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*U.S. Court of Appeals for the Fifth Circuit*

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# DAVID SHAPIRO'S ADVERSARY STATEMENT ON FEDERALISM

*Patrick E. Higginbotham\**

FEDERALISM: A DIALOGUE. By *David L. Shapiro*. Evanston: Northwestern University Press. 1995. Pp. ix, 154. \$19.95.

This book reflects the extraordinary combined force of scholarship and advocacy by a master of both. Professor David Shapiro practiced as a young lawyer with a distinguished Washington, D.C. law firm and served as Deputy Solicitor General for nearly three years. He is a Professor at Harvard Law School and one of the leading scholars in the field of federal courts and federal jurisdiction. For many years, he has authored the leading casebook in the field.

Asked to deliver the Julius Rosenthal Lectures at Northwestern University School of Law in 1994, Professor Shapiro saw that the three-lecture series offered the opportunity to structure a treatment of federalism in an adversary format, without losing the balanced and honest presentation of the scholar. In the first lecture, he states the case for the "nationalist," in the second, for the "federalist," and in the third lecture he offers a synthesis. Each lecture has the approximate length of a merit brief in the Supreme Court. Together, the three lectures — now published as *Federalism: A Dialogue* — comprise a dialogue in the tradition of Henry Hart, Lon Fuller, and the classic Socratic process, but they are much more.

I do not see a book review as a launching pad for the reviewer's ideas, with little more than a mention of the book being reviewed. Rather, I hope to describe the three lectures by providing samples from each with no pretense of capturing nuance or of complete description. My views of their strengths and weaknesses conclude the review.

The direct draw upon the judiciary's adversary model allows Shapiro's hand to move free from the clutter of balancing-as-you-go. This model, as applied in the first two lectures, allows him to present each case in its most powerful form, to state the polarities before turning to the gray areas of current debate. The result is clarity and balance.

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There is a vast amount of writing about federalism; most of it circles like satellites in solitary orbits. Yet, this book brings rich insight and freshness to the subject by sorting the many arguments and exposing them to the light of context and relevance. This is no task for the timid. An adversary brief demands that arguments be ordered and marshaled, a challenge with so much in the libraries claiming relevance.

## I. THE NATIONALIST BRIEF

The first lecture begins with a frontal assault: There is no significant constitutional restraint on national power or on the displacement of state law and regulation by national law. Shapiro proceeds by denying that the Constitution was a compact and instead asserts that its authority came directly from the people; the fact that constitutional power was not drawn from sovereign states "is confirmed by the background and circumstances of the Constitutional Convention, the nature of the ratification process, and most significantly by the text and structure of the Constitution itself" (p. 15). To bolster this argument, Shapiro points out that no state could block ratification and that ratification required support of states representing a majority of the population of the new Union. Quoting Jefferson Powell, he points to the strongest evidence of the nationalist thesis: "[T]he Constitution contained no explicit guarantee of state sovereignty" (p. 17). Nor, he says, could any such constitutional guarantee be implied, given that the then-prevailing legal thought refused to recognize divided sovereignty. Turning to the Preamble, Shapiro asserts that the language "We the People" was not simply an airy opening flourish. Certainly Patrick Henry, the master of the flourish, did not see it that way: He complained that the Preamble should begin, "We the States."

Then, with the deftness of the advocate, Shapiro draws support from the familiar argument that the Bill of Rights, won by the anti-Federalists in their carving of federal power, evidences a sovereign role for states. He does not deny that such an inference is permissible or that it has force when viewed alone. Rather, he points to the diluting, if not alternative, inference that the Bill of Rights in limiting federal power delivered on the Preamble's promise to protect individuals from federal excesses. The brief, after many more arguments than I have mentioned, asserts that any constitutional force to state sovereignty has been eroded by subsequent amendments, evolving constitutional doctrine, and historical practice (p. 26). It concedes, but then discounts the force of *The Federalist Papers* by reminding us that they were the work of advocates.

