

# THE BURGER COURT AND "OUR FEDERALISM"

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Dicey derided federal government as "weak government;"<sup>1</sup> others have found genius lurking in its institutional arrangements. But most students, as Professor S. R. Davis's illuminating little book makes clear,<sup>2</sup> have considerable difficulty in identifying what federal government is, whether the concept is approached analytically, legally, descriptively or normatively. American lawyers are not inclined to pursue such inquiries too far. For, like Justice Black, they are concerned only with "Our Federalism"<sup>3</sup> and, like Justice Stewart and obscenity,<sup>4</sup> they know it when they see it. Moreover, American lawyers have, in large measure, confined their attention to one specific component of "Our Federalism;" its legal content.

Historically, the major "legal" issue in "Our Federalism" has been substantive in nature, i.e., the extent to which the basic charter mandates a clear division of powers, one that both protects *and confines* the central and state governments in their respective spheres. That issue is devoid of current significance. The radical transformation that has occurred in the structure of "Our Federalism" in the nearly two centuries of our existence has emptied the concept of nearly all legal content and replaced it with a frank recognition of the legal hegemony of the national government. This occurred well before the arrival of the Burger Court, and that Court shows no signs of attempting to undo the past.

In recent years, attention has been drawn to a second, process-oriented dimension of "Our Federalism:" we have come to accept as an article of faith that adequate federal judicial and administrative mechanisms should exist to enforce federally secured rights. The Burger Court has been the object of much criticism at this level, some of it of an inflamed character. I think that the criticisms have been vastly overstated and that the Burger Court has done little to impair the Warren Court's legacy of strong federal enforcement of federal rights.

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1. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 171 (10th ed. 1959).

2. S. DAVIS, THE FEDERAL PRINCIPLE, A JOURNEY THROUGH TIME IN QUEST OF A MEANING (1978).

3. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

4. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (concurring opinion).

## I

Substantively viewed, "Our Federalism" is the central device by which our vast nation has hoped to reconcile its needs for unity with its needs for diversity.<sup>5</sup> Historically, substantive federalism questions have been at the center of the American constitutional order. Pared to essentials, the constitutional controversy has focused upon the respective claims of the nation and the states to determine the content of public policy. The controversy has gone through several stages, with the emerging national consensus becoming triumphant in each instance. The decisions of the early Marshall Court and the Civil War Amendments represented important stages in this process. But while they vindicated nationally formulated norms against claims of state (or, more precisely, sectional) autonomy,<sup>6</sup> neither the Marshall Court decisions nor the Civil War Amendments were understood at the time to establish the complete legal hegemony of the national government.

That development came during (or, more precisely, at the end of) the period of national growth and industrialization.<sup>7</sup> Regulatory efforts of this era raised questions concerning national authority to regulate a complex, highly integrated economy dominated by nationally active corporate giants, as well as questions of national competence to provide minimum economic security for our people. As a matter of constitutional theory these issues were resolved by 1941. Again, national authority was vindicated—this time through judicial acceptance of broad interpretations of the commerce and spending powers. While the important judicial decisions are too well known to justify review here, the extent to which they confirmed a major reshaping of the original federal system is usefully recalled. Of course, if Marshall was right in asserting that the commerce clause was intended to reach "those internal concerns which affect the states generally,"<sup>8</sup> national legislative power necessarily expanded as the economy entered a national, industrial, highly interdepen-

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5. National political parties, now in a period of evident decline, were another such device. They too had a federal structure. FREUND, *FOUNDATIONS AND DEVELOPMENTS OF AMERICAN FEDERALISM IN FEDERALISM AND THE NEW NATIONS OF AFRICA* 162 (1964). On the decline of the national political parties, see M. JANOWITZ, *THE LAST HALF-CENTURY* 11, 482-83, 510-34 (1978). See also, J. Herbers, *The Party's Over for the Political Parties*, N.Y. Times, Dec. 9, 1979, § 6 (Magazine), at 158.

6. Prior to the Civil War, slavery proponents had denied, correctly in my judgment, congressional authority to prohibit slavery in the slave-holding states. But they went much further, asserting a lack of national competence to bar slavery in the territories; indeed, some posited a congressional duty to protect that institution there. D. FEHRENBACHER, *THE DRED SCOTT CASE: ITS SIGNIFICANCE IN AMERICAN LAW AND POLITICS* (1978), provides an excellent study of the constitutional problems involved.

7. I put aside the brief period of congressional interest in securing broad rights to the Freedmen. By 1875 the political energy behind that effort was completely spent and the Court's most noted Reconstruction decisions confirmed that fact. For a sympathetic view of those decisions, see Benedict, *Preserving Federalism: Reconstruction and the Waite Court*, 1978 SUP. CT. REV. 39 (1979).

