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## JUDGES AND FEDERALISM: A COMMENT ON “JUSTICE KENNEDY’S VISION OF FEDERALISM”

*Robert F. Nagel\**

Professor Maltz makes the point that Justice Kennedy tends to take an expansive view of states’ rights when the issue involves control over state institutions (“structural autonomy”) but not when the issue involves control over substantive policies (“decisional autonomy”).<sup>1</sup> According to Maltz, Kennedy is especially unsympathetic to states’ rights when state decisional autonomy is threatened by the federal judiciary. Professor Maltz ascribes this inconsistency in Kennedy’s views to a failure of understanding, specifically Kennedy’s failure to see the importance of decisional autonomy to the principle of federalism. In this comment I expand on this explanation by asking whether there is something about the role of a judge that interferes with a robust understanding of the importance of decisional autonomy to federalism. I suggest that Kennedy’s failure of understanding is traceable to attitudes towards authority that are probably inherent in judging. This explanation seems to be consistent with an array of federalism cases, including the recent jurisdictional cases described and analyzed in Professor Wells’ paper.<sup>2</sup>

I should first briefly explain why I think it is worthwhile expanding on Professor Maltz’s criticism of Kennedy. One reason is that Maltz’s depiction of Kennedy’s rather intermittent commitment to state sovereignty is accurate and, if anything, understated. It was, for instance, the same Justice Kennedy who in *Alden v. Maine*<sup>3</sup> wrote that Congress must treat states as “joint participants in the governance of the Nation”<sup>4</sup> who in *U. S. Term Limits, Inc. v. Thornton*,<sup>5</sup> not only joined and echoed the majority’s stridently nationalistic opinion but went even further by suggesting that states have no

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1. Earl M. Maltz, *Justice Kennedy's Vision of Federalism*, 31 RUTGERS L.J. 761 (2000).

2. Michael Wells, *Suing States for Money: Constitutional Remedies After Alden and Florida Prepaid*, 31 RUTGERS L.J. 771 (2000).

3. 119 S. Ct. 2240 (1999).

4. *Id.* at 2263.

5. 514 U.S. 779 (1995).

reserved power to regulate *any* exercise of national power.<sup>6</sup> Kennedy, that is, revived the nationalistic excesses of Justice Marshall's rhetoric in *McCulloch v. Maryland*,<sup>7</sup> according to which today states would not have the authority to make federal mail trucks brake for stop signs.<sup>8</sup>

Moreover, Maltz's observation about the tension in Kennedy's views about state autonomy is true, at least to some degree, of several other Justices besides Kennedy. Think, for example, of Justice Scalia, whose opinion in *Printz v. United States*<sup>9</sup> protected states' executive functions from federal commandeering, but whose opinion in *R.A.V. v. City of St. Paul*<sup>10</sup> constricted state authority over what had always been considered unprotected speech and whose opinion in *Texas v. Johnson*<sup>11</sup> struck down flag desecration statutes in some forty-eight states. Or consider Justice O'Connor, who, of course, initiated the recent revival of Tenth Amendment structural protections with her opinion in *New York v. United States*.<sup>12</sup> In *Planned Parenthood v. Casey*,<sup>13</sup> she joined Justices Kennedy and others in an extraordinarily vehement denunciation of efforts by states to resist the judicial monopolization of abortion policy announced in *Roe v. Wade*.<sup>14</sup> O'Connor also joined Justice Kennedy in *McIntyre v. Ohio Elections Commission*<sup>15</sup> to vote to strike down bans on anonymous campaign literature that had been enacted into law in forty-nine states. This last term in *Saenz v. Roe*,<sup>16</sup> O'Connor joined with Kennedy and Scalia to displace significant state policies on public welfare, going even further than that high water mark of Warren Court policy-making, *Shapiro v. Thompson*.<sup>17</sup>

So I think Professor Maltz is on to something, an important and at least somewhat general phenomenon that does call for explanation. If, as Maltz

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6. See *id.* at 841 (Kennedy, J., concurring) ("The states have no power, reserved or otherwise, over the exercise of federal authority within its proper sphere.").

7. 17 U.S. (4 Wheat.) 316 (1819).

8. "The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by congress . . . ." *Id.* at 436. For a fuller discussion, see Robert F. Nagel, *The Term Limits Dissent: What Nerve*, 38 ARIZ. L. REV. 843, 847-52 (1996).

9. 521 U.S. 898 (1997).

10. 505 U.S. 377 (1992).

11. 491 U.S. 397 (1989).

12. 505 U.S. 144 (1992).

13. 505 U.S. 833 (1992).

14. 410 U.S. 113 (1973).

15. 515 U.S. 334 (1995).

16. 526 U.S. 489 (1999).

