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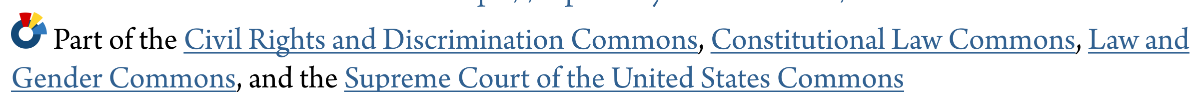
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FEDERALISM AND SOCIAL CHANGE*

TERRANCE SANDALOW†

A familiar passage in Professors Hart and Wechsler's casebook likens the relationship between federal and state law to that which exists between statutes and the common law. The underlying idea is that federal law rests upon a substructure of state law. "It builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for [its] special purpose."[1] A similar relationship exists between state and federal judicial systems. State courts are courts of general jurisdiction, assumed to have authority to adjudicate controversies unless Congress has displaced them by conferring exclusive jurisdiction on federal courts. Federal courts, on the other hand, have only a limited jurisdiction carved out of the general jurisdiction of the state courts and conferred for restricted purposes.

I mention these well-known relationships to explain why I shall not essay a comprehensive discussion of the Supreme Court's attitudes toward federalism during the past decade. Because of the variety and complexity of the relationships between state and federal law, any attempt to canvass all—or even the important—decisions bearing upon the Court's current attitude toward federalism would necessarily cover a very broad terrain, surely far more than I can traverse within the allotted time.

Instead, I will consider what insights into the Court's attitudes toward federalism can be gained by exploring a limited number of constitutional decisions arising out of the social revolution of the past decade, those involving the constitutionality of gender classifications and those relating to childbearing. Confining the inquiry in this way eliminates any possibility of a definitive statement, or even a rounded view, of the Court's attitude toward federalism during the Burger years, but by focusing attention upon a small number of important cases it may open the way to insights that would be obscured in a *tour de horizon*. More specifically, an examination of the Court's response to the most important issues raised by the women's movement may tell us something of its current attitudes toward federalism as a device for mediating conflict in a period of rapid social change.

"Revolution" is among the words whose meaning has been debased in recent years. Yet, it seems no exaggeration to say that the United States has,

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1. HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEMS 471 (2nd ed. 1973).

during the past decade, experienced a revolution, a momentous alteration in the aggregation of attitudes and practices that defined a traditional societal stance toward the family. The consequences of that revolution are not yet fully apparent, but there is little doubt that they will be profound, affecting matters as diverse as patterns of economic activity and the most intimate experiences of life. Of the many strands that compose the revolution, I shall consider only one, the demand for a redefinition of the role of women. That demand did not originate in the 1970s, but it was during that decade that its significance became fully apparent.

It is not surprising that so profound a social change should be accompanied by changes in law, nor that in a common law system judges should have played an important role in effecting the legal changes. "Strict constructionists" may, however, find it rather surprising that the justices of the Supreme Court are among the judges who have participated and that they have done so through the instrumentality of the Constitution. Nevertheless, over the course of the decade, the Court has dealt extensively with a wide range of issues raised by the women's movement. The Court's response to those issues reveals a great deal about its attitudes toward the allocation of responsibility among law-making institutions for the complex process by which law at times responds to and at times leads to social change. Debate within the Court and much of the commentary on its decisions have centered upon the appropriate division of responsibility between courts and legislatures. Nearly all of the decisions, however, necessarily involve a second question, the proper division of responsibility between the nation and the states. Decisions limiting state power, to put the point somewhat differently, not only restrict legislative power, they establish a national rule. In many areas, adoption of a national rule is dictated by the text of the Constitution, by history, or by the compulsion of circumstance. All three, for example, combine (though perhaps with varying force) to support the restrictions that the Court has imposed upon state legislation that impedes the flow of commerce.

But neither constitutional text, nor history, nor the circumstances of our national life speak with similar clarity to the locus of responsibility for deciding the issues raised by the movement toward equality of the sexes. The text, of course, is silent—except perhaps to the perspicacious few who can discern a clear direction in the due process and equal protection clauses, the ninth and tenth amendments, and emanations from and penumbras of various other provisions of the Constitution. History is far from silent, but its message is equivocal. Issues concerning personal status and family life have traditionally been regarded as within the province of the states. For nearly a century, however, the Supreme Court has employed the Constitution to nationalize the protection of interests that it regards as fundamental. Especially during the past half-century, the number and range of those interests have

