

THE RESILIENCE OF FEDERALISM: A RESPONSE TO LOGAN SAWYER'S *THE RETURN OF CONSTITUTIONAL FEDERALISM*

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In *The Return of Constitutional Federalism*,¹ Logan Sawyer provides an insightful and thought-provoking reconsideration of the factors that led to the Supreme Court decision in *National League of Cities v. Usery (NLC)*.² Professor Sawyer's critically important move in this article is to locate the 1976 decision in both its jurisprudential and political context, adopting an integrative approach that straddles what has sometimes been referred to as "internalist" and "externalist" explanations of doctrinal change. He also extracts *NLC* from the overwhelmingly normative analysis that has dominated legal scholarship on the decision. This seems to me exactly the right approach to this topic, and it yields much insight into the reasons why the Court, for the first time since the New Deal, struck down a federal law as beyond the reach of the commerce power. Professor Sawyer's central argument, that the *NLC* majority was responding to changed assumptions about the ability of the political process to safeguard federalism principles, is fully persuasive.

In this response essay, I consider the nature of the constitutional change that *NLC* represented. This was surely a significant Supreme Court decision. It undoubtedly deserves the careful attention Professor Sawyer gives it. I question, however, whether the decision itself marked as dramatic a disjuncture with the past as Professor Sawyer contends.³

I begin with a discussion of labels—a narrow, semantic point, perhaps, but one that raises issues important to understanding the significance of the developments Professor Sawyer charts. The article's title refers to constitutional federalism. The term, if not a common one in the scholarly literature, is not original to Professor Sawyer.⁴ I must confess, however, that I find it a curious label. What other kind of federalism is there? Federalism *is* a constitutional principle. There is no other kind. Although never stopping to define this term, Professor Sawyer's use of

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1. Logan Everett Sawyer III, *The Return of Constitutional Federalism*, 91 DENV. U. L. REV. (forthcoming 2014).

2. 426 U.S. 833 (1976).

3. See, e.g., Sawyer, *supra* note 1 (describing *NLC* as having "sparked" the "return of constitutional federalism").

4. See, e.g., Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795 (1996); Lang Jin, *Printz v. United States: The Revival of Constitutional Federalism*, 26 PEPP. L. REV. 631 (1999); Mark Tushnet, *Keeping Your Eye on the Ball: The Significance of the Revival of Constitutional Federalism*, 13 GA. ST. U. L. REV. 1065 (1997).

the term tracks how others have used it, namely, as a synonym for judicially enforced limits on federal power. It is by this definition that *NLC* marked a return of constitutional federalism. After decades upholding every congressional exercise of its commerce power, the Supreme Court in *NLC* seemed to return to the approach of the late nineteenth and early twentieth centuries, when the Court played a prominent role in defining the constitutional limits of congressional authority. This use of constitutional federalism as a synonym for judicial enforcement of the boundaries of federalism is problematic, I believe, both normatively and descriptively.

This use of the term seems to imply that federalism is somehow lost or demoted to a lower echelon of importance when the courts are not actively protecting it. It seems to imply that to rely on the political process to safeguard federalism is to abandon the principle. This was precisely the point Justice Douglas was attempting to drive home in his dissent in *Maryland v. Wirtz* when he contrasted “constitutional federalism” with “congressional federalism.”⁵ I do not understand Professor Sawyer to be making this claim, however. It certainly was not Herbert Wechsler’s claim when he wrote his canonical essay on the political safeguards of federalism.⁶ Wechsler’s basic point was that federalism, as a constitutional principle, had historically been protected by the political process. There was nothing less constitutional about federalism simply because nonjudicial institutions of government were serving to safeguard its vitality. While the term constitutional federalism has some utility as a linguistic weapon to critique those who would rely on nonjudicial institutions for the protection of federalism values, as a neutral, descriptive label it seems to point in exactly the wrong direction.

