The Present and Future of Federalism

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Dr. Brewer-Carías has delivered a serious critique of the trend toward centralization of political and governmental power under Venezuelan President Hugo Chavez that underscores both the theoretical significance of federalism as a check against potential government tyranny and highlights the long-standing autocratic tendencies of President Chavez. In so doing, Dr. Brewer-Carías reminds us that democratic constitutional theory is not an academic exercise, but often arises from the actual confrontation of freedom with would-be, and actual, government oppression.

I wish in my response to Dr. Brewer-Carías' presentation also to blend, as he does, the theoretical and the concrete in considering the future of federalism. As Dr. Brewer-Carías shows, categories of political structure like federalism cannot be considered in the abstract. They have meaning only in particular applications.

My response proceeds in four parts. First, an account of the traditional justifications of federalism in the United States. Second, an acknowledgment of federalism's historic role in the protection of democratic constitutionalism. Third, a question concerning whether federalism is likely to maintain its place in constitutional thinking, given the realities and challenges democracy is facing today. Finally, consideration of federalism as an abstract political/constitutional norm.

I. FEDERALISM AND THE UNITED STATES CONSTITUTION

Even if Justice Clarence Thomas of the United States Supreme Court is mistaken in suggesting that power and legitimacy in the United States do not flow from the undifferentiated “people of the United States,” but that the Constitution was formed by the sovereign acts of the people of each of the individual states,¹ the fact that such a sentiment was voiced by four of the nine Justices of

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the Supreme Court\textsuperscript{2} demonstrates the deep commitment of [the] United States [C]onstitution to the concept of federalism. Indeed, some of the examples of centralization recently asserted by the national government in Venezuela—such as central control over the forms and procedures of governance in the sub-national states—would plainly be unconstitutional in the United States.

Historically, federalism in the United States needed no theoretical justification. At the time the Constitution was adopted, any widely perceived challenge to the autonomy of the states would have doomed the proposed charter of government. At that time, the states were sovereign in fact and dominant in political terms. As late as 1861, Robert E. Lee is reputed to have said to the emissary of President Abraham Lincoln, as Lee rejected the proffered command of union forces, that he could not fight against his country. By country, General Lee was referring not to the United States, but to his native Virginia.\textsuperscript{3}

Nevertheless, though no theoretical justifications were necessary, given the political power wielded by the states, such justifications have been offered of what came to be known as “Our Federalism.” The decentralization of governmental power was seen as an important component of the Constitution’s effort to create an effective national government that would not, at the same time, threaten individual liberty. The view in The Federalist Papers—considered a fair representation of the nationalist viewpoint in the United States at the time of the ratification struggle—was that potential national tyranny could be prevented “both by limits upon national legislative powers and also by maintaining viable state governments.”\textsuperscript{4}

Federalism has been understood in U.S. history not only as a bulwark of individual liberty, but also as a means of promoting democracy. Legislation at the State and local levels promotes increased opportunity for citizen involvement in government decision-making and more responsive government as well.\textsuperscript{5} So in U.S. political thought, federalism serves both liberty and democracy, which is a viewpoint that Dr. Brewer-Carías shares.

\textsuperscript{2} Justice Thomas’ dissent was joined by Chief Justice William Rehnquist and Justices Antonin Scalia and Sandra Day O’Connor.

\textsuperscript{3} Although I have heard this statement attributed to Lee on many occasions, I have been unable to substantiate it in any of the classic sources on Lee’s life. The remark may well be apocryphal, but, even so, the remark is suggestive of a certain mindset with regard to the States.

\textsuperscript{4} CHOPER, ET AL, CONSTITUTIONAL LAW 57 (9th ed. 2001).

II. THE POTENCY OF FEDERALISM

There are numerous examples of political decentralization achieving precisely the impact that this understanding of federalism suggests. A dramatic current example is that of Venezuela itself, where, to speak more broadly than does Dr. Brewer-Carias, President Chavez is engaging in a sort of "endless coup d'état." Not all of the forms of democracy have been eliminated in Venezuela, to be sure. But, through political centralization, both federalism and the separation of powers are being robbed of meaning. President Chavez' apparent victory in the recent national referendum, though vigorously disputed, has only strengthened his democratic legitimacy around the world.6

All this goes to show that genuine democracy and popular government are not necessarily the same thing. As I wrote in a different context in 2003, "President Hugo Chavez...has ruled democratically, but dictatorially since 1998."7

Another example of the potency of federalism to promote democracy is the current political situation in the United States. At the moment when these words are being written—October, 2004—the Republican Party controls all three branches of the federal government. The other major political party—the Democratic Party—is able to sustain itself as a viable opposition political force in part because of its continuing control of various branches of government among the states.

Perhaps the most famous example of the importance of federalism—though a doomed example—was the continuing opposition against Hitler waged by the Social Democratic Party government in Prussia after the Nazi Party took control of the national executive and legislative branches of government in 1932. Hitler was unable to consolidate Nazi control effectively until the autonomy of the Sub-national governments in Germany was eliminated.

