

RETHINKING U.S. POLITICS

The U.S. Supreme Court and New Federalism: From the Rehnquist Court to the Roberts Court. By Christopher P.

Banks and John C. Blakeman. Lanham, MD: Rowman & Littlefield, 2012. 348p. \$49.95.

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— Sam Kalen, *Wyoming College of Law*

Christopher Banks and John Blakeman's ambitious book canvasses and synthesizes considerable scholarship surrounding the history of federalism, as well as specific material on the Rehnquist and Roberts Courts. The authors portray how federalism, and particularly today's "New Federalism," is a product of a complex interplay of dynamic social, political, cultural, and legal forces. Discussions about today's new federalism generally suggest an allocation of power tilting a bit more toward state authority. The authors amply illustrate federalism's dynamism, which leads them to conclude that federalism is both constantly in flux and unpredictable. It is, after all, "based not on ideological change among the justices but on personnel change over time" (p. 226).

Chapter 2 offers a useful snapshot of historical scholarship tracing the development of federalism. Banks and Blakeman draw on historic and modern scholarship, including from Alison LaCroix's *The Ideological Origins of American Federalism* (2010). The book divides federalism's development into several eras: the emergence of foundational principles, from the nation's founding to the Civil War era; the period of dual federalism, from the Civil War to the New Deal, when the Court treated the states and federal government as operating in distinct spheres and policed those spherical boundaries; the rise of cooperative federalism during the period from the New Deal to roughly the 1950s, wherein federal and state governments became partners in federal programs; and finally the modern era, which they treat as an amalgamation of past paradigms.

Chapter 3 then reviews the paradox surrounding new federalism during the Burger and Rehnquist Courts. Here, the authors examine how then-Justice William Rehnquist presaged his state sovereignty ideology during the Burger Court years, where it languished until he became Chief Justice. They accept that Rehnquist's Chief Justiceship comprised several periods, with the middle period witnessing new federalism's emergence, facilitated by greater cohesion among the Court's conservatives. This is when the Court "combined federal power by invalidating federal actions that were held to infringe upon state interests and transgress constitutional text, structure, or values" (p. 108).

The authors concentrate on two legal areas to demonstrate how new federalism fared: Congress's Commerce

Clause power and its negative (or dormant) aspect (DCC), which restricts some state or local activities that threaten national uniformity, as well as a rule of statutory construction that avoids having federal law preempt state law or threaten traditional state functions unless Congress clearly expresses an intent to do so. Banks and Blakeman illustrate how cases in these areas are complex, with outcomes motivated by an array of factors and, in the DCC area, tend toward favoring centralized federal power rather than state power.

Next, Chapter 4 walks us through Justice Clarence Thomas's willingness to jettison precedent without the reticence exhibited by other justices. Most of this chapter establishes the unexceptional proposition that Thomas's effort to expand new federalism to the Establishment Clause is unlikely to garner much support. Here, the authors review some of the Rehnquist Court's fragmented religious freedom cases, establishing how they opened the door for devolving more authority to state and local governments confronting religious liberty questions. They then explore how Justice Thomas links federalism and religious liberty, denying the principle of incorporation and suggesting that the clause only prevents Congress from interfering with a state's prerogative. Banks and Blakeman explain how Thomas's understanding arguably comports with other significant scholarship exploring the founders' understanding—one that modern scholarship suggests changed with the structural changes in federalism ushered in by the Fourteenth Amendment. While acknowledging that Thomas's approach is unlikely to attract support, they research the arguments of issue-focused litigant groups and various social factors affecting local and state policymakers to portray the fascinating counterbalance of societal and litigation trends affecting the relationship of new federalism and the Establishment Clause.

Chapter 5 is intriguing yet speculative. The authors posit that the Court may need to redefine its approach toward state preemption involving matters affecting foreign policy. Because economic affairs are becoming increasingly either global or local (described as disaggregation), bypassing nation-states or, in the United States, the federal government, how the Court will employ interpretative canons to limit or promote state power in this area appears destined for an emerging dialogue. More and more, states are engaging directly with foreign governments or, conversely, trying to influence their behavior. How the Court approaches such efforts will be telling. This leads the authors to review the rich history of preemption in foreign affairs—related cases and the Court's fairly consistent national tendency. Yet they suggest that the Court will either need to become more flexible in its approach toward such disputes or risk becoming more "fractured" and ultimately marginalized. They use the Court's willingness to cite or use foreign sources as a possible indicator of its awareness of globalization. This indicator seems a bit

unreliable, however; this issue surfaces in social cases where foreign sources are deployed to reflect worldwide societal norms rather than localized norms. In fact, foreign sources may be employed to discount localized norms reflected in state law. But that would suggest allocating less power to the states. This chapter nonetheless provides the reader with considerable scholarly and judicial fodder for charting possible scenarios for the Court's response to foreign policy issues implicating federalism. And their review of a few principal cases suggests a less strident tendency toward accepting explicit or implicit exercises of federal power.