With this terminological caveat in mind, I now turn more directly to the question of whether *NLC* marked the return of constitutional federalism, with this term considered both as a general principle of constitutionalism and as judicially enforceable constraint on national power. Constitutional federalism, understood in its fullest sense, as the constitutional principle of federalism, never left the scene, of course. The Supreme Court in the late 1930s and 1940s changed course in terms of its role in

5. *Maryland v. Wirtz*, 392 U.S. 183, 201 (1968) (Douglas, J., dissenting) (“The Court’s opinion skillfully brings employees of state-owned enterprises within the reach of the Commerce Clause; and as an exercise in semantics it is unexceptionable if congressional federalism is the standard. But what is done here is nonetheless such a serious invasion of state sovereignty protected by the Tenth Amendment that it is in my view not consistent with our constitutional federalism.”). Justice Douglas’ *Wirtz* dissent is the only time a Supreme Court justice used the term in this way, i.e., as a way to contrast judicially enforced federalism to some other, lesser form of federalism. See *McCannell v. Fed. Election Comm’n*, 540 U.S. 93, 101 (2003) and *Fry v. United States*, 421 U.S. 542, 544 (1975), for uses of the term in Supreme Court opinions as a synonym for federalism, or *Irvin v. Dowd*, 359 U.S. 394, 407 (1959) (Frankfurter, J., dissenting), for an example of the Supreme Court using the term as a generic label for the U.S. constitutional system.

6. Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

policing the boundaries of national authority, declaring the text of the Tenth Amendment as stating “but a truism that all is retained which has not been surrendered”⁷ and generally deferred to Congress’s assessment of the reach of its enumerated powers.⁸ But federalism, as an issue of contestation, fought out in both the political and judicial arenas, remained very much in place.

The white South’s constitutional counter-offensive against federal civil rights legislation offers one particularly clear example of the persistence of debates over federalism during this period. Segregationists in the South returned again and again to states-rights arguments in their attempt to oppose congressional legislation designed to protect the civil rights of the South’s black citizens.⁹ Another example was the states-rights platform put forth by 1964 Republican presidential candidate Barry Goldwater. A critique of an unconstitutionally expansive federal government was at the heart of Goldwater’s presidential campaign.¹⁰ Similar arguments formed a key component of the conservative resurgence of the late 1960s and 1970s.

When compared to past battles over the New Deal or future battles that accompanied the rise of the New Right in the 1970s and beyond, the stakes in the federalism debates of the 1950s and 1960s might appear peripheral to the mainstream of American legal and political discourse. The mere fact that the Supreme Court had receded to the background on this particular constitutional question ensured that the federalism-based claims would not receive the kind of rigorous attention as a problem of constitutional interpretation that they received when the Court was actively engaging the question. But federalism was there all along, a central factor in constitutional discourse even during the years when the Court ceded center stage.

Although Professor Sawyer makes no claim that federalism, as an element of national political contestation over constitutional values, disappeared in the 1950s and 1960s, I wonder if his insistence on portraying

7. *United States v. Darby*, 312 U.S. 100, 124 (1941).

8. *See, e.g.*, *Wickard v. Filburn*, 317 U.S. 111, 120 (1942); *Darby*, 312 U.S. 100; *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

9. *See, e.g.*, Lindsey Cowen, *What is Left of the Tenth Amendment?* 39 N.C. L. REV. 154 (1961); *Text of Minority Report on the Civil Rights Plank*, N.Y. TIMES, July 13, 1960, at 21 (Democrats critiquing their party’s civil rights plank for failing to observe “the constitutional division of delegated powers between the Federal and state governments and by strict adherence to” the Tenth Amendment) [hereinafter 1960 Democratic Minority Report].

10. *See, e.g.*, BARRY GOLDWATER, *THE CONSCIENCE OF A CONSERVATIVE* 22 (2007 Princeton Univ. Press ed. 1960) (“The Constitution . . . draws a sharp and clear line between federal jurisdiction and state jurisdiction. The federal government’s failure to recognize that line has been a crushing blow to the principle of limited government.”); *Text of Goldwater Speech on Rights*, N.Y. TIMES, June 19, 1964, at 18 (“I find no Constitutional basis for the exercise of Federal regulation [to regulate public accommodations and employment]; and I believe the attempted usurpation of such power to be a grave threat to the very essence of our basic system of government; namely that of a Constitutional republic in which 50 sovereign states have reserved to themselves and to the people those powers not specifically granted to the Central or Federal government.”).

