurisdiction (even sovereignty) is the key conceptual category.

[26]304 U.S. 64 (1938). *Erie* was followed by several significant decisions: Sibbach v. Wilson, 312 U.S. 1 (1941); Guaranty Trust Co. v. York, 326 U.S. 99 (1945); Hanna v. Plumer, 380 U.S. 460 (1965). These decisions arguably changed *Erie*, but each addresses the effort to maintain a line between state and national lawmaking power.

Erie and its progeny granted to states predominant authority for articulating substantive law unless the Constitution expressly granted the national government authority to preempt state law. Recent Supreme Court cases extend this notion by limiting the Fourteenth Amendment as a basis for authorizing national preemptive power.[27] However, this specific American resolution masks the key repudiation of transcendental substantive law. For supporters of rights, then, this vision of federalism rejects the fundamental presuppositions of human rights law – that such law attaches to the fact of human existence rather than to sovereignty.[28] American civil rights law has, as a consequence, been rooted in Constitutional rights that presumably operate against states only as a consequence of their acceptance of the Constitution. That is, the substantive problems discussed below are raised even as the greater repudiation of human rights, as such, is hidden.

Systemic problems concern the respect and deference to be afforded common institutions in the federal relationship. These problem operate against the general background of comity and private international law. However, in the American experience, the use of such principles to shield state decisions from national review has tended to force national courts to engage in the unsavory business of judging the legitimacy of state institutions. The problem is that, in the enforcement of nationally-based public values, a system of federalism implies that there ought be deference to state enforcement mechanisms and that efforts ought be taken to

[27]See, e.g., City of Boerne v. Flores, 521 U.S. 507 (1997).

[28]The fundamental principle of human rights law is that humans have rights solely by virtue of being human. See, e.g., Louis Henkin, The Age of Rights 2 (1990).

avoid invalidating state substantive law. This possibility that deference to state authority can be abused necessitates the establishment of standards for judging state behavior. This very process is potentially unseemly and almost assuredly at odds with comity and traditional standards of private international law. Thus the U. S. Supreme Court struggled to limit its intervention during the Jim Crow period in response to claims that states were violating constitutional rights.

Initially the Court focused on evidence suggesting that the state government was untrustworthy. This construction allowed the Court in *Yick Wo v. Hopkins*[29] to determine that a local government was motivated by ill motives and to imply as much in *Norris v. Alabama*.[30] In the latter case, the Court was motivated to depart from its own standards of deference to trial court findings of fact by the evidence that those findings were being manipulated to ensure conviction of an accused rapist. On the other hand in cases like *Hughes v. Superior Court*,[31] the Court's view that a state was trustworthy, motivated it to refuse a claim of rights violations against the state.

Later, when the Court adopted a more aggressive approach to enforcing rights, the Court seemed to believe that allegiance to structural limitations on its power could circumscribe the degree to which it cast dispersions on state autonomy. However, the considerable breadth of substantive rights undercut any advantage this approach might have offered. Litigants seeking to enforce perceived rights forced courts to decide whether those rights existed and thus repeatedly raised the conflict between state and national governments. Any hope that the question of

[29]118 U.S. 356 (1886).

[30]294 U.S. 587 (1935).

[31]339 U.S. 460 (1950).

substantive rights conflicts could be avoided was dispelled. The Court was left to decide between substantive claims, choosing which constitutional rights are more or less important – and which issues should be left to the states.

In this way, civil rights law has raised a constant conflict over the substance of federalism. These **substantive problems** involve which rights exist and how broadly should they be defined. Part of this conflict is familiar; substantive national rights restricting government action presents a direct conflict with state sovereignty and the exercise of state prerogatives. But related to this is a different and no less difficult issue: how are enforcement mechanisms to be structured in light of potential conflicts between national and local governments. In response American courts have restricted the scope of enforcement causes of action by imposing restrictive state of mind or causation requirements on federal rights.[32] They have created immunities that free local officers[33] and municipalities[34] from liability for rights violations. And, they have denied that certain violations constitute civil rights violations (as opposed to private law delict).[35] Federalism has been the fundamental concern which illuminates these substantive interpretations of American civil rights law, often to the detriment

[32]See, e.g., City of Sacramento v. Lewis, 523 U.S. 833 (1998) (requiring showing of behavior which "shocks the conscience" to prevail in substantive due process suit). The Court has also required that the narrowest ground for recovery be relied upon, even if its requirements mean plaintiff will lose. See, Graham v. Connor, 490 U.S. 386 (1995).

[33]See, e.g., Saucier v. Katz, 533 U.S. 194 (2001).

[34]Though municipal corporations have no immunity from suit, as such, see Owen v. City of Independence, 445 U.S. 622 (1980), the lack of vicarious liability and strict requirements of a causal link between municipal policy or custom and the action in question, see Board of County Commissioners v. Brown, 520 U.S. 397 (1997), that has the same effect as a qualified immunity for municipal corporations.

of that body of law.

B. Minorities and Federalism: Some Thoughts

The presence of significant minority populations present potential problems for rights enforcement in federal states. In the American experience the problems of federalism have very much been related to the large black American minority population in the country. States's rights and much talk of federalism is intimately bound to slavery, Jim Crow, and discrimination against black Americans. This is largely because, until the second half of the Twentieth Century, the overwhelming majority of black Americans lived the 11 Southern states where they were concentrated in "black belts" and subjected to second class citizenship. This put efforts to protect the rights of that minority in direct conflict with the federalism-based power of the nominal white majorities in those states.

