The Politics of Constitutional Federalism

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The Return of Constitutional Federalism offers new insight into how constitutional law changes in the courts.† This Comment expands on this analysis by examining how conventional political explanations obscure a richer story about how federalism became a centerpiece of legal conservatism outside of the juridical arena. Recovering this story moves us toward a better understanding of how politics can transform the popular understanding of constitutional rules and opinions.

Scholars connect the rise of constitutional federalism to the emergence of a cohesive New Right coalition. Far from exposing a natural tie between federalism and conservatism, however, the history of this alliance reveals that the relationship between conservatism and federalism to be much more fluid and contested than we might expect. This Comment looks first at the political explanations for the return of federalism canvassed in The Return of Constitutional Federalism. Using the historical example of the antiabortion movement, this Comment then re-examines the fraught relationship between conservatism and federalism in the 1960s and 1970s. Prior to and even after the emergence of a New Right coalition, influential social conservatives at times embraced the idea of an active federal government, a muscular Congress, and a powerful judiciary. Rather than expressing a coherent political vision, federalism brings together a loose coalition of conservative groups with differing ideological agendas and widely varying views of federal power.

Revisiting Political Explanations for the Return of Federalism

Some political explanations present the bond between conservatism and constitutional federalism as a marriage of convenience.‡ Upset with an interventionist Congress and the Warren Court, conservatives supposedly used constitutional federalism to discredit the legal liberal status quo.§ In this account, conservatives had no natural interest in constitu-

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3. See, e.g., CHRISTOPHER BANKS & JOHN C. BLAKEMAN, THE UNITED STATES SUPREME COURT AND THE NEW FEDERALISM: FROM THE REHNQUIST TO THE ROBERTS COURTS 76 (2012) (describing judicial supporters of federalism as either “conservatives who were . . . aligned with
tional federalism beyond using it to advance a pre-existing policy agenda. As the champion of these interest groups, Ronald Reagan promised “to shrink government at all levels.” Its proponents argued that Reagan’s New Federalism would radically restructure both the relationship between the federal government and the states and the constitutional role of federalism.

Beginning with the selection of William Rehnquist as Chief Justice, Reagan and other conservative Presidents implemented this agenda by selecting movement conservatives to serve on the federal bench. At bottom, however, constitutional federalism thinly disguised a substantive agenda involving both fiscal and social conservatism. Conservative social movements endorsed a variety of policy goals, from scaling back federal civil rights laws to restoring criminal laws against abortion. Constitutional federalism promised to deliver these results in a seemingly neutral and legitimate way.

Alternatively, political explanations of constitutional federalism frame it as a logical extension of conservative policy preferences. In this account, constitutional federalism reflected the commitments of interest groups interested in tax cuts, deregulation, and the end of federal protection for racial minorities, gays and lesbians, and abortion rights. Groups angry about Supreme Court decisions from Miranda v. Arizona to Roe v. Wade saw in constitutional federalism a perfect expression of their anger at perceived federal incompetence, bias, and overreaching.

As The Return of Constitutional Federalism reminds us, political explanations for federalism’s return begin too late, neglecting the reappearance of constitutional federalism well before the New Right took American politics by storm. However, the problems with conventional accounts do not end with the appearance of the New Right. Political ex-

4. See, e.g., Erwin Chemerinsky, Reconceptualizing Federalism, 50 N.Y.L. Sch. L. Rev. 729, 735 (2006) (“[F]ederalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare.”).


planations for the return of constitutional federalism offer a deeply incomplete view of the complex and contingent connection between conservatives’ ideological commitments and constitutional federalism.

**The Antiabortion Movement and the Making of a Federalist Coalition**

By the late 1980s, the antiabortion movement appeared to be a leading champion of federalism. In 1989, when asking the Supreme Court to overrule *Roe*, prominent pro-life organizations presented the 1973 decision as an unjustified federal incursion into areas of traditional state power. Birthright, an antiabortion pregnancy counseling service, asked the Court to “return[.] to the states the right to make their own laws regarding abortion.” By the time the Court considered *Planned Parenthood of Southeastern Pennsylvania v. Casey* arguments about the virtues of federalism played an important part in antiabortion advocacy. As one pro-life organization argued, the Court ought to undo *Roe* in recognition that “the states have a sovereign right to endow all those subject to their jurisdictions with legal rights and interests.”

