Federalism, Judicial Independence, and the Power of Precedent

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In this essay I discuss the importance of judicial independence to federalism. After setting the stage with a brief argument on the inadequacy of political safeguards to protect federalism and the usefulness of judicial safeguards, I turn to a discussion of judicial independence and two necessary conditions for judicial safeguards. In the final section I propose an argument about the power-creating force of precedent.

I. Safeguarding Federalism

A. The Political Safeguards Argument

Although we remember Federalist 51 as a defense of separation of powers, in it Madison describes a parallel system for maintaining the power balance between state and federal governments: "the different governments will control each other, at the same time that each will be controlled by itself." (51, par. 9) In Federalist 39, Madison describes how the constitution is both federal and national: by federal he means that the states are involved in the central level decision-making, and he cites the Senate, the electoral college, and the states= involvement in ratifying the constitution, as well as the "natural attachment" (Fed. 46, par. 2) that citizens have to their own state, as evidence.

The potential for the states to be involved in central decision-making has been invoked by jurists to argue that the court need not play umpire between state and federal governments. Wechsler (1954) neatly turns the tables with an argument that Congress, rather than threatening state power, helps to protect it. Not only does the Senate serve as a forum for states to express

and protect their interests, but even the House, through state control of elections, can be twisted to represent state interests. Choper (1980) urges us to consider the court's finite institutional capital: as a non-elected body, the court has limited leverage; it is best to reserve what power it has, and not test its legitimacy, by allowing it to focus on the protection of individual rights. In agreement with Wechsler, he argues that the court need not concern itself with federalism disputes because the states are protected through political institutions; he adds to Wechsler's list lobby organizations such as the National Governors' Association. Kramer's (2000) political safeguards argument is not so much an addition to Wechsler as a transformation of it. He argues that it is the informal political institutions, particularly the political parties, that ensure state institutional input in the national decision-making process. Riker (1964) called the court the "handmaiden" of the executive: it can aid the executive to centralize control, but it cannot stop the executive from doing so if it disagrees. In sum, according to the political safeguards argument, if the court is involved in federalism disputes it should be to adjudicate claims that a state government has shirked on its duties or exceeded its power; it need not review federal government action as the central government is already reined in by the political process.

B. Federalism's Structural Weakness

The political safeguards argument is not without detractors. Critics cite the weakening of the party system, the evidence that once politicians move from state to federal office they no longer behave as state officials, the Seventeenth Amendment, and even the rise of the national media[1] as reasons why political safeguards cannot work. Kramer's argument stands robust against these arguments, but is ultimately not supportable; I address it below.

Political safeguards depend upon one government checking another, on the infiltration of state interests in federal decision-making. Senators must remain true not just to their state, but to *all* states, preserving state power against a greedy central government. The demands political

[1] Justice Powell included these arguments in his dissent in *National League of Cities.* See the discussion in Yoo (1997).

safeguards place upon the electoral system contradict the system=s design. Electoral competition causes each politician to do what he can to please his own constituents; he wants to be the one to provide demanded services. Naturally, when services are demanded in jurisdictions his level of government holds no responsibility over, he will do what he can to get his government involved. At times his objective will cause him to envy the successes of his compatriots in other levels of government; wherever possible, he will try to claim credit for those accomplishments. At some point, it is likely that the politician will be tempted to encroach upon the jurisdiction of another level of government, despite rules to the contrary.[2]

This conclusion runs directly contrary to Madison=s argument in Fed. 46. He writes:

> The adversaries of the Constitution seem to have lost sight of the people altogether in their reasonings on this subject; and to have viewed these different establishments not only as mutual rivals and enemies, but as uncontrolled by any common superior in their efforts to usurp the authorities of each other. ...[T]he ultimate authority, ... resides in the people alone, and that it will not depend merely on the comparative ambition or address of the different governments whether either, or which of them, will be able to enlarge its sphere of jurisdiction at the expense of the other. ...[T]he event in every case should ... depend on the sentiments and sanction of their common constituents. (Fed. 46, par. 1)