Today, the black population is more dispersed, but since black Americans still constitute significant percentages of the population in Southern states, and because large black American populations reside in largest metropolitan areas of the country, the conflict between minority rights and federalism continues. In recent years, the rapid growth of the Latino population in the United States, and their concentration, like black Americans, in several states and in many urban centers, potentially present similar federalism challenges.

However, extrapolating from the American situation is inherently problematic. The nature of minority/federalism problems tend to be very specific to the history and ethnic mix of

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[35]See, e.g., Paul v. Davis, 424 U.S. 693 (1976).

the countries in question. It is likely that federal states are *more* beneficial to minority populations in certain contexts than a unitary state. In other contexts it is not so clear that federalism is a benefit; in yet others, like the United States, federalism is a tool used to resist progressive social change. At least three distinct situations can be distinguished.

1. Disempowered Majorities who are Minorities in the Nation

Where a large minority group predominates in a certain geographic area within a larger state, the creation of a sub-national unit might make possible a national unity that would not be possible under a unitary form of government. This type of sub-national constitutionalism resembles the decolonialization process and emphasizes popular sovereignty and self government. Rather than being in conflict with rights enforcement, it has the potential to increase rights enforcement as self-government helps localize universal norms.

The greatest risk in this context is that the national unit will disintegrate. However, it appears that the risk is muted where sub-national units would not be especially viable standing alone. That is, there are independent factors at work which work against splintering in some circumstances. The likelihood of state disintegration is heightened, however, where there are deep, longstanding ethnic tension between citizens of the putative sub-national entity and the majority population of the state at large. This risk is further heightened when the sub-national group shares an identity with or allegiance to a nearby state. The residents of the potential sub-national entity might wish to join or align itself with a neighboring state or that state might desire an independent regional ally. In both cases, sub-national constitutionalism risks promoting the demise of the larger state in a context of ethnic violence and terror.

2. Captive Minorities

Where minority groups are geographically concentrated but in no areas constitute a substantial enough population to support a viable sub-national unit, federalism becomes dangerous in a different way. In this circumstance, federalism is likely to be among the tools used to oppress the minority population. The devolution of power to sub-national units empowers the majority to manifest local prejudices with the backing of national government. In sub-national units with large minority populations, inter-ethnic tension that emerges can be decisively resolved by a sub-national majority which is not necessarily held to the public values and norms of the national government. Efforts of the national government to intervene on behalf of vulnerable minorities is immediately complicated by the substantial federalism issues that intervention raises. This is the context that has generated the American problems discussed above.

3. Hostage Minorities

Where minorities are widely dispersed, constituting nowhere a large population, devolution of power to sub-national units has few inherent consequences for minority rights. Clearly, minorities might be better protected in some jurisdictions than in other. However, this would be less the consequence of federalism than regional variation. Indeed, the same variation might occur without any real difference in a unitary system of government. The main risk of this system, lies in the chance that, if there is regional variation in treatment, it will force the concentration of particular minority groups in certain regions where there is better treatment and

greater protection from abuse.

C. Global Power and Trans-border Problems

The American case also implies that the trends toward economic integration and globalism might differentially effect federalism. The different context in which integration and globalism effects federalism might have different consequences for rights enforcement as well.

The tendency toward globalization might have the effect of promoting the concentration of power in a national government where the national government acts as a broker of national relationships with global economic players. In this type of state, national economic power (and states' inability to regulate national and transnational economic players) would tend to destroy sub-national independence. The resulting centralized state might not necessarily impinge on rights, but there would be no checks on its behavior if it did.

In some states, however, certain regions' power exceeds that of the national government. A federal arrangement might facilitate a powerful sub-national entity dominating globalist economic relationships. Not only would that state likely broker its own economic deals, its relationship would tend to dictate the nature of the national and sub-national economic relationships. There is no necessary effect on rights enforcement in such an context, but we might expect the local jurisdiction to resist public values of the national order, further setting itself apart from other regions and destabilizing the state. Formalization of such power relationships through a federal state would seem to help avoid deterioration of the state, but by allowing a single unit to go it alone, the federal structure might aggravate the rights protection issue. That is, sub-national units might, outside a true federal establish strong, independent

relationships with global economic interests. The absence of a federal system would constrain it in its efforts to sacrifice its citizens' rights in the name of commerce. A federal system might not be as effective at constraining these tradeoffs. So while this situation seems neutral as to rights, there are some substantial risks related to federalism in this circumstance.

The case of a true federal system promises to be an interesting check on globalism and the risks that globalism might disrupt rights enforcement. A true federal state is mostly resistant to the likely disruption of globalism, if by true federalism we mean that power is shared by federal and state governments. Where local authorities exercise the power of both national and sub-national governments and promote the public values of each, the benefit of local sensitivity is combined with the full weight of federal authority. In this context, the potentially disruptive effects of globalization can be diffused.

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Sub-national constitutionalism is a promising tool to promote social justice and political legitimacy. However, these outcomes are not inherent to the system. Rather, they are in some cases facilitated by the disbursal of power among strong and independent governments. It is the balance that is key. The American experience, however, shows that such a balance is very difficult to maintain, as different interests are able to capture arguments for national or sub-national governance and employ them in the service of their own interests. Once states become too dominated by either national or local interests, it is quite difficult to change it, often with dire consequences for the rights of the citizens of those states.