Thus, we see that there is a great deal of justification for the praise of, and commitment to, federalism that is the foundation of Dr. Brewer-Carías' paper. Nevertheless, no political principle can be appreciated independently of context. And no political thinkers, even those as wise as the writers of The Federalist Papers,

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6. In early September, the Bush administration dropped its support for Venezuela's $250 loan request before the World Bank and the Inter-American Development Bank, reportedly to signal its unhappiness with the manner in which the referendum was conducted.

can be followed uncritically many years after the world they knew has disappeared. Federalism must today be questioned as well as praised.

III. QUESTIONING FEDERALISM

I wish to raise three questions about federalism that may alter its political and constitutional significance for the future. These questions concern the effectiveness of federalism in combating tyranny, its relevance in meeting the most pressing challenges that democratic governments face today, and federalism's unwitting role in promoting the increasing economic inequality in the world that threatens the future of democracy itself.

The first question—the capacity of federalism to combat oppressive political regimes—is raised directly by Dr. Brewer-Carías' paper. Simply put, despite the tradition of federalism in Venezuela, President Chavez seems to have had little political difficulty in centralizing political and governmental power.

Nor is this story unique to Venezuela. In the United States, long-standing principles of decentralized governmental power were simply swept away by the public demand for central government action in light of the Depression in the 1930's. Nor, after the emergency passed, did the states return to anything like their former prominence. Even the Republican Party in the United States, though to champion the rights of the states, has in recent years imposed, or sought to insert, federal norms on traditionally State concerns, like the legal alcohol drinking age, highway speed limits and State criminal parole policies. Today, for partisan political reasons, the Republican Party seeks a national solution to the issue of homosexual marriage, another field of traditional local control.

These instances suggest that federal political structures do not endure very well in the face of popular demands in democratic systems. When the people want governmental action of a certain kind, politicians at the national level, whatever their ideology toward federalism, are very likely to respond with central government solutions.

The second question is whether sub-national governments can realistically play a role in solving the most significant problems facing nations in the world today. Though obviously an inadequate recitation, I will label these problems as worldwide terrorism, the deteriorating planetary environment and globalism, which signifies a series of issues, including worldwide corporate
power as well as north/south matters of development and economic justice.

In terms of foreign-based terrorism, it is generally conceded that national governments must control national borders, so in that context the issue of federalism does not arise. But in terms of terrorism occurring internally from whatever source, whether domestic or foreign, the situation is quite otherwise. It has been argued vigorously in the United States, for example, that, aside from taxing and spending powers, the central government lacks a regulatory police power. Indeed, the Supreme Court has recently held, in cases acknowledged as reinvigorating federalism, that Congress may not regulate weapons in schools or violence against women and has also intimated that Congress may not regulate the crime of ordinary arson.

If these holdings were taken seriously, and their consistent application is in doubt, they might cripple central government efforts to combat terrorism occurring within the United States. For example, terrorists in other countries have already used violence against women to accomplish their political and religious goals. Were this to occur in the United States, the Morrison case would simply have to be overruled, either expressly or impliedly, in order for Congress to respond effectively. But, to acknowledge the incapacity of the states to fight terrorism without central government leadership and control is to acknowledge that there really is, and must be, a central government police power. Yet, the acceptance of such a national police power would be taken among many in the United States to be a direct contradiction of federalism.

The same point can be made with regard to the environmental challenges that face humankind in the 21st century. It is true that efforts by sub-national governments to fight global warming—such as California’s recently proposed auto emission standards or New Jersey’s agreement with the Netherlands [to cooperate on global warming abatement issues] can represent important ex-

11. Why, for example, should the central government be permitted to sanction ordinary crime against abortion clinics but not violence in schools? Cf. N.O.W. v. Scheidler, 510 U.S. 249 (1994) (upholding the use of federal RICO statute against anti-abortion protestors using tactics that violate state law to attempt to close abortion clinics).
periments in the best tradition of federalism. Yet, in the end, only comprehensive, national legislation can deal with environmental systems, which are by their nature systemic. When the United States Supreme Court pretends that comprehensive systems can be divided into fragmented and unrelated parts, in the name of federalism, the Court is ignoring simple science. Scientifically speaking, there is no such thing, for example, as intrastate water. All such water has moved across state borders in the past and, of course, will do so again in the future. While that fact does not determine what level of government should regulate such bodies of water, it should inform the vocabulary of such determinations.

The final illustration of the doubtful relevance of federalism in the future is globalization—the interrelated issues raised by a rapidly integrating world economy. The challenges of globalization cannot be met at the sub-national level. This is the case whether one applauds globalization or harbors skepticism towards it. Positively speaking, major international lenders often mandate economic reforms at the nation state level. More negatively, international corporations sometimes play one sub-national government off another in their efforts to find the most advantageous terms for investment. But to allow corporations to spark a “race to the bottom” in terms of corporate regulation is to endanger national standards protecting labor, the environment and the rights of indigenous peoples.