The pro-life movement’s embrace of states’ rights appears to fit well within conventional political explanations for the return of constitutional federalism. If constitutional federalism serves as a convenient vehicle for conservatives’ policy preferences, then antiabortion arguments for states’ rights might have taken the place of more divisive demands for the recognition of fetal rights. If, by contrast, constitutional federalism itself represents a central ideological commitment of conservatives, then antiabortion arguments for states’ rights might reflect a deeply held preference, rooted in state traditions of privileging the prerogatives of parents, husbands, and nuclear families.

Just the same, abortion opponents’ use of federalism was far from inevitable. Indeed, between 1973 and 1981, antiabortion activists endorsed an expansive role for both Congress and the federal courts. In

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advancing a right to life, abortion opponents expected the federal judiciary to recognize a new fundamental right, using interpretive techniques drawn from substantive due process jurisprudence.\textsuperscript{16} When \textit{Roe} made antiabortion litigation appear counterproductive, pro-life prioritized federal statutes—or even constitutional amendments—that would strip the states of any freedom to experiment with different ideas about abortion.\textsuperscript{17} The movement’s decision to enter a coalition in favor of federalism came in response to a highly unpredictable set of political events: the creation of effective New Right organizations, frustration with the futility of federal judicial and legislative solutions, and Ronald Reagan’s decision to fuse a pro-life message with a commitment to “New Federalism.”\textsuperscript{18}

In the 1970s, the Court’s \textit{Roe} decision raised difficult issues concerning federal judicial intervention with the traditional prerogatives of the states. As Justice Byron White explained in his dissenting opinion in \textit{Doe v. Bolton},\textsuperscript{19} \textit{Roe}’s companion case: “The upshot [of \textit{Roe}] is that the people and the legislatures of the 50 States are constitutionally disentitled [sic] to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand.”\textsuperscript{20}

For an emerging antiabortion movement, however, federalism politics had virtually no appeal. Before 1973, antiabortion activists had prioritized the defense of a fundamental right to live—and had expected the federal courts to advance their cause.\textsuperscript{21} Antiabortion law review articles

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  \item \textsuperscript{17} On the human life statute, see, e.g., DONALD CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 197 (2001); LAURENCE TRIBE, ABORTION: THE CLASH OF ABSOLUTES 162 (1990).
  \item \textsuperscript{19} See BYRN v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 200 (N.Y. 1972); Byrn v. N.Y. City Health and Hosps. Corp., 38 A.D.2d 316, 324 (N.Y. App. Div. 1972). As this Comment shows, antiabortion scholars also contemplated constitutional protections for the unborn, implemented by the judiciary.
  \item \textsuperscript{20} Id. at 222 (White, J., dissenting).
  \item \textsuperscript{21} For example, abortion opponents sought state and federal judicial protection for the unborn child. See Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 200 (N.Y. 1972); Byrn v. N.Y. City Health and Hosps. Corp., 38 A.D.2d 316, 324 (N.Y. App. Div. 1972). As this Comment shows, antiabortion scholars also contemplated constitutional protections for the unborn, implemented by the judiciary.
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began contending that “[a]lthough the Constitution contains no express reference to the right to life,” the Declaration of Independence, the Fourteenth Amendment, and international law protected that right.\textsuperscript{22} Much as the federal courts had identified a constitutional right for married couples to use contraception, antiabortion activists hoped that the federal courts would impose on the states a fundamental right to life.\textsuperscript{23} Doing so would require a reworking of conventional procedural due process, substantive due process, or equal protection—an expansion of judicial power and federal constitutional rights at the expense of state power.