HeinOnline -- 43 Law & Contemp. Probs. 30 1979-1980

shown a remarkable capacity for growth. In consequence, as I have written elsewhere, "constitutional law must now be understood as the means by which effect is given to those ideas that from time to time are held to be fundamental in defining the limits and distribution of governmental power in our society."[2] And, it has been, as Chief Justice Marshall wrote long ago, "the province and duty of the judicial department to say what the law is."[3]

The issues raised by the social changes of the past decade brought these allocations of competence into conflict and thereby left the Court with a substantial degree of freedom to decide whether they should be resolved by the adoption of a constitutional—and, therefore, national—rule or whether they should be left for resolution by the states. It is precisely because of the Court's relative freedom in framing a response to that question that its decisions are so fruitful a source for discerning its attitudes toward the states' role in mediating the conflicts arising during a period of social change.

The Court's attitude toward that role over the course of a decade would be of considerable interest at any time, but its attitude during the past decade is of special interest. A central count in the indictment of the Warren Court by its many critics was its alleged disregard of the federal structure of our government, as evidenced by its willingness to override the judgment of the states on major issues of policy and to impose national rules of decision.[4] An examination of the Court's work during the Burger years may help to inform our judgments about that criticism. Within two and one-half years of Chief Justice Warren's retirement, four members of the Warren Court were replaced by a president who was among its chief critics and who owed his election in large part to constituencies opposed to the nationalizing tendencies of the Warren years. A fifth appointment, by another president but also a critic of the Warren Court, was made three years later, and the appointee has now served nearly half of the decade we are considering. The positions taken by the reconstituted Court may shed light on the question whether the centralizing thrust of the Warren Court reflected only the policy preferences of its members or whether they were the product of deeper currents in our national life.

The most insistent claim of the women's movement has been that law must be sex-neutral. The claim has been pressed in the political forum, through the effort to gain adoption of the Equal Rights Amendment (ERA), and in the courts, by the effort to obtain an interpretation of the equal protection clause that would prohibit all, or very nearly all, governmental classifications on the basis of sex. The latter effort has been more successful. Nearly eight years after its sub-

2. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1184 (1977).
3. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).
4. *See e.g.*, P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT 51-97 (1970).

HeinOnline -- 43 Law & Contemp. Probs. 31 1979-1980

mission to the states, the ERA has yet to be adopted, but the effort to obtain an interpretation of the equal protection clause prohibiting gender discrimination by government has been sufficiently successful to raise a serious question whether adoption of the ERA would serve any but a symbolic purpose. Significantly, the doctrinal development has occurred entirely during the past decade.

In 1971, in *Reed v. Reed*,[5] the Court, for the first time in its history, held a gender classification unconstitutional. The case involved the validity of an Idaho statute which provided that when two individuals were otherwise equally entitled to appointment as the administrator of an estate, a male applicant must be preferred to a female. In the eight years since *Reed* the Court has decided eight cases involving the validity of state statutes employing gender classifications. The classifications were held unconstitutional in six[6] and sustained in two.[7] The details of these cases need not detain us. It is sufficient to note that the decisions, together with a number of others involving gender classifications in federal statutes,[8] establish the presumptive invalidity of governmental discrimination on the basis of sex. To be sure, the Court has been unwilling to declare that gender classifications are—in the current jargon of equal protection—"suspect," but it has repeatedly said that they are valid only if necessary to serve an important governmental interest. Not very many statutes are likely to survive that test.

The most interesting feature of the sex discrimination cases, for purposes of the present inquiry, is the Court's inattention to the issues of federalism that they present. Not a single opinion in any of the cases suggests that the justices considered the federal structure of our legal system relevant to a decision of the issues before them. No reasons are given to justify adoption of a national rule, nor is any consideration given to the values that might be served by refusing to adopt such a rule. The issues are approached no differently from the way in which they would be by a constitutional court in a nation with a unitary system of government.

The Court's failure to consider the implications of federalism in addressing the permissibility of gender classifications is all the more striking because the standard it has adopted for determining their validity has at times cut deeply into state power to legislate with respect to family relations, an area that traditionally has been regarded as being at the core of the exclusive province of the states. Even in such an area, of course, the states must comply with

5. 404 U.S. 71 (1971).

6. Caban v. Mohammed, 99 S. Ct. 1760 (1979); Orr v. Orr, 99 S. Ct. 1102 (1979); Duren v. Missouri, 439 U.S. 357 (1979); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Taylor v. Louisiana, 419 U.S. 522 (1975).