17. 394 U.S. 618 (1969).

charges, Kennedy (and, I would add, others on the court) do not understand the importance of decisional autonomy to our federal system, what accounts for this failure of understanding?

One hypothesis emerges from the term limits decision. In *Thornton*, Kennedy joined a majority opinion that is, in my opinion, deeply hostile to—I would even say oblivious of—an essential aspect of the idea of federalism. The majority opinion suggests that state term limits would turn the United States into a “confederation of nations.”<sup>18</sup> Justice Kennedy frames the issue as being whether “the sole political identity of an American is with the State of his or her residence.”<sup>19</sup> Furthermore, the majority asserts repeatedly that representatives in the national government “owe primary allegiance not to the people of a state, but to the people of the Nation.”<sup>20</sup> In short, the *Thornton* majority, including Justice Kennedy, writes as if there were no middle ground between confederation and consolidation, as if the mixed federal system of divided and limited loyalties contemplated by our Constitution were in fact an alien and dangerous idea.<sup>21</sup>

On the contrary, that it is possible and desirable to be loyal both to the national and state governments at the same time is a distinctly American idea. Indeed, the Constitution was enacted partly on the idea that loyalty to the states would discipline and define the nature of loyalty to the union.<sup>22</sup> It was often and emphatically urged, for example, that citizens in the states, protective of their freedoms and their local institutions, would act—through political organization and even armed resistance if necessary—to keep the national government within the limits of its constitutional authority.<sup>23</sup> State-based disagreement with national institutions, then, would constitute a form of loyalty to the Nation.

There are some obvious reasons why this American idea of multiple, partial loyalties might be especially incompatible with the judicial mind and temperament. The essential task of judges, of course, is to resolve cases, and to do this they need to find some controlling authority. An authority, it goes without saying, will tend to seem controlling to the extent that it is definite, unambiguous, and permanent. Accordingly, as is commonly noted, judges are inclined to simplify complex historical evidence and to over-state the

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18. 514 U.S. at 821.

19. *Id.* at 840 (Kennedy, J., concurring).

20. *Id.* at 803.

21. See Nagel, *supra* note 8, at 849-51.

22. See *id.* at 850 and sources cited therein.

23. See generally THE FEDERALIST NO. 17 (Alexander Hamilton), NOS. 44, 45 (James Madison).

degree of certainty with which a legal rule or principle resolves a case.<sup>24</sup> For exactly the same reasons it is to be expected that judges will deny, distort, or undervalue constitutional principles that are characterized by open-endedness, ambiguity, and other forms of messiness. This is to say that it is to be expected that judges will be especially inclined not to appreciate or understand those processes that depend upon various forms of political disagreement, conflict, and defiance.

This judicial preference for singular and clear authority would explain, among other things, the *Thornton* Court's otherwise weird insistence that it would threaten our constitutional structure to elect representatives to Congress who owed any loyalty except to the Nation. As my children say, "Get real!" Or, as I say, only a judge could think that it was the Arkansas terms limits statute that ushered in the possibility that states might elect parochial representatives or, more importantly, that conflicted, partial loyalties and perspectives are incompatible with our federal system.

Seen from this perspective, the difference between structural autonomy and decisional autonomy is that structural autonomy involves less conflict with national objectives because the only relevant national policy determination relates to the state governments themselves. Notice that structural autonomy still does not extend to nondiscriminatory federal regulations that bind state governments along with citizens. In such circumstances judicial protection of state autonomy would represent a sharper conflict with national authority because states would be free to defy an otherwise generally applicable federal policy. In these circumstances, Congress is essentially free under *Garcia v. San Antonio Metropolitan Transit Authority*<sup>25</sup> to invade even the structural autonomy of the states. In short, although the Court protects the structural autonomy of the states in recognition that under our constitutional system states must continue to exist, the Justices protect structural autonomy only when it represents the minimum possible threat to the implicit judicial preference for a clear ordering of authority over public policy.

Along similar lines, it is possible to generally construct a rough index of when national authority is likely to be vindicated by the judiciary. National authority is highest (and most likely to be protected from competitors) where states defy or disagree with Supreme Court interpretations of the Constitution because both the Court and the Constitution are almost pure

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24. See, e.g., Roger M. Smith, *The Inherent Deceptiveness of Constitutional Discourse: A Diagnosis and Prescription*, in INTEGRITY AND CONSCIENCE 218 (Ian Shapiro & Robert Adams eds., 1998).