The Supreme Court’s \textit{Roe} decision did little to convince abortion opponents of the virtues of either political or constitutional federalism. Most leading antiabortion attorneys opposed a constitutional amendment that would have overruled \textit{Roe} and returned the abortion issue to the states.\textsuperscript{24} While a majority of leading antiabortion attorneys agreed on the importance of “raising the unborn child to a 14\textsuperscript{th} Amendment person,” pro-life lawyers wanted a federal constitutional amendment to go even further, “explicitly prohibit[ing] private destruction of the unborn.”\textsuperscript{25}

The movement’s leaders remained ambivalent about federalism well into the early 1980s. When Senator Orrin Hatch (R-UT) proposed a constitutional amendment that would return the abortion issue to the states, a powerful minority in the movement framed Hatch’s amendment as a betrayal of pro-life principles.\textsuperscript{26}

Perhaps pro-lifers’ lack of interest in federalism politics should not come as a surprise. A variety of organizations later attracted to the New Right took a contradictory view of the expansion of federal power. The evangelical Protestants who helped to create the Religious Right expressed concern about growing federal power while turning to the federal courts for protection against the imposition of “secular humanism” on schoolchildren.\textsuperscript{27} Popular outrage about the Supreme Court’s decisions on school prayer found expression in demands for a new federal constitutional amendment as well as in criticism of federal judicial overreach.

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\textsuperscript{22} Quinn & Griffin, \textit{supra} note 16 at 579; \textit{The Unborn Child}, \textit{supra} note 16 at 1004; \textit{see also} Note, \textit{In Defense of the Right to Live: The Constitutionality of Therapeutic Abortion}, 1 GA. L. REV. 693, 697 (1966).

\textsuperscript{23} As late as 1976, abortion opponents continued to make similar arguments. \textit{See, e.g.}, Brief for United States Catholic Conference as Amicus Curiae Supporting Appellees at 17–18, Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976) (Nos. 74-1151, 74-1419).

\textsuperscript{24} \textit{See, e.g.}, Memorandum from Dennis Horan to the NRLC Board of Directors (Jan. 19, 1974), in \textit{The American Citizens Concerned for Life Papers} (on file with Gerald Ford Memorial Library, University of Michigan, Box 4).

\textsuperscript{25} \textit{Id.}


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ing. Legally and politically, different members of a later New Right coalition prioritized a substantive goal, whether it involved the rights of religious believers, unborn children, or parents. At most, states’ rights arguments advanced an underlying substantive goal, not a deeply held belief about the importance of state sovereignty.

**CONSTRUCTING CONSERVATIVE FEDERALISM**

With the emergence of the New Right in the late 1970s and early 1980s, leading conservative politicians and grassroots operatives reformulated federalism politics, arguing that the expansion of the national government systematically undermined socially conservative causes. Leading accounts recognize the role played by Ronald Reagan and Edwin Meese in forging a “New Federalism.” Politically, Reagan’s federalism involved cutbacks in federal regulation and the devolution of managerial authority over regulatory initiatives to the states. Constitutionally, the Supreme Court’s federalism revolution dramatically changed the law governing the Commerce Clause, Tenth Amendment constraints on federal power, Eleventh Amendment immunity, and congressional power under Section Five of the Fourteenth Amendment.

Political explanations for the return of constitutional federalism present these developments as the result of conservative social movement mobilization. However, as the history of the pro-life movement makes clear, social conservatives did not always have a natural attraction to federalism. Nor did federal overreaching inevitably become a policy priority for movement conservatives. Conservative affinity for constitutional federalism emerged instead as the result of New Right efforts, inside and outside the White House, to unite grassroots groups with otherwise divergent goals.

The creation of the New Right coalition came partly as the result of an unprecedented political opportunity in the late 1970s and 1980s. Some social conservatives, particularly evangelical Protestants, represented an untapped source of votes. Other constituents, particularly in the South and Midwest, had traditionally voted for the Democratic Party, but felt increasingly alienated by Democrats’ endorsement of women’s rights and civil rights. Convincing these voters—who held different religious

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30. See id. at 166–73.
31. See id. at 7–10.
32. See, e.g., WILLIAMS, supra note 28 at 6–10, 128.
33. See, e.g., id. at 7–10.
convictions and prioritized different policy issues—that they had common cause would require tremendous rhetorical innovation.

According to Reagan and New Right leaders like Paul Weyrich and Richard Viguerie, social conservative groups shared a single problem: the interference of the federal government with the family. In a 1980 speech, for example, Reagan asserted that leaders of the federal government had “begun to think they can be parent; they can be teacher; they can be clergyman. And I think it is time to get the Government back to what it was supposed to be 200 years ago, and that is a servant of the people.” Reagan’s message attracted grassroots conservatives concerned about “sex education in public schools, court rulings that have prohibited prayers in the schools and regulations that allow teen-age girls to have abortions without their parents’ knowledge.”