the pre-*NLC* decades as marked by a “near uniform consensus” that the political safeguards theory “accurately described American government”¹¹ risks obscuring or downplaying the persistence of contestation over the constitutional boundaries of national power during this period. I do not see many white southerners feeling their views on federalism were well protected in Congress in these years. And surely many Goldwater supporters agreed with his argument that much of Congress’s recent legislation ran roughshod over federalism principles. There was, in short, no consensus faith in political safeguards that could then “crumble”¹² in the late 1960s and 1970s. What existed was a persistent political debate over federalism principles in which those who believed their constitutional interests were protected through the political process outnumbered those who felt their interests were not being protected. The skeptics of the political safeguards thesis were hardly nonexistent. Indeed, they were quite vocal and passionate in their constitutional claims. But they were in the minority. Academics might have dismissed them, they might have been losers in the national political process, and the courts might have brushed them aside, but they were there. And their basic constitutional claim—that national authority was overreaching into the constitutionally protected realm of state sovereignty—was gaining strength.

This still leaves the question of the role of the courts in protecting federalism, i.e., constitutional federalism in the narrower sense of the term. Here too, I believe that Professor Sawyer’s emphasis on consensus support for the political safeguards and the return of judicially enforced federalism risks overlooking a resilient minority position in the pre-*NLC* period.

Important to understanding the origins of *NLC* is recognizing that a belief that proper protection of federalism values demanded the intervention of the courts remained a prominent part of constitutional discourse in the 1950s and 1960s.¹³ Few participants in this debate over the proper balance between national and state power ever abandoned the possibility of judicial review as a check on national power. As far as this debate touched on the topic of judicial review, the question was not *whether* the courts had a role to play, but what role the courts should play. The political safeguards argument was a contribution to this discussion. It was a claim for judicial deference, not for judicial abdication of the field of battle.¹⁴ Congress was the primary defender of the principle of federal-

11. Sawyer, *supra* note 1.

12. *Id.*

13. See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1 (1950).

14. See, e.g., Wechsler, *supra* note 6, at 559 (“This is not to say that the Court can decline to measure national enactments by the Constitution when it is called upon to face the question in the course of ordinary litigation; the supremacy clause governs there as well. It is rather to say that the Court is on weakest ground when it opposes its interpretation of the Constitution to that of Congress in the interest of the states . . .”).

ism, the primary definer of the state-federal balance, but it was not the only one.

When defenders of segregation failed to block Congress from passing civil rights legislation, they went to court, where they continued to press the kinds of federalism-based arguments that they made in Congress.¹⁵ They found little sympathy for their constitutional arguments in the Supreme Court, but they were occasionally able to convince a southern federal judge. A three-judge district court in Alabama held the public accommodations provision of the 1964 Civil Rights Act as beyond the reach of the Commerce Power, stating in its per curiam decision:

If Congress has the naked power to do what it has attempted in title II of this act, there is no facet of human behavior which it may not control by mere legislative ipse dixit that conduct ‘affect(s) commerce’ when in fact it does not do so at all, and rights of the individual to liberty and property are in dire peril.¹⁶

The Supreme Court overturned the district court’s ruling and upheld Title II of the 1964 Civil Rights Act,¹⁷ but even here, at what might be the high-water mark of judicial deference to the commerce power, the Justices made a point of noting that they were not abandoning the Court’s role as a constitutional check on congressional power. Justice Clark wrote in *Katzenbach v. McClung*: “The power of Congress in this field is broad and sweeping; *where it keeps within its sphere* and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere.”¹⁸ The Court was always careful to distinguish judicial deference from nonreview.¹⁹ Justice Black, writing in concurrence in *Heart of Atlanta* made the point even more explicitly:

15. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301 (1966) (rejecting South Carolina’s challenge to the Voting Rights Act of 1965); *United States v. Manning*, 215 F. Supp. 272 (W.D. La. 1963) (rejecting Louisiana’s challenge to the Civil Rights Act of 1960); 1960 Democratic Minority Report, *supra* note 9, at 21 (“What is or is not appropriate legislation under the powers delegated to Congress is for determination by the courts.”).

16. *McClung v. Katzenbach*, 233 F. Supp. 815, 825 (N.D. Ala. 1964). The court in this case seemed to blend a critique of Title II based on federalism principles and on due process principles. See *id.* (declaring that since Title II reaches beyond the scope of the commerce power, its application to the plaintiffs is a violation of their Fifth Amendment due process rights).

17. *Katzenbach v. McClung*, 379 U.S. 294 (1964); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964).

18. *Katzenbach*, 379 U.S. at 305 (emphasis added).