The secret to the efficacy of the political safeguards is that they express the people's will; the safeguards are backed by a public watchful that the union operates according to plan. If the federal government initiates legislation or executive action that violates the federal bargain, disrupting the balance of power between state and federal governments, the people will punish the federal government. Only if the people believe that the federal government would be better able to handle the jurisdiction than the states will the people fail to punish.[3] Madison's defense of the Constitution depicts the people as holding the reins on their team; the people know the joint product they expect from their federal and state governments. They can balance each

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[2] I make this argument formally in a manuscript titled "The Credit Assignment Problem," which first appeared as a chapter of my dissertation: *The Federal Problem* (1998).

[3] See Madison's argument in Fed. 46, par. 4.

governments= talents and ambitions to produce the best joint effort for union good; the allocation of powers between state and federal governments is efficient, or at least meets with public approval.

Unfortunately, this expectation exceeds the capacity of boundedly-rational voters; the federal system is complex, with a prism of responsibilities doled out between federal and state government, some shared, some separate. The allocation in some dimensions may be justified by a principle, for example, provision of public goods at the level required to absorb all externalities; but more often the assignment is somewhat haphazard, based upon historical precedent or, frankly, political convenience. The people simply cannot be expected understand the system so perfectly as to stand in the way of government action that is inefficient when viewed from a whole union perspective.[4]

Fragmentation is a political force that may preserve the federal balance by delaying legislation and perhaps introducing new argument, encouraging deliberation. In the United States, fragmentation works best horizontally, through separation of powers, but it may also be vertical, when federal and regional powers are held by different parties, as is often the case in Canada. When fragmentation protects federalism it does so as an accidental side effect from political, ideological resistance. The defense of federalism is not for federalism's sake. It therefore is far from failsafe; it cannot be counted upon in any instance. When it does work, it is by luck.

Unfortunately, Kramer's political parties solution suffers from the same faults. While without question the party organizations depend upon state functionaries and therefore we may argue that state-level institutions are involved in the national decision-making process, we must remember the organizations function to get their party in office. Positions are adopted for their

[4] Nor can the states be counted on to protect their own long-term interests; it is not uncommon for the states to offer support, through amicus briefs, of federal encroachment. I leave this interesting subject for another essay.

immediate political expediency. Decisions are not made with federalism=s balance in mind; if they happen to satisfy the federal bargain, it is a result of luck.

Given the existence of a structural source of opportunistic motivation, and its inevitability, the traditionally-cited political safeguards become more than ineffective; they become inappropriate. Fragmentation is fleeting, albeit at times effective. Nevertheless, we must conclude that federalism is fragile, made even more so when fragmentation collapses.

C. Judicial Safeguards

These depressing conclusions about political safeguards and only cautious optimism about fragmentation cause us to take another look at the judiciary's capacity to preserve federalism. Given our analysis of the inevitable opportunism in federalism, egged on by the electoral system, the judiciary may seem poised as no other institution to stabilize federalism. As a non-elected body, the judiciary is free from constituency-pleasing motivations.[5]

Despite these positive features, as a political economist raised on Riker, the initial look is cautious, mindful of Riker's dismissal of the court as mere handmaiden to the executive. But recent events[6] have proved so promising that it is Riker's thesis that needs reexamination. In it we find that his judgment was based on intuition informed by observation. One must wonder what he would have made of the modern Rehnquist court, nudged by an insistent O'Connor into a narrower read of federal powers generally defending the states against some of the more flagrant attempts by the federal government to usurp power. The court appears to have the capacity to do more than police disputes between the states; it can safeguard federalism in all types of opportunistic behavior.[7]

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[5] Court decisions appear to be synchronous with public opinion to some important extent. See Friedman 1993.

[6] *Bush* v. *Gore* excepted, of course!

