The New Federalism: Discerning Truth in American Myths and Legend

Randy Lee
THE NEW FEDERALISM: DISCERNING TRUTH IN AMERICAN MYTHS AND LEGENDS

Randy Lee*

The Myth of the New Federalism

The wind whispers that we are on the brink of a new age. In the earliest age, the powers to know and to alter the Constitution were given to what would become the nine. Because of the pride of mortal men, these powers ultimately ensnared the nine causing them "to walk in the permanent twilight" and to create a right to economic liberty where none existed and to thwart the power of the federal government.

Yet, hope remained, and in the second age the power passed to a new nine. With NLRB v. Jones & Laughlin Steel Corp., this

* Professor of Law, Widener University School of Law, Harrisburg Campus. The author would like to thank Paula Heider for technical support on this article. He would also like to thank Professor John Gedid and Mr. Daniel R. Schuckers for their insights on the issue of federalism, Peter Winter and Mary-Kate Lee for their research assistance, and his family for their support of his work.


2 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 180 (1803) (holding part of a role of federal judges is to "inspect" the United States Constitution).

3 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 415 (1819) (holding the United States Constitution is "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs").

4 Although the number of Justices on the United States Supreme Court varied prior to 1869, it has been stable at nine since the Judiciary Act of 1869. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 984 n.4 (Kermit L. Hall et al. ed., 1992).


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nine began to wield the powers for good and found good rights where none had been, and released the federal government from its narrow prison.

The powers, however, cannot forever be controlled for good. Though the noble nine should have destroyed the powers when they had the chance, they did not, and, thus, the powers passed, in yet another age, to one who both hated and loved the powers. By his hand all the good that had been done by the noble nine became undone, and the land descended once more into shadow.

I. INTRODUCTION

With apologies to J.R.R. Tolkien, such is the myth of the new federalism of the Rehnquist Court. Despite its title, the myth is about more than federalism. In fact, in the myth, notions of separation of powers, individual rights, judicial activism, and concepts of justice and ultimate good become as much parts of federalism as is the distribution of power between local and national governments.

Thus, before one can evaluate the reality of the new federalism in federalism's terms, one must transcend the myth of the new federalism. To so transcend the myth, this Essay seeks to answer seven questions about both this new federalism and its surrounding myth. These answers ultimately dictate that discussions of the new federalism return to the dynamic of federalism, the allocation of decisions among the national government, local governments, and private individuals, and divorce themselves from the various policy influences that try to infiltrate these discussions under a false banner of federalism.

9 301 U.S. 1 (1937) (holding Congress can regulate labor practices of manufacturing entities formed on a national scale).
10 See, e.g., Roe v. Wade, 410 U.S. 113 (1973) (creating a right to have an abortion); Griswold v. Connecticut, 381 U.S. 479 (1965) (creating a right to use contraceptives for married couples).
12 Cf. TOLKIEN, supra note 8, at 382.
13 Cf. id. at 61.
14 Cf. id. at 64.
While there is much in the myth of the new federalism that is distracting, there is in this myth, as in all myths, an element of truth. At the heart of the myth of the new federalism is the recognition that the Supreme Court can change profoundly the meaning of the Constitution without the consent of the governed. That recognition brings the myth of the new federalism into conflict with another myth of America, that we are a nation to be governed not from the towers of the great, but from the shires of the good. Thus, ultimately, consideration of the new federalism demands that we decide who will rule the meaning of the Constitution: the people or the Court.

II. SEVEN QUESTIONS ABOUT THE NEW FEDERALISM

(1) *What is federalism?* Imagine three boxes. One is marked "National Community," one is marked "State and Local Communities," and one is marked "Individuals." Now, we will need to take all the decisions relevant to people's lives and determine in which of the three boxes to place each decision. That process of assigning different decisions to different boxes is federalism.

Many provisions of the United States Constitution implicate federalism. For example, as our understanding of Congressional powers, like the commerce or spending powers, is broadened, that takes decisions out of the *State and Local* box and puts them in the *National* box. When we apply provisions of The Bill of Rights (like the Establishment Clause or the right to counsel) to states, that takes decisions out of the *State and Local* box and puts them in the *Individuals* box.

