

## PREFACE

In a previous book, we explored the role of the federal courts in reforming conditions in American prisons. One of our findings was that principles of federalism did not deter the courts from revamping state prison systems. The federal courts simply ignored the weight of history—the Thirteenth Amendment, the century-old “hands-off” doctrine, the lack of precedent—and systematically set about redesigning the nation’s prisons, first in the South and then throughout the rest of the country.<sup>1</sup> Of course, their decisions followed in the wake of *Brown v. Board of Education*<sup>2</sup> and the rights revolution. Still, in the cases involving prison conditions, the federal courts systematically dismantled a preserve of state power that up until that time had been invulnerable to federal oversight. Furthermore, no one really opposed them—not the press, not George Wallace, not Orville Faubus, not Lester Maddox. Of course, some people complained, but their complaints were feeble and localized.

Our explanation for this remarkable phenomenon is that what now passes for federalism in the United States is actually managerial decentralization. When there is a consensus, national norms swamp state prerogatives. What at times appears to be a manifestation of federalism is the absence of national norms; when there is disagreement, states are permitted discretion. In the cases involving prison conditions, the courts tapped into a national consensus, one held not only by federal judges but by members of Congress and Justice Department officials, as well as correctional leaders across the country. In short, the courts reigned in the unacceptable practices of outlier states. If federalism has any bite, one might have expected it to have protected these states that marched to a different drummer, since tradition, the Constitution, and, until the 1970s, an unbroken chain of legal doctrine all understood prison administration to be one of the quintessential functions of the states. Yet this sphere of autonomy was invaded and toppled with virtually no resistance. Our explanation is that federalism is no longer an operative principle in the United States.<sup>3</sup>

A host of people have taken issue with our conclusion or challenged us for dismissing federalism’s many virtues.<sup>4</sup> Furthermore, since our initial writing on federalism, the U.S. Supreme Court has continued to expand on

its federalist revival and elaborate on the appeals of federalism. Many of its decisions have met with criticism from legal academics, but even those who most vigorously criticize the Court's newfound approach tend to argue that the Court's account of federalism is off the mark, not that something is wrong with the idea of American federalism itself.

In our view, the problem is much more basic. Rather than plunging into the particularistic morass of the technical literature on intergovernmental relations, tracing the shifting relations between state and national governments over time, reviewing the changing role of the federal courts in umpiring the federal system, parsing the rapidly growing decisions handed down by the Supreme Court, or undertaking a systematic comparative analysis of federal systems around the world, we have embarked on a rethinking of the concept of federalism itself. Our objective is to clarify its meaning, distinguish it from closely related structural arrangements, reflect on the causes and conditions that give rise to and sustain it, link it to an emerging body of comparative scholarship that examines federalism in a less reverential way, and then consider the implications of our argument for the structure of the American federal system. Thus our aim is to help revive a flagging theoretical analysis of federalism.<sup>5</sup>

A number of colleagues have supported us in the production of this volume, although few, if any, would probably want to be associated with all or even most of our arguments. So we absolve them of responsibility en masse. Still, we want to acknowledge their help. They include Takeshi Akiba, Brad Chilton, Jesse Choper, Lawrence Friedman, Paul Frymer, Bob Kagan, Dale Krane, Samuel Krislov, John Noonan, the late Nelson Polsby, Robert Post, and Harry Scheiber.

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