19. See, e.g., *id.* at 303–04 (“Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators . . . have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end.”); *Maryland v. Wirtz*, 392 U.S. 183, 196, 198 (1968) (“This Court has always recognized that the power to regulate commerce, though broad indeed, has limits. . . . The Court has ample power to prevent what the appellants purport to fear, ‘the utter destruction of the State as a sovereign political entity.’ . . . This Court has examined and will continue to examine federal statutes to determine whether there is a rational basis for regarding them as regulations of commerce among the States.” (citations omitted)).

The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial, rather than a legislative, question, and can be settled finally only by this Court.²⁰

Thus, when in the late 1960s and early 1970s several Justices showed themselves to be increasingly willing to use judicial review as a bulwark against new exercises of congressional authority into the workings of the states and the lives of the American people, they were not resurrecting some lost constitutional tradition. *Maryland v. Wirtz*,²¹ the constitutional challenge to the 1966 extension of the Fair Labor Standards Act (FLSA), was perhaps a long shot for states-rights advocates, but it was hardly a shot in the dark. Twenty-seven states joined Maryland's challenge to the law.²² At the trial court level, the states persuaded one of the judges on the three-judge panel that the extension of the FLSA violated their sovereignty.²³ On appeal at the Supreme Court, they persuaded two Justices.²⁴ Then, in a 1969 opinion, Justice Black found an opportunity to follow through on his tacit threat in his concurrence in *Heart of Atlanta*. He dissented to a Court ruling upholding the application of Title II of the 1964 Civil Rights Act to an isolated recreation facility with only weak connections to interstate commerce.²⁵ In 1971, Justice Stewart, who had joined Justice Douglas's dissent in *Wirtz*, dissented to a Court ruling that regulation of local "loan sharking" was within the commerce power.²⁶ Although Justice Douglas wrote the opinion for the majority, he recognized the constitutional challenge as "a substantial one."²⁷ These

Similar assertions, if more muted in form, can be traced back to the decisions that first established modern commerce clause doctrine. *See, e.g.*, *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937) ("The authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the internal concerns of a state. That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system.")

20. *Heart of Atlanta*, 379 U.S. at 273 (Black, J., concurring); *see also id.* at 275 ("I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws.")

21. 392 U.S. 183 (1968).

22. *Id.* at 187. In contrast, when South Carolina challenged the 1965 Voting Rights Act in the Supreme Court, they were supported by only five other southern states, while twenty-one states joined briefs in support of the law. *South Carolina v. Katzenbach*, 383 U.S. 301, 307 n.2 (1966).

23. *Maryland v. Wirtz*, 269 F. Supp. 826 (D. Md. 1967).

24. *Wirtz*, 392 U.S. at 201 (Douglas, J., dissenting) (joined by Justice Stewart).

25. *Daniel v. Paul*, 395 U.S. 298, 315 (1969) ("While it is the duty of courts to enforce this important Act, we are not called on to hold nor should we hold subject to that Act this country people's recreation center, lying in what may be, so far as we know, a little 'sleepy hollow' between Arkansas hills miles away from any interstate highway. This would be stretching the Commerce Clause so as to give the Federal Government complete control over every little remote country place of recreation in every nook and cranny of every precinct and county in every one of the 50 States. This goes too far for me." (footnote omitted)).

26. *Perez v. United States*, 402 U.S. 146, 157 (1971) (Stewart, J., dissenting).

27. *Id.* at 149.

developments are best understood as moderate extensions of earlier developments, more evolution than rupture.

Even if we accept Professor Sawyer's claim that a faith in the political safeguards occupied a consensus position in American constitutionalism in the period between the New Deal and *NLC*,²⁸ I believe the significance of that consensus was less than he makes it out to be. To accept the political safeguards is to stake out a position on a continuum. It is to believe that in most cases the values of federalism are best protected by Congress and thus the Court need not intervene. But this is not to say that to embrace the political safeguards is to reject judicial review in the name of federalism. It is not to say that judicial enforced limits on national authority "were universally agreed to be moribund."²⁹ Most members of the Supreme Court never believed they had abandoned judicial review in this area. And those who turned to the courts to recognize their argument that Congress was overstepping its constitutional limits certainly did not believe the courts had abandoned the field of battle. *NLC* was indeed a significant decision. But its significance was in that the majority found a law that they felt demonstrated a breakdown of the political safeguards that managed to protect federalism in most other cases—not that the majority made some sort of wholesale rejection of a previously dominant paradigm.