Strategically, identifying a common enemy allowed social conservatives, in the words of one pro-life activist, to “get a lot more accomplished.” The New Right offered political expertise, access to direct mail networks, and financial stability to previously struggling single issue groups. United, social conservatives appeared to have greater political influence. Adopting the rhetoric of federalism allowed diverse social conservatives to speak to one another in a way that was tactically effective, mutually comprehensible, and likely to minimize tensions within the political coalition.

Ideologically, the message advanced by Reagan and New Right leaders like Weyrich appealed to a variety of movement conservatives “concerned that the federal government [had] intruded in a major way into areas that concern them such as the home.” “The bottom line of pro-family people,” explained anti-feminist Phyllis Schlafly, “is get the federal government off our backs.”

Just the same, social conservatives’ embrace of constitutional federalism reflected the changing demands of a particular political moment: the promise of financial power and political influence offered by the New Right, Reagan’s self-identification as a friend of the pro-family movement, and the advantages of coalition rather than single-issue politics. Nonetheless, read in historical context, some conservatives’ interest

35. Id.
39. Id.
in constitutional federalism appears tenuous and shallow. Abortion opponents, for example, supported a muscular federal government so long as the expansion of federal power advanced antiabortion activists’ substantive goals. Support for federalism values made sense only insofar as the states promised to deliver better results.

**PROGRESSIVE FEDERALISM, CONSERVATIVE FEDERALISM, AND CONTINGENCY**

Recent scholarship has studied the progressive potential of federalism. For example, Heather Gerken has endorsed the virtues of “federalism all the way down.” With power exercised through local government or small communities, minorities do not answer to majority rule but rather act as “part of a complex amalgam of state and local actors who administer national policy.” Forced to compete with national majorities, racial minorities and progressive dissenters lose out. By contrast, local institutions from cities to school boards provide a forum for minorities, since they “allow racial minorities and dissenters to rule.”

The Return of Constitutional Federalism offers powerful historical evidence that constitutional federalism can be—and has been—more than a vehicle for the views of conservative activists or entrenched majorities. Recent examples reinforce this conclusion. In the marriage equality struggle, social conservatives have relied on a strong federal government to limit access to marriage, particularly through the federal Defense of Marriage Act. Rhetorically—and sometimes constitutionally—gay rights advocates have invoked federalism values in demanding constitutional change. Conversely, in battles about the Affordable Care Act, conservatives have attacked the supposed overreaching of the federal government by launching what the Washington Times called a “states’ rights war over Obamacare.”

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41. See Gerken, supra note 40.
42. Id. at 7.
43. Id.
44. Id. at 9.
tutional federalism have always had an uneven appeal for both conservative and progressive social movements.

What, then, does *The Return to Constitutional Federalism* mean for normative scholarship on federalism’s progressive potential? The answer, it seems, offers an equal measure of hope and frustration. The history of constitutional federalism’s return undermines the claim that federalism has a fixed political meaning or deep conservative roots. Advocates, attorneys, activists, and academics can—and have—reimagined and redefined federalism in response to an ever-changing political and doctrinal landscape. Nothing stands in the way of efforts to craft a more effective progressive—or conservative—federalism.

Nonetheless, *The Return to Constitutional Federalism* reminds us that the rise of constitutional federalism—or any brand of federalism—depended on a series of unanticipated doctrinal shifts and political changes. The story of the antiabortion movement’s engagement with federalism shows that the politics of federalism can be just as unpredictable.

So while there are no logical obstacles to the creation of a better—or different—federalism, *The Return to Constitutional Federalism* spotlights both the difficulty and contingency of constitutional change. Constitutional federalism gained support not only because new doctrinal developments made it more compelling, but also because larger social and political changes lent the doctrine more credibility. Later, constitutional federalism gained political momentum because grassroots activists and political leaders crafted a powerful political coalition convinced of the value of states’ rights rhetoric. The last federalism revolution, as *The Return of Constitutional Federalism* reminds us, defies any simple doctrinal or political explanation. It is for this reason, though, that the subject is so deserving of reconsideration.