Federalism, then, is a process of allocating life decisions between different political communities. Thus, as Professor Erin Daley pointed out, federalism should not dictate the answer to a

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15 G.K. CHESTERTON, The Everlasting Man, in 2 COLLECTED WORKS 135, 244 (Ignatius Press 1986) (observing that in all myth there is the recognition that "man found it natural to worship[,]" even in those myths that led him to a worship of "unnatural things").

16 Cf. TOLKIEN, supra note 8, at 284.

17 Professor Erin Daley, Is the Supreme Court Undoing the New Deal: The Impact of the Rehnquist Court's New Federalism, Remarks at the Law &
particular question (for example, which flag should fly over the South Carolina State House); federalism should only determine who should answer that question.

(2) What is the new federalism? The term "new federalism" refers to a trend dating back to the early 1990s in which the United States Supreme Court began to indicate that more decisions should remain in the State and Local box. Among the most recognized cases representative of this trend are New York v. United States\(^\text{18}\) and United States v. Lopez.\(^\text{19}\)

It is helpful to view the new federalism in the context of the federalism that immediately preceded it and dates from 1937 and NLRB v. Jones & Laughlin Steel Corp.\(^\text{20}\) to around 1985 and the Court's decision in Garcia v. San Antonio Metropolitan Transit Authority.\(^\text{21}\) Along the way the Court upheld Congress's authority to regulate a farmer's right to raise crops for home consumption\(^\text{22}\) and its authority to combat private racial discrimination by instruments of commerce like Ollie's Barbeque.\(^\text{23}\)

Garcia can be seen as a rhetorical high point of this period because there Justice Blackmun said, speaking for the Court, "With rare exceptions, like the guarantee, in Article IV, [Section] 3, of state territorial integrity, the Constitution does not carve out express elements of state sovereignty that Congress may not

\text{Government Institute and the Widener Law Journal Annual Symposium (Nov. 21, 2002).}\(^\text{18}\)
\text{505 U.S. 144 (1992) (holding Congress cannot compel a State to adopt a regulatory scheme).}\(^\text{19}\)
\text{301 U.S. 1 (1937) (holding Congress can regulate labor practices of manufacturing entities formed on a national scale).}\(^\text{21}\)
\text{469 U.S. 528 (1985) (holding Congress can regulate labor terms of local governments and local mass transit workers).}\(^\text{22}\)
\text{Wickard v. Filburn, 317 U.S. 111 (1942).}\(^\text{23}\)
\text{Katzenbach v. McClung, 379 U.S. 294 (1964).}\(^\text{23}\)
employ its delegated powers to displace.\textsuperscript{24} Thus, in Blackmun's view, the Constitution did not prevent states from being reduced to nothing more than lines on a map. The significance of this language, if it is not self-evident, comes clearly into focus when we compare it to language from the Supreme Court's majority opinion in \textit{Carter v. Carter Coal Co.},\textsuperscript{25} the Court's last major federalism case before the 1937-85 era. In \textit{Carter}, the Court indicated that the greatest evil to which a broad notion of federalism could lead was to leave states "so despoiled of their powers" or "so relieved of the responsibilities which possession of the powers necessarily enjoins" that the states would be reduced "to little more than geographical subdivisions of the national domain."\textsuperscript{26}

Although we normally think of federalism and, more generally, constitutional interpretation as exclusively judicial creatures, the \textit{new federalism} can be exhibited or inhibited by the other branches. For example, Congress defines the issues that the \textit{new federalism} will address by the laws that it passes, and such passages are in part a function of how broadly or narrowly Congress interprets its Constitutional powers. Thus, had Congress not believed that its commerce power was broad enough to allow it to regulate local public schools, the Supreme Court would not have been called upon to mark the outer limits of federal power in \textit{Lopez}.\textsuperscript{27} Similarly, the Executive Branch stems the tide of the \textit{new federalism} when it tries to use its executive powers to expand its control of local law enforcement in the name of national security or to prevent local governments from allowing assisted suicide\textsuperscript{28} or marijuana use.\textsuperscript{29} On the other hand, the Executive Branch yields to the \textit{new federalism} when it defers to States to decide how much