Part Two of the brief for national authority declares that "The Existence of Significant State Autonomy is Economically Counter-

productive" (p. 34). This section of the brief takes the conclusions of Part One as given — especially that there are few constitutional limits upon the exercise of national power at the expense of state power. It examines the optimal allocation of power between state and federal government. In this context, Shapiro asserts that traditional economic argument rests on "asserted virtues of rivalry or competition" (p. 35). The states supposedly serve as countervailing forces to the federal government and engage in competition among themselves. Again, Shapiro takes the debate to first principles: He contends that the resistance to national authority "hinge[s] in large part on a value judgment that is sometimes, but not always, made explicit — a judgment that a free and competitive market is presumptively . . . preferable to governmental regulation" (p. 37). He continues by arguing that even the market's supporters recognize that its imperfections will require repair best done at the national level; in any event, the model of competing states is overstated easily. Political rights of travel do not assure practical economic freedoms; it is not so easy to move capital investment from a declining market to a rising market; and the ever-haunting externalities and transaction costs will persist. As for "public goods," Shapiro sees "no self-evident reason why the size of those units, and the basis for raising the needed revenues to run them (including, perhaps, some form of user fees in some instances) cannot or should not be determined on a national level" (p. 40).

Shapiro's brief for nationalist government concludes by asserting that we need a "Strong National Authority . . . in Order to Protect the Rights and Interests of Individuals and Groups" (p. 50). This contention rests heavily on the history of federal expansion of constitutional limits upon states by federal courts and Congress.

## II. THE FEDERALIST BRIEF

The brief for federalism begins by asserting that the constitutional convention took place against a "background of independent state power . . . and was called for the explicit purpose of amending the Articles [of Confederation]" (p. 59). Shapiro recalls that the delegates were not elected by the people but appointed by state governments, each of which had an equal vote. Turning again to *The Federalist Papers*, the argument becomes that, although they were written to persuade, they cannot be ignored as strong contemporaneous expressions of purpose — to reassure the states and thereby to secure ratification of the Constitution. Shapiro continues by arguing that the states were the building blocks of union. For example, he points out that the electorate of the House of Representatives was the electorate of the most numerous branch of the

state legislature, and that Article I not only limits the powers of the national government but also protects the states from each other.

After marching through constitutional text, the brief turns to the Guaranty Clause of Article IV. Shapiro's handling of the Guaranty Clause in the point-counterpoint of the two briefs illustrates the strength of the dialogue. In the first brief, Shapiro argued that Article IV "seems essentially designed to protect the states from each other (and to provide for the common defense)" (p. 21). He read it as a federally enforceable limitation on the state, an admonition to the people of the states to maintain a republican form of government. Through the eyes of the federalist, however, Article IV seems to protect states from federal interference; the clause becomes a guarantee of state autonomy.

The brief for the federalist position moves to the "Virtues of State Autonomy from Economic and Related Policy Perspectives" (p. 76), and then to "Liberty and Social Virtues of State Autonomy" (p. 91). It also parades the familiar virtues of local rule, including the option for regional compacts when "local" problems do not conform to state boundaries. The brief advances the state as the presumptive level of government and insists that the case for federal power must overcome that presumption. Indeed, it contends that when a need arises for units larger than a single state, we logically should begin with an examination of interstate compacts before turning to the federal level. Relatedly, the very existence of several polities fosters individual freedom. An individual may move to a state that is more hospitable than his home state. Finally, the brief argues that the state itself can decide best whether a local problem is handled best by counties or cities.

### III. SHAPIRO'S SYNTHESIS

Having advocated the federalist and nationalist positions, Professor Shapiro, in his third and concluding lecture, sorts through the arguments, locates common ground, and gives us his own views unshaped by advocacy. In his words, he undertakes to "strike the balance."

Shapiro first points to constitutional text in emphasizing three points "worthy of repetition" (p. 110). First, the broad Article I power, despite its coupling with the expansionary power of the Necessary and Proper Clauses, has deliberate jurisdictional limits; second, the Constitution secures national protection to states from other states and protection from requests of "insurrection from within" (p. 111); third, as Deborah Merritt writes,<sup>1</sup> the guarantee of

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1. See Deborah Jones Merritt, *The Guaranty Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

a republican form of government is “a promise of protection *both* against upheaval from within *and* intrusion from without,” a guarantee that the states will be protected “as politically functioning entities” (p. 111). Shapiro points to *New York v. United States*<sup>2</sup> as confirmation of the decisional force of the Guaranty Clause — that is, that the core of the guarantee of a republican form of government is political accountability of the representatives. It follows that the national government may not coerce the representative to take legislative action.