The previous chapters all build toward the penultimate chapter, where the authors explore the Roberts Court's response to new federalism. This chapter contains two parts, focusing initially on possible attitudinal tendencies of the new justices and then on statistical analyses of decisions. While recognizing the constraints of using the confirmation process as a predictive tool, the initial part mines the confirmation hearings and concludes that the personnel changes on the Court are not likely to "dramatically disrupt the new federalism jurisprudence." The authors, for instance, purport to glean from Justice Elena Kagan's testimony *her* approach toward the Commerce Clause. This is somewhat problematic, however, because it arguably underestimates how lawyers such as Kagan can deftly navigate between furnishing an acceptable answer and not saying much.

The second part of the chapter examines cases involving preemption and the Eleventh Amendment, as well as the Commerce Clause, to distill possible federalism-biased voting patterns. Here, the authors aptly note how preemption decisions can allocate power between the states and federal government, or possibly favor or disfavor business interests, and consequently serve as a possible window into the justices' attitude toward federalism. Their detailed analysis, however, suggests a complex interplay of factors that may lead the justices to whittle away slightly at new federalism, but perhaps influenced more by economic philosophy than federalism. And this chapter is augmented by a much appreciated postscript describing the Court's decisions on the Affordable Care Act and Arizona's immigration law, and how these cases portend a continuing dialogue about federalism.

Overall, this book contains considerable information and serves as a welcome addition to federalism scholarship. Yet lawyers will find aspects of the book too imprecise, with the authors occasionally sweeping too broadly with attempted historical parallels. In the postscript, for instance, Banks and Blakeman suggest that John Roberts's Commerce Clause distinction between activity and inactivity harkens back to a pre—New Deal era, a somewhat too perfunctory comment. They intermittently engage in generalization with possibly too little support or signaling to the reader how they have omitted nuances

(making the book, of course, easier to read). They occasionally explore cases with too much detachment from legal principle, such as the Court's decision in *Department of Revenue of Kentucky v. Davis* (2008), where they hint toward an expansion of traditional federalism values, but they diminish the posture and history of the case and extant criticisms of a doctrine necessitating the Court's treatment (pp. 297–98). But this is nonetheless an invaluable book for anyone interested in federalism.

Corporate Sovereignty: Law and Government under Capitalism. By Joshua Barkan. Minneapolis: University of Minnesota Press, 2013. 243p. \$75.00 cloth, \$25.00 paper.

Lawless Capitalism: The Subprime Crisis and the Case for an Economic Rule of Law. By Steven A. Ramirez. New York: New York University Press, 2012. 286p. \$45.00 cloth, \$25.00 paper. doi:10.1017/S1537592714001819

— Joseph G. Peschek, *Hamline University*

That both books under review include the term "capitalism" in their title or subtitle may indicate a heightened attention to fundamental questions of political economy among scholars in recent years. Both Joshua Barkan and Steven A. Ramirez treat the financial and economic crisis of 2007–8 and its aftermath as a point of departure for their studies. Central to each author is an argument about the relationship of law to capitalism. In recent decades, the law and economics school of thought has argued for the application of neoclassical, microeconomic market assumptions in judicial decision making. Both authors challenge these neoliberal assumptions.

In *Corporate Sovereignty*, Barkan argues that corporate power should be thought of as a mode of political sovereignty. Rejecting the distinction between the economic power of corporations and the political sovereignty of states, he contends that corporate and sovereign power are "ontologically linked" through a principle of "legally sanctioned immunity of law" (p. 4). While the relationship between the state and corporations may appear to be adversarial, "it is in fact a kind of doubling, in which the fate of state sovereignty and corporate power are conjoined and also in conflict" (p. 4). Corporations and states model each other's defining features, depend on one another, and establish the other's conditions of possibility. "Nonetheless," Barkan writes, "the relation is full of tension, as these institutional ensembles mix and threaten one another's existence" (p. 6).

Barkan's book is intellectually ambitious and challenging. The author uses Giorgio Agamben's concept of "the ban" to argue that "the corporation, as a politicolegal concept, plays an important role in establishing the legally defined borders and limits of law as well as spaces and cases where laws apply only to the extent of not being applicable" (p. 8).