[7] For fuller arguments about the court's capacity, see, for example, Bednar & Eskridge

Current history provides evidence that it is possible for the court to safeguard federalism, not just as a referee of interstate dispute, but also as an umpire over federal government behavior. But we still do not have the *how*. It is not enough to say that the judiciary is untainted by the same corrupting influences of electoral politics as the democratic branches. We still must ask, what empowers it to use its review powers to settle federalism disputes? Why has it intervened when it has? We cannot be satisfied with a simple demand-side story; it is not the case that federalism is more in danger now than it has ever been. For some reason the court recently has supplied an articulation of federal division of powers and it has not met with resistance from the other branches. Here we are lead to the study of judicial independence.

II. Judicial Independence and Federalism

A. Separation of Powers, Fragmentation, and Judicial Independence

In an essay on judicial independence, Ferejohn (1999) makes the distinction between institutional and individual dependence. While it is critical that individual justices be unconstrained and independent in their decision-making, it is natural for the court, as an institution, to be dependent on the other federal branches. The U.S. Founders created a government of separate but interdependent governments; the judiciary is dependent by design. While the legislature and executive have means to influence the judiciary's behavior by restricting its jurisdiction, etc., Ferejohn argues that usually the judiciary is left in peace. The judiciary is often in step with the federal government anyway. The only times when the judiciary has been put in danger are in times of power transitions, but the system soon re-equilibrates, and the judiciary's independence is restored.[8]

1995, Yoo 1997.

[8] While judicial dependence is dangerous in theory, it seems, at least in the U.S. case, to be innocuous in practice. The theoretical, fearsome possibility is that the central government could restrict the court's jurisdiction in the very dimensions that it wants to centralize, thereby blocking any possibility for judicial safeguards for the states. Barry Friedman has noted that

I question, however, whether we can be as sanguine about judicial dependence when we consider federalism. Specifically, 1) states cannot depend upon political safeguards for protection, 2) states themselves may have political incentives to be party to the federal government=s encroachment schemes, potentially leading to their long-term detriment, and 3) the evolution in federalism that these forces cause is motivated not by a perceived need for a more centralized federation, which is a long-term perspective, but instead to satisfy the short-term, orthogonal objective of constituent service. Under this perspective of the dangers of the federal balance, it is crucial to have a neutral observer to the federal bargain, one that doesn=t gain by shifts in the balance, and one that doesn=t have electoral incentives. Above all, it must have the liberty to remain neutral.

According to prevailing theory, the stability of federalism and the independence of the court both depend upon political safeguards, in the form of fragmentation (for both) and checks (for both: federalism: state representation, for judiciary, its review powers). So, what do we see during times when fragmentation holds? The court has an opportunity to regulate federal activity; we would ordinarily expect to see more court review of federal powers when federal power is fragmented, all else equal. On the other hand, we might predict that we would see a more federalism activity in court when fragmentation fails, as states will be challenging more; but the court will not effectively protect their powers. The attempt to construct a testable hypothesis fails because the theory is still incomplete: these attempted predictions are made from a legalist perspective; they ignore the court's private incentives. What we can say with

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while the federal legislature and executive have this theoretical power, they have rarely used it. It would be useful to consider why we have seen this restraint on the federal government=s part; perhaps it is evidence of a prudent self-restraint, a long-term commitment to the federal bargain that is not traceable electorally. The thesis I sketch in this essay would advocate an alternative hypothesis: the court hasn't had both opportunity and will at the same time often enough for the other branches to need to retaliate. In equilibrium, we would not expect to see any cases of federal restrictions on the judiciary if the judiciary were too dependent to ever anger the center.

The measurement of judicial independence will be very complicated because of the equilibrium problem of no observations.

confidence is that the times when the court is most needed, when fragmentation fails, is exactly when its ability to safeguard federalism is most crippled.

B. Personal Motivations

Citing Wechsler and Choper, the *Garcia* majority ruled that the court need not exercise review powers in federalism cases. In dissenting opinions, Justices Rehnquist and O'Connor vowed to fight *Garcia*, both writing of the importance of federalism's balance. And fight *Garcia* they did: in the past 15 years they have successfully unraveled *Garcia*'s hands-off approach and firmly established the court's intervention in federalism disputes and review of federal legislation.