\textsuperscript{24} \textit{Garcia}, 469 U.S. at 550.
\textsuperscript{25} 298 U.S. 238 (1936).
\textsuperscript{26} \textit{Id.} at 295-96.
\textsuperscript{29} \textit{Id.} (noting federal prosecutions of marijuana growers authorized to grow marijuana under Oregon Medical Marijuana Act of 1998).
involvement the States should have with religious institutions. Although any of these actions could ultimately be subject to judicial review, it is also true that a great deal of legislative and executive conduct will never be subjected to judicial review or will not be subjected to such review immediately. Thus, the parameters of federalism can be as much a function of executive or legislative attitude as judicial attitude.

(3) Is the new federalism really new? The new federalism is new in the sense that it reflects a different attitude, than the Court had from 1937-85, about how decisions should be allocated between the three boxes. The notion, however, that there should be more decisions in the State and Local box and fewer in the Federal box than there were from 1937-85 is not new. In fact, in the old federalism before 1937, the Supreme Court severely limited the degree to which Congress could regulate, under the Commerce Clause, activities like mining, agriculture, and manufacturing. One can argue that under this old federalism, current federal occupational health and safety, environmental, labor, agricultural, and discrimination laws would have fared much worse than they have even under our new federalism.

Furthermore, the issue raised in New York v. United States and its progeny, the degree to which a national government can place restrictions or impose its will on a local government, can be traced to The Declaration of Independence. There, Jefferson complained initially and primarily about the English Crown's conduct toward colonial governments, conduct like "refus[ing] his Assent to Laws, the most wholesome and necessary for the public good," and making local judges "dependent on his Will alone."

30 President Bush has established the Center for faith and community based initiatives with the intent that the federal government will not prevent religious institutions from competing for state grants receiving federal funds. Although the Center is designed to encourage local policymakers to partner with religious entities, the decision to use such entities and how to use them is left to the local policymaker. Exec. Order No. 13,199, 66 Fed. Reg. 8499 (Jan. 29, 2001).
33 THE DECLARATION OF INDEPENDENCE para. 3 (U.S. 1776).
34 Id. para. 11.
In that light, the concerns of the *new federalism* look very much like the concerns that gave rise to the nation.

(4) *Could we ever go back to the old federalism?* Professor Robert Post has argued that America could not return to the pre-New Deal, pre-1937-85 brand of federalism even if it wanted to.\(^35\) While some of Professor Post’s reasons for his conclusion are tied to judicial attitudes that the Court may have already changed, other of his reasons may be valid. For example, Professor Post noted that in the eyes of the political culture, the New Deal "legitimated the national government’s authority to speak as the genuine representative of an authentic national democratic will."\(^36\)

In addition to Professor Post’s observation about the change in political perspective, changes in technology and communication have also made people more willing to see decisions far away from them as decisions they should have a voice in and hence decisions in the *National* box. As viewers watch stories every day through various media about the status of the *Ten Commandments* in an Alabama courtroom\(^37\) or the status of committed same-sex relationships in Vermont,\(^38\) they begin to believe that these events affect them and that, therefore, they should have a voice in them. Furthermore, as travel from coast to coast has become more possible and more a part of daily living, and as people relocate their families to other states more as a regular part of life, the events in far off states may actually affect someone who is momentarily far away.

On the other hand, people within states often do not feel that their local affairs are national business. For example, when the Vermont legislature held hearings about how they would respond to the Vermont Supreme Court’s directive to eliminate "Common Benefits Clause" problems created by different legal treatment of

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\(^36\) Id. at 1514.