7. Parham v. Hughes, 99 S. Ct. 1742 (1979); Kahn v. Shevin, 416 U.S. 351 (1974).

8. Califano v. Westcott, 99 S. Ct. 2655 (1979); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

HeinOnline -- 43 Law & Contemp. Probs. 32 1979-1980

established constitutional limitations. Still, one might think it appropriate for the Court, in considering new constitutional limitations on state power, to take account of their potential intrusiveness in areas of traditional state concern. A decision last term, *Orr v. Orr*,[9] illustrates the point. The case involved the validity of Alabama statutes that subjected men, but not women, to liability for alimony. The appellant, in challenging a decree ordering him to pay alimony, characterized the statutes as announcing "the State's preference for an allocation of family responsibilities under which the wife plays a dependent role, and as seeking for their objective the reenforcement of that model among the state's citizens."[10] The Court accepted the appellant's contention that such a purpose could not sustain the statute, stating that "the 'old notio[n]' that 'generally it is the man's primary responsibility to provide a home and its essentials,' can no longer justify a statute that discriminates on the basis of gender."[11] No reason is offered why, in an area in which the state traditionally has been responsible for establishing policy, it should now be foreclosed from pursuing a policy that seeks to reinforce this conventional —though perhaps increasingly obsolescent—conception of family roles.

The omission is striking, but not especially surprising. The Court's failure to consider the necessity for, or even the desirability of, a national standard for determining when gender classifications are appropriate is merely one manifestation of a continuing, and in this century accelerating, trend, for which the Court is only partially responsible, that has significantly eroded the policy-making role of the states. Whatever the framers may have intended, the nation is now dominant, not merely in the sense declared by Article VI but in the larger sense that its supremacy extends over all, or very nearly all, the domain of modern government. Congress has, for all practical purposes, acquired the legislative authority of a unitary government, and the citizenry looks mainly to it, and to the other institutions of the national government, for responses to the growing number of problems that are now held to be within the competence of government. Of course, the bulk of our law is still state law, and the states remain primarily responsible for its formulation and administration. Yet, even in areas in which the states have continuing responsibility, they have over the past fifty years increasingly been required to act in accordance with terms set by the national government and under its supervision.

The subordination of the states has been accompanied, inevitably, by diminished respect for their capacity to contribute to the resolution of important social issues. Though they continue to have important decision-making responsibilities, it seems increasingly to be understood that they—like adminis-

9. 99 S. Ct. 1102 (1979).
10. 99 S. Ct. at 1111.
11. 99 S. Ct. at 1112, *quoting* Stanton v. Stanton, 421 U.S. 7, 10 (1975).

HeinOnline -- 43 Law & Contemp. Probs. 33 1979-1980

trative agencies or local governments—must act within the framework of norms that the larger society regards as fundamental, norms that are to be given legal expression by the institutions of the national government. This conception of the states is vividly illustrated by Justice Brennan's opinion in *Frontiero v. Richardson*,[12] a 1973 decision involving the validity of a gender classification in a federal statute. Writing for himself and three other members of the Court, Justice Brennan urged that gender classifications should be held "suspect."[13] Among the reasons he advanced, significantly, was that Congress, in submitting the Equal Rights Amendment had "concluded that classifications based upon sex are inherently invidious . . . ." This "conclusion of a co-equal branch," he continued, "is not without significance to the question presently under consideration."[14] Since the legal consequences of a decision that gender classifications were suspect would have been virtually equivalent to those resulting from adoption of the ERA, Justice Brennan's opinion comes very close to a denial of the states' role in the amending process.

Justice Powell, writing also for the Chief Justice and Justice Blackmun, differed sharply with Justice Brennan on precisely this point. To declare gender classifications "suspect," he wrote, "would preempt by judicial action a major political decision . . . currently in process of resolution" and would not "reflect appropriate respect for duly prescribed legislative processes. . . ."[15] The point of the amending process, Justice Powell seems to be saying, is not merely to establish the existence of a national consensus, but to establish the existence of that consensus by the action of state legislatures. His opinion thus seems to recognize a role for the states in responding to fundamental social changes that Justice Brennan's opinion implicitly denies them. It is tempting to attach significance to the fact that all who joined with Justice Brennan, and none who joined with Justice Powell, were members of the Warren Court. Ultimately, however, Justice Powell's opinion offers little comfort to those who believe that the states should have an important role in deciding questions as fundamental as those raised by the demands that law should be sex-neutral. Though declining to hold gender classifications suspect, Justice Powell and those for whom he wrote concurred with Justice Brennan in holding that the statute before the Court was unconstitutional, applying a standard that, as subsequent decisions have demonstrated, allows the states little more discretion than would the standard proposed by Justice Brennan.