Justice Rehnquist and especially Justice O'Connor have a vision of federalism where the federal government respects state powers and does not encroach upon them for political convenience. They have proven unafraid to use their position to enforce this vision; they have successfully pursued an agenda based on a personal evaluation of the union's needs.

C. Two Necessary Conditions for Judicial Safeguards

If fragmentation were the only necessary condition for effective judicial safeguards, then only two explanations are possible regarding the paucity of review of federal power prior to 1985: either the system was never fragmented or the federal government never before needed reining in. Both lack plausibility.

On the other hand, is the best explanation for the shift from *Garcia* to *Lopez* new appointments to the bench with the sense to listen to Justice O'Connor? Perhaps, but then we must believe that Sandra Day O'Connor is the first justice to think that the federal government plays a bit loose with the federal bargain and the balance of powers between states and center, or at least the first persuasive one. More credible is this alternative: Was there an institutional shift

that allowed some opinionated justices to speak their minds freely, without retribution?

Judicial safeguards require both opportunity *and* will: the institutions (perhaps through fragmentation) must clear the path, and the justices must have the will to follow it. Unfortunately, it seems (at least based on the U.S. experience) that these two conditions coincide infrequently; federal tensions cannot wait for the alignment of the constellations and in the meanwhile may perish for lack of credible, neutral dispute resolution should fragmentation or the party system fail (frighteningly likely, given how serendipitous their protection is). In the next section I will describe one way that a more mature federation might overcome the laws of probability.

III. Independence through Precedent

A. A New View of Precedent

Stare decisis is generally cited as a constraint: it restricts a judge's ability to act on his personal preferences. As a doctrine it is praised for minimizing errors and the influence of whim (contingent, of course, on the original decision being free of both) and above all for providing consistency. While it is an internal constraint---the court imposes it upon itself---nevertheless we consider it to be a limitation on court power.[9] At a minimum it raises the bar for a judge who would like to pursue more innovative interpretation. We generally consider it to be a constraint that justices begrudgingly submit to, for their own long-run good. The public admires precedent; use of it legitimizes court decision-making.

Rather than thinking of precedent as something that justices swallow like cough syrup, I'd like to consider it as a justice's most prized possession, one that gives her secret reserves of power. Schelling (1960) wrote of the empowerment of tying ones' hands; likewise, in some

[9] Therefore, it operates quite differently from court dependence on other branches, which is an external constraint on court power.

circumstances the court, by submitting itself to precedent and constraining the set of actions it can take, will find that it is much more capable of coercing desired behavior.

With precedent to draw on, if the federal government steps out of line, then the court will respond (innocently and appropriately!) by relying on precedent to rule their action unconstitutional. In game theoretic terms, having precedent allows justices to make a credible conditional threat. The problem with many threats is that they are not subgame perfect: that is, once the other player has made his move, taking the action that you would prefer he NOT take, you are in a position of not wanting to follow through on your threat. Consider the parent who tries to coerce out of her child good behavior at a restaurant by threatening to spank; once the food or tantrum is thrown, the parent regrets the threat because she does not want to follow through with the spank. The position of the dependent court is much the same; while it can threaten, its threat is not credible; the federal government knows that the court is beholden to it, perhaps out of fear of the center's own credible threat to retaliate by further restricting the court's power.

The court---even the dependent court---is in an entirely different power position when it can turn to precedent. Precedent allows the court to precommit to punish the errant federal government despite its vulnerable position. In fact, given the public's respect for precedent, the court is generally immune from the center's vengeance. Only in cases where there is overwhelming public support for the federal government's action will the court face retaliation: in these cases the public dismisses the court's reliance on precedent as stodgy, and the federal government is freed to pursue its desired action AND to "correct" the court. These rare instances aside, precedent is a valuable tool of empowerment; it is particularly helpful when the court lacks institutional freedom, when the federal government is not fragmented: precisely the time when the court is most needed to review federal action.