\(^38\) *Civil Union in Vermont*, WASH. POST, Mar. 18, 2000, at A18 ("B[y] [moving] toward an acceptance of same-sex unions, Vermont’s legislature will offend many.") (emphasis omitted).
heterosexual and same-sex couples, the legislature was adamant it would do so without the advice or participation of outsiders.

(5) *Is the new federalism really radical?* Professor Marci Hamilton has spoken with one of the most reasoned voices of anyone on this issue. Professor Hamilton has described the *new federalism* as not so much "a massive federalism revolution," but a "nibbling" at the fringes of the allocation of decisions created by the federalism of the 1937-85 era. When one considers what the allocation of decisions was before that era and what America would look like if we already had returned to that allocation, one would have to agree with Professor Hamilton that nothing we have seen so far requires that we "consider moving to the Bahamas or some other country."42

One might also characterize cases like *United States v. Lopez,*43 *City of Boerne v. Flores,*44 and *Board of Trustees v. Garrett*45 to be more about Congress's failure to generate an appropriate record than to be about Congress's excessive use of power. In that light, the *new federalism* would differ from the federalism of 1937-85 more in the form it required than in actual substance.46

Yet, it is fair to suggest that the concerns being expressed now about this *new federalism* are not so much a response to how it

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46 Professor Thomas Sargentich pointed out appropriately that *United States v. Morrison,* 529 U.S. 598 (2000), can be read to indicate that *United States v. Lopez,* 514 U.S. 549 (1995), was not merely a case about a flawed record. Sargentich, *supra* note 19.
works or where it has taken us but to where it might take us in the future. In *Garrett*, the Supreme Court struck down a portion of a federal anti-discrimination law, the ADA. In separate opinions in *Troxel v. Granville*, Justices Thomas and Scalia indicated a willingness to reconsider whether "unenumerated rights" to be found in the concept of "liberty" in the Fourteenth Amendment really could limit the decisions that a local government could make. In *Employment Division, Department of Human Resources v. Smith*, Justice Scalia actually got a majority of the Court to agree with him in restricting the degree to which the Free Exercise of Religion Clause limits the decisions allocated to the State and Local box.

If one were to extrapolate these decisions far enough, one could envision a constitutional landscape with no federal anti-discrimination laws, no right to privacy, and states capable of eliminating religions from their borders by declaring their essential practices criminal through otherwise "valid" and "neutral" laws. If the Court were to take us there, then we would certainly be beyond nibbling.

(6) *Is the new federalism really about federalism?* As noted in the first question, federalism should not dictate the answer to a particular question but should only determine who should answer that question. Thus, it should matter little to the adherents of the new federalism what decision Congress has reached on an issue; it should matter only that Congress should have left the decision in the State and Local box. Similarly, critics of the new federalism should not criticize it because, under its banner, the Supreme Court has tolerated bad decision-making by States. They should only criticize the new federalism because, under its banner, the Supreme

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49 Id. at 80 (Thomas, J., concurring); see also id. at 91-92 (Scalia, J., dissenting).
51 Id. at 878-81.
52 See supra text accompanying note 17.
Court has prevented the Federal Government from making decisions that belong in the Federal box.\textsuperscript{53}

A recent piece by Linda Greenhouse in the \textit{New York Times} is an example of criticism of the \textit{new federalism} that may be based on criteria other than federalism.\textsuperscript{54} There, in the context of her criticism of the current Supreme Court and its \textit{new federalism}, Ms. Greenhouse quoted Walter Dellinger, who headed the Office of General Counsel under President Clinton, as saying of the Court, "[t]his is a court that says that judges are better able than the P.G.A. to define the essence of golf\[...\] [t]his is a court that decided a presidential election."\textsuperscript{55}

If one looks first to Mr. Dellinger's comment about the Court's decision in \textit{PGA Tour, Inc. v. Martin},\textsuperscript{56} one finds that while the comment may express a valid concern about judicial or federal arrogance, it has nothing to do with the \textit{new federalism}. \textit{Martin} was, in fact, authored by Justice Stevens, a member of the Court more likely to be noted for opposing the \textit{new federalism} than supporting it, and two of the most vigorous supporters of the \textit{new federalism}, Justices Scalia and Thomas, both dissented. More to the point, \textit{Martin} represents one of the most sympathetic readings the Court has given to a product of the spirit of 1937-85 federalism, the Americans with Disabilities Act. Were one to want to use an ADA opinion to criticize the \textit{new federalism}, \textit{Board of Trustees v. Garrett},\textsuperscript{57} in which the Supreme Court struck down a provision of the ADA dealing with federal regulation of state labor practices, would have been a better choice.