The Court has displayed no greater attentiveness to the values of federalism in a second line of cases that have been important to the women's movement, those relating to childbearing. In *Cleveland Board of Education v. La*

12. 411 U.S. 677 (1973).
13. 411 U.S. at 688.
14. 411 U.S. at 687-88.
15. 411 U.S. at 688.

HeinOnline -- 43 Law & Contemp. Probs. 34 1979-1980

Fleur,[16] it invalidated, as a denial of due process, a Board policy requiring compulsory maternity leave several months before expected childbirth. In *Geduldig v. Aiello*,[17] it sustained, against an equal protection challenge, a state statute that excluded pregnancy from coverage under a state system of disability insurance for workers. In neither case do the opinions contain any suggestion that considerations of federalism entered into the decision.

The most important of the cases involving childbearing is, of course, *Roe v. Wade*,[18] the celebrated abortion decision. At this point, it will come as no surprise that none of the opinions consider the relevance of federalism to the appropriate decision. The case is, nonetheless, a useful vehicle for considering some of the values that the Court has subordinated by its disregard for federalism. Justice Blackmun's opinion for the Court opens with a forthright acknowledgment of

> the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experience, one's exposure to the raw edges of human existence, one's religious training, one's attitude toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not simplify the problem.[19]

The language has the ring of an introductory paragraph to an opinion that sustains the regulatory power of the states. But, of course, it is not. The opinion went on to restrict sharply the state's power to prohibit or regulate abortions and, in doing so, invalidated legislation in all but a few states.

I put to one side my deepest reservations about the decision, whether with no more warrant than it had in the Constitution or from history, the Court was justified in invalidating legislation in forty odd states. As Justice Rehnquist wrote in dissent,

> [t]he fact that a majority of the states . . . have had restrictions on abortion for at least a century . . . is a strong indication . . . that the asserted right to an abortion is not "so rooted in the tradition and conscience of our people as to be ranked as fundamental".[20]

Justice Rehnquist's dissent, and my own disagreement with the decision, rests upon its undemocratic character. But it is also worth noting that the decision reveals a great deal about the Court's attitudes toward state legislatures and the values of federalism.

16. 414 U.S. 632 (1974).
17. 417 U.S. 484 (1973).
18. 410 U.S. 113 (1972).
19. 410 U.S. at 116.
20. 410 U.S. at 174.

HeinOnline -- 43 Law & Contemp. Probs. 35 1979-1980

The number of states whose statutes were invalidated as a result of *Roe v. Wade* indicates at a minimum, a consensus that abortion should be subject to greater control than is permitted under the Court's decision. At the outset, I want to suggest, although I cannot prove, that it is unlikely that the Court would invalidate an act of Congress reflecting a similar consensus. If I am right—indeed, even if I am not—the Court's willingness to invalidate the legislation of so many states tends to confirm my earlier suggestion that it gives little weight to state legislation as an expression of societal norms with respect to issues that it regards as fundamental. The states are viewed, rather, as subordinate governmental agencies subject to societal norms determined at the national level.

There is less need to speculate about what *Roe* reveals regarding the Court's attitude toward the values of federalism. Among the justifications customarily advanced for a federal system is that nationally uniform laws are likely to be less sensitive than state laws to local preferences. The force of this justification has no doubt diminished as regional differences have become less pronounced. Yet, regional differences persist, as we are reminded in each presidential election and by the state responses to the ERA. No doubt, it is too late for a state to argue that it can, as an expression of local preference, act contrary to a national consensus regarding the proper scope of individual freedom. But unlike the situation confronted by the Court in *Griswold v. Connecticut*,[21] the contraceptive case, a national consensus plainly had not evolved regarding abortion. Some states had recently reformed their laws and others were considering proposals for reform. In short, the political process was at work, offering the prospect that, on a social issue that was the subject of deep disagreement and intense feeling, the law might come to reflect a tolerable accommodation of competing views, differing from state to state in accordance with the differences among their citizens. Sensitivity to the values of federalism would thus have counseled a decision permitting the states to shape their abortion laws, at least in some measure, according to local preferences. Instead, the Court adopted an extraordinarily detailed set of restrictions on state power.