I believe Professor Sawyer errs in accepting as descriptively accurate the dire, even hyperbolic claims Justice Brennan made in his *NLC* dissent.³⁰ Justice Brennan pressed the argument for relying on the political safeguards of federalism beyond Wechsler. More than a description of the general tendency of federalism interests to be recognized through the political process, in Justice Brennan's hands the political safeguards theory becomes a hard and fast rule. Through the political process, "the States are fully able to protect their own interests," he asserted.³¹ More than a justification for general judicial deference to Congress, Justice Brennan seemed to believe that the courts should basically cede oversight in this area.

Judicial redistribution of powers granted the National Government by the terms of the Constitution violates the fundamental tenet of our federalism that the extent of federal intervention into the States' affairs in the exercise of delegated powers *shall be determined* by the

28. See, e.g., Sawyer, *supra* note 1 (describing *NLC* as "reject[ing] a doctrinal principle that had been established for forty years").

29. *Id.*

30. See *id.* ("[A]s both the tone and substance of Justice Brennan's opinion indicated, *NLC* was a clear departure from the Court's commerce clause doctrine.")

31. *Nat'l League of Cities v. Usery*, 426 U.S. 833, 876 (1976) (Brennan, J., dissenting).

States' exercise of political power through their representatives in Congress.³²

It is only based on this revisionist description of federalism's recent past in the Court that Justice Brennan's declaration that *NLC* marked a rejection of "long-settled constitutional principles"³³ and a resurrection of the discredited approach of the pre-1937 Court³⁴ makes sense. Justice Brennan went on to lambast the majority opinion as a "patent usurpation of the role reserved for the political process,"³⁵ a "startling restructuring of our federal system,"³⁶ "a catastrophic judicial body blow at Congress's power under the Commerce Clause,"³⁷ and "an ominous portent of disruption of our constitutional structure."³⁸ This all may be an effective critique, but it is based on a skewed description of the state of Commerce Clause doctrine prior to *NLC*.

Justice Brennan not only overstated what the Court did in *NLC* vis-à-vis pre-existing doctrine, he proved a poor prognosticator. Hardly an "ominous portent of disruption of our constitutional structure,"³⁹ *NLC* proved to be a tentative, uncertain foray into judicially enforced federalism. As a precedent, it was remarkably short lived. The Court found ways to distinguish it in subsequent cases,⁴⁰ and within a decade the Court overruled it.⁴¹ It was an indication of things to come, to be sure, a reflection of the rising stock of federalism concerns inside and outside the courts, but it also demonstrated the Court's ambivalence with this new role.⁴²

When viewed from the perspective of constitutional development, and not just as a question of what five Justices of the Supreme Court agree upon, we should understand what happened in *NLC* as a shift of emphasis rather than a category shift. It was, to be sure, a victory for federalism—a victory for those who felt that national authority needed to be pushed back to better protect state autonomy, and for those who felt that the judiciary needed to serve as a check on national authority and protector of federalism principles. But this was a victory that was built on sturdy ideological and legal foundations. What happened over the course of the 1960s was that a minority but still quite influential position in extrajudicial constitutional discourse with a marginal presence in pre-

32. *Id.* at 876–77 (emphasis added).

33. *Id.* at 879.

34. *Id.* at 867–68.

35. *Id.* at 858.

36. *Id.* at 875.

37. *Id.* at 880.

38. *Id.*

39. *See id.*

40. *See, e.g.,* *United Transp. Union v. Long Island R.R. Co.*, 455 U.S. 678 (1982).

41. *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

42. *See* Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 VAND. L. REV. 1623, 1623–24 (1994).

vailing constitutional doctrine evolved into something more robust, a development evident both inside and outside the courts. By the mid-1970s, when the right case came along, a case in which Congress had extended its regulatory reach deeper into the activities of the states, and had done so over the opposition of a majority of the states, a majority of the Supreme Court Justices concluded that this was a step too far. Although Justice Brennan declared the majority's ruling a refutation of all that came before, a break from a settled commitment to the leaving federalism concerns to the political process, I believe *NLC* is best understood as a moderate course change, a development built upon a resilient commitment to federalism principles that had never left the scene.