Similarly, one can have problems, as apparently do both Ms. Greenhouse and Mr. Dellinger, with the federal Supreme Court removing from state governments decisions about the State's

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\textsuperscript{53} In defense of those who criticize the \textit{new federalism} for the decisions it has yielded, Professor Sargentich has argued that the \textit{new federalism} is an inappropriate judicial activism as distinguished from the more individual-rights centered judicial activism of the Warren Court. Sargentich, \textit{supra} note 19, at 478.

\textsuperscript{54} Linda Greenhouse, \textit{The Imperial Presidency vs. the Imperial Judiciary}, \textit{N.Y. Times}, Sept. 8, 2002, at 3.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} 532 U.S. 661 (2001).

\textsuperscript{57} 531 U.S. 356 (2001).
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election of federal government officers. People who have such problems, however, would likely be advocates of the *new federalism* rather than critics of it. After all, in *Bush v. Gore*, the Court could be said to have removed a decision from the *State and Local* box and placed the decision in the *Federal* box. Such a move should not trouble an adherent to the 1937-85 brand of federalism, but it could trouble an adherent of the *new federalism*. Furthermore, one would expect that people troubled by *Bush v. Gore* on the grounds of federalism would be similarly troubled when federal courts intervene in a state legislature's drawing of Congressional districts as was done in *Vieth v. Pennsylvania*, a case involving a Democratic challenge to Republican line drawing.

Thus, it is possible that the debate over the *new federalism* may be more a debate about good decisions versus bad decisions or judicial activism versus judicial restraint than about into which of our boxes a decision goes.

(7) *Who should create a new federalism?* At a conference on the Constitution and the Clinton Administration at Duke University in 2000, Executive Counsel Dellinger also indicated that he was very proud that the Constitution had not been amended during his period of Executive Branch service. Critics of the *new federalism* might well take issue with Mr. Dellinger's assessment of his time in office. While it was true that the text of the Constitution had not been amended during Executive Counsel Dellinger's service, critics of the *new federalism* maintain that cases like *United States v. Lopez* and *City of Boerne v. Flores* changed the meaning of the Constitution. Mr. Dellinger, as a critic of the current Supreme Court, might well agree.

If there is a paradox here between the perception that the Constitution had not been amended and the recognition that it had been changed, it is one Mr. Dellinger shares with a large segment

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of the public generally. While eighth-grade civics classes routinely teach that it is a tribute to the Constitution that it has been amended so infrequently, they also echo Chief Justice Marshall’s view in *McCulloch v. Maryland*,63 that the Court enjoys the power to adapt the document over time. Thus, one is left to wonder why *We the People of the United States*64 are so quick to be troubled by the formal amendment process present in Article Five65 and so comfortable with the implicit power of judicial adaptation of the Constitution.

One might try to explain this paradox by maintaining that the Article Five process is reserved for major changes in the Constitution while judicial adaptation reflects only slight tinkering. Yet, Professor Peter Shane has argued quite convincingly that frequently the Constitutional *tinkering* done by the Court or even by Congress dwarfs in significance the effects of some of the Article Five amendments.66 Other critics, like Professor Robert George, argue that this tinkering invites at best judicial self-deception and at worst invests in the judiciary "a tremendous measure of essentially legislative power to establish the terms of the relationship between [the people] and [the] state."67