Subsequent decisions have tightened the restrictions, significantly reducing the opportunities that a federal system might have provided for ameliorating local discontent with the Court's initial decision. The question whether the national will should be enforced, unaffected by the moderating influence of local preferences, or whether some outlet should remain for the expression of those preferences is among the recurring problems of a federal system. The circumstances in which we choose one way or the other define the contemporary meaning of the federal principle. From this perspective, the

21. 381 U.S. 479 (1965).

HeinOnline -- 43 Law & Contemp. Probs. 36 1979-1980

second round of abortion decisions is, in the main, but another illustration of the nationalizing tendencies of the Court's responses to the social changes of the past decade.

The only important exception to the Court's insistence upon national uniformity was announced in three 1977 decisions holding that neither federal Medicaid legislation nor the Constitution requires the states to fund nontherapeutic abortions.[22] Although the opinions do not advert to the values of federalism to support the decisions, their effect is to leave room for the expression of local policies. The Court has, however, demonstrated a good deal less deference to the states on other issues growing out of *Roe v. Wade*.[23] Thus, in *Planned Parenthood of Missouri v. Danforth*,[24] it held that a state may not condition an abortion upon spousal consent. Tight restrictions have also been placed upon the state's power to involve parents in a minor's decision to obtain an abortion. In *Danforth*, the Court held that the minor's decision could not be subjected to a parental veto.[25] Thereafter, in *Bellotti v. Baird*,[26] it invalidated, by an eight-to-one vote, a state statute that permitted a court to authorize an abortion if the parents refused consent. Four members of the Court, in an opinion by Justice Powell, held that to be constitutional a statute must assure "every minor the opportunity . . . if she so desires . . . to go directly to a court without first consulting or notifying her parents."[27] The court must, they continued, authorize the abortion if it is satisfied that she is sufficiently mature and well informed to make the decision on her own. In the absence of such a showing, the court must nonetheless authorize the abortion if it finds that an abortion would be in her best interest.[28] Parental consultation may be required, Justice Powell concluded, only if the court finds that the minor's "best interests would be served thereby."[29] Four other members of the Court, in an opinion by Justice Stevens, intimated doubt that a state could interfere even to this extent with a minor's power to obtain an abortion.[30] However this disagreement is resolved, it seems clear that a minor's power to obtain an abortion will be determined largely under federal law.

Danforth and *Bellotti* demonstrate not only the Court's reluctance to permit local preferences to temper enforcement of the national will, but the centripetal force exerted by such a policy, its tendency to draw to the center, for deci-

22. Poelker v. Doe, 432 U.S. 519 (1977); Maher v. Roe, 432 U.S. 464 (1977); Beal v. Doe, 432 U.S. 438 (1977).
23. 410 U.S. 113 (1972).
24. 428 U.S. 52 (1976).
25. 428 U.S. at 72-75.
26. 99 S. Ct. 3035 (1979).
27. 99 S. Ct. at 3050.
28. 99 S. Ct. at 3050.
29. 99 S. Ct. at 3051.
30. 99 S. Ct. at 3053.

sion, an increasing number of issues once within the authority of the states. Legal regulation of the relations between husband and wife and parent and child has traditionally been regarded as the responsibility of the states, relations that are more nearly immune from federal interference than almost any other. Yet, even these relations came under federal control as the Court sought to enforce its newly-discovered constitutional principle to the limits of its logic.

I warned at the outset that I would make no effort to offer a rounded view of the Court's attitude toward federalism during the past decade. In this respect, at least, I trust I have not disappointed you. Yet, if the Court's decisions in the sex discrimination cases and those involving childbearing—the most important decisions arising out of the movement to achieve equality of the sexes—do not fully define the Court's attitudes toward federalism, they nonetheless offer an important perspective on it. The Court's failure to concede any role to the states in mediating the conflicts generated by the most important social change of the decade—indeed, its seeming unawareness that the denial of such a role required justification or even comment—is a remarkable demonstration of the extent to which a unitary system of government has evolved in the United States. The Burger Court is not responsible for that development, but its decisions have confirmed it in much the same way that the actions of the Eisenhower Administration confirmed the New Deal. To reach this conclusion is not to conclude that federalism is dead; the states exist, and their very existence imposes some limits on federal power. The federal principle is, moreover, of continuing importance with respect to a broad range of subsidiary issues that confront the legal system. But the Court's response to the most important legal issues arising during the past decade demonstrates how deeply embedded the assumption has become that the nation, not the states, is responsible for responding to important issues of social change.

HeinOnline -- 43 Law & Contemp. Probs. 38 1979-1980