25. 469 U.S. 528 (1985).

symbols of unified, definite national authority and because tolerating state and local government challenges would fragment authority among innumerable contestants.<sup>26</sup> This is demonstrated by Kennedy's participation in the hysterically nationalistic opinion in *Casey*.<sup>27</sup>

Next highest is where the national legislature (which, inevitably, is contaminated with some degree of state influence and even state-based loyalty) defies or disagrees with federal judicial interpretations of the Constitution. This is illustrated by Kennedy's strong hostility, as expressed in *City of Boerne v. Flores*,<sup>28</sup> to congressional efforts to enforce the Fourteenth Amendment in ways that reverse precedent.

Somewhat lower on the scale is where state decisions conflict, not with specific existing judicial interpretations of the Constitution, but with general values arguably implicit in the Constitution. Here national authority is less defined and therefore less clear—but still very strong according to the judge's preference for singular authority, especially when challenged by multiple decisionmakers. This is demonstrated by the many individual rights cases and the dormant commerce clause cases in which, as Professor Maltz points out, Kennedy voted to limit state decisional autonomy on the basis of highly questionable interpretations of the Constitution.<sup>29</sup>

Lower yet on the scale of national authority are situations where state decisions conflict with congressional policies. Such policies, of course, represent national authority and are often upheld, as is the case with most commerce clause enactments, including those that regulate state governments directly.<sup>30</sup> But here, national authority is seen as less powerful because congressional policies are constitutionally discretionary and because Congress is suspect due to the possibility of parochial influences. Hence Kennedy can vote to overrule the Gun-Free School Zones law and to protect local school districts from statutory claims of sexual harassment.<sup>31</sup>

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26. Even sophisticated commentators call this "anarchy." See Larry Alexander & Frederick Schauer, *On Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1379 (1997).

27. See *Planned Parenthood v. Casey*, 505 U.S. 833, 843-901 (1992) (plurality opinion).

28. 521 U.S. 507 (1997).

29. See Maltz, *supra* note 1, at 765-70.

30. See Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L. REV. 643, 656 (1996).

31. *United States v. Lopez*, 514 U.S. 549 (1995) (holding that Congress has no power under the Commerce Clause to create gun-free school zones); *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 653 (Kennedy, J., dissenting) (1999) (holding that a private damages action may exist against a school board for cases of student-on-student harassment).

National authority in this category is even less implicated to the extent that states are unlikely to favor substantive policies that oppose the congressional policy. States, for example, are unlikely to favor either guns in schools or sexual harassment, so whatever national authority is implicated by the congressional policy is less undermined by judicial protection of state decisional autonomy.<sup>32</sup>

Next lower on the scale of national authority is when the national congressional policy at issue relates specifically to state institutions and, therefore, the authoritativeness of national regulatory policy is not significantly diminished. This is demonstrated by cases like *New York v. United States*<sup>33</sup> and *Printz v. United States*.<sup>34</sup>

At the very low end of the spectrum of national authority are instances where the congressional policy would be enforced by lawsuits against the states themselves, Professor Wells's subject. In this area there is no necessary reason to expect substantive disagreement between the national and state governments. In any event, federal policies can be carried out through suits naming state officials rather than the state. Hence, the Court has a long-running willingness to enforce the Eleventh Amendment and now, in *Florida Prepaid Education Expense Board v. College Savings Bank*,<sup>35</sup> to protect state immunity even from legislation enacted under Section 5 of the Fourteenth Amendment. Professor Wells argues that *Florida Prepaid* represents a misapplication of *Flores*<sup>36</sup> and that it ignores the fact that Congress is better than the Court at balancing how vigorously rights should be enforced as against state values.<sup>37</sup> I would add that to allow enforcement in federal courts only if state relief is demonstrably inadequate, which is what *Florida Prepaid* does, is to see reluctance or disagreement at the state level as the only predicate for invoking federal jurisdiction. In short, the sovereignty of state governments is protected by *Florida Prepaid*, but only because there is no evidence of conflicting perspectives on appropriate policy.

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32. This suggests, by the way, that Kennedy might be inclined to vote against the Violence Against Women Act, as states already penalize violent acts generally and any failure to specify gender-violence can only in an attenuated way be seen as a challenge to national policy.

33. 505 U.S. 144 (1992).

34. 521 U.S. 898 (1997).

35. 119 S. Ct. 2199 (1999).

36. See Wells, *supra* note 2, at Part III.B.

37. Wells, *supra* note 2, at 790-91.



In summary, my suggestion is that Justice Kennedy's sharply differential assessment of structural autonomy and decisional autonomy is a part of a much broader pattern. The fundamental impulse behind that pattern is to vindicate national authority, and that impulse is at war with federalism to the extent that federalism exists so that disagreement can be registered and national authority questioned. Of course, the Justices do understand the elementary and undeniable principle that states have constitutional status, and a willingness to protect structural autonomy naturally flows from this understanding. But for the Justices to appreciate fully *why* states exist would be in tension with inherent aspects of the judicial function and with natural inclinations of the judicial mind.