The substantial likelihood that sub-national governments will find it difficult to respond effectively to pressing social, economic and political issues such as these undermines any likely reliance on federalism in democratic governmental organization. For the day has passed in democratic nations when the people would accept a situation like that described in the Kansas v. Colorado case in 1907 in which the Supreme Court stated that though the reclamation of arid lands in the United States was a worthy goal, and though the states collectively might be inadequate to accomplish this goal, there was simply no authority in the national government to carry out this function. Democracy requires that some

13. See New York State Ice Co. v. Liebman, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) (State can serve as a laboratory).


15. 206 U.S. 46 (1907).
level of government be effective in addressing social needs. Democracy will fall prey to dictatorship should democratic government prove institutionally incapable of doing so. This reality may limit the future importance of federalism.

While federal solutions to the above issues might prove ineffective, the final question I wish to raise about federalism concerns not its ineffectiveness but its potential negative impact on the growing income inequality in the world. The issue of income inequality in the world is significant both politically and religiously. Politically, poverty and the gap between rich and poor represent a real threat to democracy. When Alexis de Tocqueville came to the United States in 1830, he was quick to see that the basis for democracy was a fundamental social and economic equality in society. He expected such equality to spread in the world and with it, democracy. In these expectations, he proved largely correct for a long time, for throughout the 20th century mature economies in the world produced a large and growing middle class that served as the backbone of democracy in many nations.

Unfortunately, and for reasons that are unclear, the trend in the United States and other countries toward income equality began to reverse itself after World War II. Slowly but inexorably, the percentage share of national wealth at the top of the income ladder grew. I cannot do justice to such an important and complex trend in a few sentences, but as a representative example, a 2002 United States Census Report showed the top 20% of U.S. households earning almost 50% of the aggregate national income.16 This disparity resulted from a slowly growing inequality over a fifty year period.17 It is not clear that democracy can survive in the context of deep division between the haves and the have-nots.

The other reason to raise the issue of income inequality is the ethical/religious requirement of economic justice. The Torah and the Gospel are clear that the needs of the poor must always assume priority when there is discussion of large scale social organization.

Again, time and space do not permit discussion of the relationship of political decentralization to poverty and to general income distribution in society. Certainly federalism can serve to embed local elites in a protected sanctuary immune from political interference. On the other hand, there are also historical exceptions to

17. A gradual increase in percentage from 43.8% to 49.7%.
that tendency. The Indian sub-national State of Kerala, for example, has been an unusual, successful instance of democratic and egalitarian Communist government.\textsuperscript{18} The point is that federalism cannot be praised without acknowledgment of its potential negative aspects.

Poverty and income inequality present an even more pressing difficulty for democracy in Latin America than in the United States. President Chavez has seized on this problem by exploiting the divisions between rich and poor in Venezuela in his attempts to consolidate political power.

It may be that a large degree of social and economic equality in a democracy must exist before federalism can be viewed as a viable political option. If that should turn out to be the case, then attention will have to be paid to questions of economic justice in society before the issue of federalism can be addressed.

\textbf{IV. A Political Future for Federalism?}

A dissenting view has emerged in the United States Supreme Court cases that have reinvigorated federalism in the United States. According to this dissenting view, federalism can and should be maintained through political mechanisms rather than through judicial/constitutional means.\textsuperscript{19}

This view suffers from the obvious flaw that it relies on central government authorities to protect federalism when those officials' own interests may be said to lie in increased central political power. In addition, in a system like that of the United States, with its extreme reliance on judicial review, political enforcement of constitutional norms is widely regarded as no enforcement at all.\textsuperscript{20} Even these dissenting Justices in the Supreme Court could not bring themselves to assert that the courts should have no role in the enforcement of federalism.

Nevertheless, the very effort waged by Dr. Brewer-Carías demonstrates that such political checks can be effective. For, in the Venezuelan situation, the opposition to centralization of power has been largely political in nature. And though one cannot say that

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\textsuperscript{18} For an account, see Bill McKibben, \textit{Hope, Human and Wild: True Stories of Living Lightly on Earth} 117 (1995).
\textsuperscript{19} Morrison, supra note 9, at 660 (Breyer, J., dissenting) ("Congress, not the courts, must remain primarily responsible for striking the appropriate state/federal balance").
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his warnings have been entirely heeded, they certainly have not been ineffective.

In the end, political oppression may not be a matter of the structure of government. And opposition to political oppression may call not for institutional change, but political and personal courage. We see in Venezuela, and it has been the case in all democracies, that the maintenance of democratic government, though it may be aided by certain political structures, always in the end requires the voices of brave individuals who attempt to rouse the people to the danger confronting their liberties. Dr. Brewer-Carías is an inspiring example of such commitment.