Shapiro acknowledges that the Civil War and the New Deal brought large shifts in the state-federal balance. He points out that despite these nationalizing forces, the Civil War amendments, the courts’ expansive reading of the Commerce Clause, and changes in technology, much of the regulation of our daily lives — of our “property, education, local transportation, family relations, [and of] the definition of liability-creating civil and criminal conduct” (p. 114), for example — has remained with the states. Shapiro explains why. In his eyes, “significant structural reasons [explain] the retention of state authority in so many areas of general importance” (p. 116). These structures include the bicameral national legislature — where each state is assured at least one representative — the Senate — where each state is assured two senators — and the Electoral College — where presidential politics are channeled to state-by-state campaigns. These, in turn, are supported by the Supreme Court’s insistence that Congress speak clearly when it would preempt state law. But he finds much more than structural arrangements in these constitutional texts.

Shapiro points to a “‘sub-constitutional’ area of considerable breadth where strong forces work toward the continued recognition of state authority but do not compel it” (p. 118). Several forces operate in this subconstitutional area to uphold the states as functioning political entities. The allocation of the burden of persuasion provides such reenforcement. Shapiro would allocate the burden to those who would contend for national power and give to the states the presumptive right. Furthermore, Shapiro places importance on the fact that states inevitably tailor and shape the national programs that they implement. Finally, he suggests that the opportunities for regional cooperation — “intermediate federalism” — also are identified best by states. Shapiro sees potential for such ventures and uses *New York v. United States* as an example (p. 127).

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2. 505 U.S. 144 (1992) (holding that portions of the Low-Level Radioactive Waste Policy Act requiring states to accept ownership of waste or regulate according to Congress’s terms violate the Tenth Amendment). Shapiro states: “[T]he decision may be the most coherent and effective effort to address the constitutional underpinnings of federalism to have emerged from the Supreme Court’s continuing struggle with the issue over two centuries.” P. 111.

His larger point is that some national roles actually support federalism. He identifies five: first, when a necessary public good will not be furnished absent national power; second, when economies of scale are achievable only nationally — for example, safe air traffic; third, when national power enters the dialogue of private rights; fourth, when legislation affects redistribution of wealth; and fifth, when the courts play a role in monitoring congressional purpose.

The mark of this subconstitutional zone is flexibility. Its flexibility is essential given that the zone is cut athwart with powerful centripetal forces that must oscillate with powerful centrifugal forces.

#### IV. THE DIALOGUE CONTINUED

I only have skimmed these tightly organized lectures to give the reader some idea of their subject and treatment. By definition, my review presents an incomplete and distorted view of this book, though a distortion correctable by reading. At almost any turn, the regular players in this debate who do read this book can, and some will, point to a contention and scoff, saying that it fails to develop the full range of relevant scholarship. For example, they may dwell upon the fact that Shapiro sometimes devotes few words to enormously complex subjects such as the treatment of the economics of state rivalry, races to the bottom, and convoys. Such criticism will miss a large point about this book. In the process of writing a brief, a dialogue leading to judgment, advocates leave parts on the cutting room floor, and for good reason. They fall under the forces of context and relevance, the discipline of dialogue. That is not to demean their contribution. To the contrary, the intricate explication of theories of public choice and the economics of state rivalry are prerequisites to such a writing. That material left on the cutting room floor says much about the roles of the cut and uncut. The one does not displace the other; they remain in complementary tandem serving different purposes. This is a dialogue, not an exploration of fresh material and data, as Professor Shapiro makes plain at the outset.

The debate about federalism is at least as old as the republic, true enough, but this work arrives at a particularly propitious time. There is a large discontent with remote governmental decisionmaking, if the debates of political campaigns are accurate signals, and I think they are. We are seeing political leaders describing their work as revolutionary when it aims to return federal decisions to local government. In short, there is a heated debate now in progress about the “best” location of decisionmaking for specific social problems. Professor Shapiro’s dialogue is about the meaning of “best.”