In a series of letters to James Madison and Samuel Kerchal that spanned almost thirty years, Thomas Jefferson indicated that he believed every nineteen years, the people should meet in a new constitutional convention.68 Thus, at least some of those to whom we ascribe the label of "founding fathers" recognized that the Constitution would need to adapt over time but felt the amendment process provided for that adaptation. As Professor George describes this necessity, "[e]ven the most perfect constitutions of government will necessarily mix timeless truths of political

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63 17 U.S. (4 Wheat.) 316 (1819).
64 U.S. CONST. pmbl.
65 U.S. CONST. art. V.
morality with principles and policies devised to deal with contingent historical circumstances whose passing can render those principles and policies inapposite and even irrelevant."\(^{69}\) In such circumstances, Professor Carrington maintains that "[e]xtreme reverence for an institution staffed by mortal beings is misplaced sentimentality. Correction of the excessive independence of the Supreme Court to restore vitality to state and local politics is therefore overdue."\(^{70}\)

### III. Conclusion

In 1963, I was a kindergartner in a Midwest public school. Before we could eat our cookies and drink our milk each day, our teacher led us in prayer. For better or for worse, the Supreme Court’s decision in *School District of Abington Township, Pennsylvania v. Schempp*\(^{71}\) removed that decision to pray in school from the *State and Local* box and placed it in the *Individuals* box. That shift changed the meaning of the Constitution for the children in my school, their parents, and the school itself, in a significant way. Professor Shane has argued that when the Supreme Court began the federalism of the 1937-85 era, it changed the meaning of the Constitution in a similarly significant way – this time taking decisions out of the *State and Local* box and placing them in the *Federal* box.\(^{72}\) Critics of the *new federalism* believe that the current Court has again changed the meaning of the Constitution by trying to put those relocated decisions back.

Since the ratification of the Constitution, many have accepted the premise that it will sometimes be necessary to make fundamental changes in the distribution of life decisions among our three boxes. If that is true, then *We the People* must come to grips with which should concern us more: Executive Counsel Dellinger’s concern with the Article Five process making those changes or Professor George’s concern that judicial adaptation invests in the judiciary the essentially democratic power to define the relationship between the people and their communities. If one

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\(^{69}\) George, *supra* note 67, at 38.

\(^{70}\) Carrington, *supra* note 68, at 414-15 (citation omitted).

\(^{71}\) 374 U.S. 203 (1963).

\(^{72}\) Shane, *supra* note 66, at 246.
traces America’s roots back as far as *The Declaration of Independence*, one may well find an answer to this dilemma. The transgressions of King George inventoried in that document go not so much to personal autonomy\(^{73}\) but to the right of people to decide together for themselves the nature of their political communities.\(^{74}\) In this light, the most important truth to be encountered in the myth of the *new federalism* is not that a particular decision should fall in a particular box, but that we have forgotten that it is the right of the people, and not the power of the Court, to decide what decisions fall in what box.

If our myth of the new federalism can be said to resemble Tolkien’s myth of the ring,\(^{75}\) then perhaps we may find our grain of truth for our age where Tolkien found his. Perhaps the consolation of Middle Earth may be equally the hope for us: "[t]his is the hour of the Shire-folk, when they arise from their quiet fields to shake the towers and counsels of the Great. Who of all the Wise could have foreseen it? Or, if they are wise, why should they expect to know it, until the hour has struck?"\(^{76}\)

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\(^{73}\) Even the passage of *The Declaration of Independence* most associated with personal autonomy, the passage deeming that "all men are created equal" and "endowed by their Creator with certain unalienable Rights" links the securing of these rights to the creation of political community. *The Declaration of Independence* paras. 2-3 (U.S. 1776).

\(^{74}\) *See, e.g., id.* paras. 6-18, 22, 25-28. Two transgressions, however, do go to individual procedural due process rights, *id.* at paras. 23-24 (trial by jury), and a third covers seizure of American seamen and their forced servitude in the British Navy, *id.* para. 31.

\(^{75}\) *See supra* text accompanying notes 1-16.

\(^{76}\) TOLKIEN, *supra* note 8, at 284.