B. Federalism's Evolution

If courts can gain liberation through precedent, then we can make a prediction about the pattern of court regulation of the center, and about independent behavior more generally: while we would expect the confluence of institutional independence and will to make use of it to be relatively rare in the early stages of a court's life, as the democracy develops, and those periods occasionally come, they serve as windows for establishing precedent that a later court, institutionally dependent but motivated to regulate the center, can use. Therefore, we would expect periods of court regulation of the center to come more frequently the more established the judiciary. It has nothing to do with altering the institutional relationship, or the court gaining legitimacy---although these may be additional factors---instead, this is a freedom that depends not on institutional or political alignments, but on established doctrine.

For example, the recent line of federalism cases will have a lingering effect. The court will appear to be institutionally independent much longer than it is because once the institutional independence expires, the court can continue to rely upon the gains made by the Rehnquist court, if it so wishes. Viewed as a device for independence, we might become less critical of decisions like *New York*, where some criticize O'Connor for ignoring 200 years of decisions (See Levy 1993). Instead, one might agree with her that the court needs to regulate federal powers, and protect the states from commandeering, and this was the first opportunity to do so. With the window once opened, *New York* and its sister decisions serve as a prop to keep open the window when institutional factors would otherwise close it. If the court continues its motivation to umpire the balance of power between federal and state governments, the precedents established recently insure that the court can act on its motivation (nearly) regardless of the institutional climate.

C. Closing Remarks

Most often, we consider the judiciary's independence to be important because of its need to preserve individual rights. But what of the importance to preserve federalism? Just as we would never argue that the Ninth Amendment is more important than the Tenth, we shouldn't

prioritize the court's responsibilities over protection of rights and of federalism. Political safeguards are insufficient protection of states *qua* states. The times when the court is most needed---when fragmentation fails---is when it appears to be most crippled; the independence necessary to regulate federal government activity is curtailed when fragmentation decreases. The centralization that Riker sees as such a natural part of the American Constitution may be driven by apolitical notions of greater efficiency from collected powers, but it also may be driven by spurious political motives, and most surely is if the engine is party politics.

I don't argue that federal-state power boundaries ought to remain frozen throughout the lifespan of a constitution; I do argue that shifting them ought to be difficult, done only when there is national consensus. If only a bare majority of the people believe that the shift ought to occur, it shouldn't occur; we run the risk of the shift being advocated for political reasons, rather than because it is good for the union as a whole. It is a tradition in our federation, as in most, that supermajorities are required for important decisions; changes to the nature of the federal bargain ought to be included on the list of things that we undertake with caution.

At several critical logical junctures, the argument laid out in this paper cries out for further study of judicial independence. What is the relationship between fragmentation and independence? How much does the court depend upon public support for its legitimacy? Has the degree of court independence varied throughout the past 200 years, and if so, how can we understand the cycles? What triggers the onset of independence and what explains its duration? What is the relationship between court motivation and independence? Is precedent linked to independence? Finally, is independence a function of court action? The essay to the most part considers independence as an exogenous factor that either comes the court's way or doesn't, but we should also consider the potential that the court, through its behavior, can bring on independence, or cause its collapse.

Critics of judicial involvement in federalism disputes point out that apart from sporadic, and largely disastrous, interventions (Dred Scot, New Deal) the court has not been a player in federalism; now that it has chosen to become involved, it has thoroughly botched the job of

articulating a position; the case law has spawned a cottage industry of legal writers trying to make sense of its ambiguity. As a contributor to this activity, I cannot dispute the problems with the jurisprudence, but I am not persuaded to reject judicial review of federalism disputes altogether. As a theorist and a scholar of comparative politics, I cannot come to general conclusions based upon one case study, especially one that is evolving. If I am correct and the American federation has been a success largely due to luck (and brute force when luck ran out), as the motives of decision-makers in party systems and political branches are concerned with electoral gain and not federal balance, then we cannot hope to export the system and believe that our stability will be repeated. If we can improve our understanding of judicial independence, we may be able to shortcut our 200 years of judicial non-involvement in a developing federation; we may be able to establish a judiciary with the institutional opportunity (and perhaps will, too) to constrain the federal government. We suffered enormously from our lack of an effective safeguard of federalism; we cannot say that it is unimportant. An improvement to the science of judicial independence may spare others from our same experience.

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