Perhaps Professor Shapiro's message adapts to the view of the reader, but I found his work to be proof of a large theorem: Process matters — in both instrumental and intrinsic terms. In the immediate sense, the process chosen by Professor Shapiro is the jewel in this work. In a larger sense, the very fact that our state governments have work to do that of necessity cannot be done at the federal level — and that the federal government does work that the states are better suited to do — dictates the terms of debate over the location of decisional responsibility for government programs.

I see federalism as a constitutionally ordered structure and substantive concept. It is also a process. As Professor Shapiro puts it, "the true genius of American federalism lies in the continuing, and constitutionally assured, basis for dialogue — for moral, political, economic, and social debate over the merits of the allocation of power among the various branches" (p. 140). The book offers a superb defense of federalism, a lasting contribution. There is more. His writing proves the power of Socratic process, so long ago appropriated by our profession. Moreover, federalism ultimately wears its strongest armor as a constitutionally required process. Professor Shapiro's book leaves the reader painfully aware of how often that assertion is undervalued and its wisdom missed.

Extolling the virtue of federalism as a process does not mean that it is without need of normative support. At least two recent Supreme Court decisions suggest that the structural protections surrounding the process require judicial support. In *New York v. United States*, the Court located a limit upon federal power in the line between the persuasion and coercion of state representatives.<sup>3</sup> Justice O'Connor's opinion for the Court was foreshadowed by her writing in *FERC v. Mississippi*.<sup>4</sup> I suspect Justice Black would have joined her in *New York v. United States*, as his own opinion in *Testa v. Katt*<sup>5</sup> required state courts to enforce federal law. The lesson of *Testa* was that federal law is, by definition, the creature of state citizens and thus cannot offend state policy.<sup>6</sup> It is true that federal law is not foreign law and that the lines between the people and the Constitution are at times direct and do not pass through the statehouse. Nonetheless, refusing to tolerate a co-opting of people's elected representatives lies comfortably with this core principle of *Testa*.

The extraordinary decision of *United States v. Lopez*<sup>7</sup> came down while Professor Shapiro's book was in galley. He therefore

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3. See *New York v. United States*, 505 U.S. at 166-69.

4. 456 U.S. 742 (1982).

5. 330 U.S. 386 (1947).

6. See 330 U.S. at 392-93.

7. 115 S. Ct. 1624 (1995).

discusses *Lopez* in the Epilogue and is cautious about its full implications. *Lopez* places at the least a large cloud on the vision of unlimited congressional power under the Commerce Clause. Earnest predictions of where *Lopez* will take Commerce Clause jurisprudence seem little more than educated hope, and the possibilities seem widely divergent. *Lopez* may amount to little more than symbolic jurisprudence — a fleeting genuflect to limits upon congressional power that in practice are always tantalizingly just out of reach. On the other hand, it may evidence a willingness of the Court to locate limits. Having drawn a line, it must either draw another or erase.

With all respect to the four dissenting justices, the *Lopez* Court had no real choice, and that is the large blinking caution light hung out by that case. In its brief and oral argument, the Government threw down the gauntlet by refusing to concede and by failing to identify any limits upon the commerce power that would remain if the Court sustained the statute. A total lack of judicially enforceable limits under the Commerce Clause cannot comport with a vision of the Constitution as an organic instrument. Our reverential invocations of dispersed power demand more than procedural limits. *Lopez* could not uphold the prohibition against carrying a gun in proximity to a school without exposing a jurisprudence already struggling with its candor. Of course, there is always the contention that the structural channeling of the political process protects the states when federal courts head for the sidelines, refusing to referee. This view appeals to my modest ambitions for the federal judiciary. That said, the recent inability of Congress to resist the political temptation to federalize crime frontally challenges our faith in the ability of states to fight for themselves in the political arena, as it seems we have no normative limits enforceable by federal courts. This view of states' rights as the scraps left after the congressional meal deals the Third Branch out of the federalist structure. So, in the end, there is comfort in the concept of federalism as a dialogic process as well as in the encouraging signs in *New York v. United States* and *Lopez* that the judicial retreat to the sidelines may not be for the whole game.