8. *Gibbons v. Ogden*. 22 U.S. (9 Wheat.) 1, 195 (1824).

dent stage. Even so, the present centralization of economic control in the national government would have astonished the framers, in practical terms if not in terms of constitutional theory.<sup>9</sup>

But the real transformation of "Our Federalism" has been worked by the modern federal role in taxation, borrowing and spending. Here the change seems to be one of theory, radically altering the financial premises of 1789 federalism. The framers envisaged a "clear separation between state and federal governments, with each provided with the sources of public revenue necessary for support of the functions assigned to it."<sup>10</sup> Exercises of national taxing and borrowing powers in this century have changed all that, not only by the huge accumulations of federal dollars but in the drying up of potential state revenue sources. Both results are far beyond anything contemplated by the framers. More importantly, the framers surely never imagined the recent but now deeply ingrained practice of massive transfers of federal dollars to state and local governments. I am speaking not simply of the restrictions attached to the transfers but of the actual transfers themselves. Once the Supreme Court recognized the congressional power to spend for the general welfare extends beyond the article 1, § 8 checklist,<sup>11</sup> twentieth-century Congresses inevitably asserted the right to finance functions that traditionally the states had exclusively financed or regulated. And, quite plainly, the Court could not maintain a line between those functions "assigned" to the states and those functions "assigned" to the national government without overtly resorting to the doctrine of dual federalism.<sup>12</sup> Inevitably, the logic of that concept yielded to that of "cooperative federalism." This change in premise is the foundation of the 1937 decisions upholding the Social Security Act.<sup>13</sup> Moreover, with the power to spend unlimited except by constitutional prohibitions, federal monies—with or without conditions attached—may be transferred not only to states but to their subordinate units of government. No purpose is excluded: federal resources can be utilized for the specific purpose of improv-

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9. *Gibbons*, for example, assumes that some economic conduct could not be reached by Congress. 22 U.S. (9 Wheat.) at 194-45.

10. Hamilton, *On Nonconstitutional Management of a Constitutional Problem*, PUBLIC INTEREST, Winter 1978, at 111, 113. Indeed, eighteenth-century governmental theory assumed that the same federal model would operate in the financial relations between state and local governmental units. On the presidential power of the purse, see, L. FISHER, *PRESIDENTIAL SPENDING POWER* (1975).

11. *United States v. Butler*, 297 U.S. 1, 65-67 (1936).

12. *United States v. Butler*, 297 U.S. 1, 68 (1936). See Ely, *The Irrepressible Myth of Erie*, 87 HARV. L. REV. 693, 700-02 (1974).

13. *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937). A judicially posited line between spending for "matters of national, as distinguished from local welfare," *United States v. Butler*, 297 U.S. 1, 67 (1936), results not in a dichotomy of assigned functions but an area of considerable overlap. *Helvering v. Davis*, 301 U.S. 619, 640 (1937) ("There is a middle ground or certainly a penumbra in which discretion is at large").

ing the quality of local police departments and for the more general purpose of "saving" financially hard pressed cities and corporations.<sup>14</sup>

If these results under the commerce and spending powers seem inevitable as a matter of judicial construction of the Constitution, the end result is still a profound alteration of the original constitutional framework. The power of the national government to bring about compliance with nationally defined policies through regulation and conditional spending is, for all practical purposes, unlimited. The legal hegemony of the national government is, therefore, firmly established. In major part at least "Our Federalism" is a political, rather than a legal, doctrine.<sup>15</sup>

All this was well established before the arrival of the Burger Court. The Warren Court had already participated in the development toward centralized power, helping to define the extent to which the national government could guarantee political and civil rights to its citizens on a nationwide basis by providing for more effective enforcement of constitutionally specified norms and by imposing upon the states and private parties norms which go beyond those specified in the Constitution. Here, I think it fair to say that the Burger Court has simply confirmed the views of its predecessor.<sup>16</sup> As yet, its decisions cast no material, constitutionally-grounded federalism doubts about the power of Congress to protect civil rights and liberties.

The Burger Court has, in short, formulated no serious judicial threat to the primacy of national legislative authority. The sole significant constitutional decision, the academically beloved *National League of Cities v. Usery*,<sup>17</sup> suggests the existence of some structurally-derived restrictions upon national power to legislate in ways that impair "integral" state functions.<sup>18</sup> But that decision has, as yet, shown no generative power and, in any event, is by its own terms not a barrier to national control over the private sector.<sup>19</sup> Nor is it likely to constitute a measurable barrier to national control over the states through conditioned spending<sup>20</sup> and regulation based upon the Civil War Amendments.<sup>21</sup> On the whole, therefore, the Burger Court has not significantly altered the

14. See generally Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847, 871-83 (1979).

15. See, for example, Kaden, *supra* note 14.

16. This seems to me particularly true if the Court's generous and expansive reading of civil rights legislation is taken into account, as its decisions under Title VII and 42 U.S.C. § 1981 and § 1982 make clear. *E.g.*, *Runyon v. McCrary*, 427 U.S. 160 (1976).

17. 426 U.S. 833 (1976).

18. Whether "impairment" includes anything other than substantial economic burdens remains to be seen. *E.g.*, *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070, 1083-84 (5th Cir. 1979). Compare Kaden, *supra* note 14, at 889-93, suggesting that *National League of Cities* place limits on federal coupling of state legislative and administrative machinery.

19. 426 U.S. at 840-41.

20. See Kaden, *supra* note 14, at 874-81, 893-96.

21. The cases and commentary are collected at 58-60, H. MONAGHAN, 1979 SUPPLEMENT, TO P. FREUND ET AL., CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS (4th ed. 1977) [hereinafter cited as H. MONAGHAN, 1979 SUPPLEMENT].

conventional wisdom that the Constitution remits the states to the national political process for the protection of their interests.<sup>22</sup>

The bulk of the Burger Court's substantive innovation has been at the level of non-constitutional doctrine. The Court has shown an increasing reluctance to displace state law by expansive construction of federal statutes<sup>23</sup> or through the development of federal common law.<sup>24</sup> Decisions refusing to expand the range of judge made law at the expense of state autonomy are, I think, an important development. Still, I know of no empirical basis for a complaint that these decisions, either singly or in combination, are working a major revision in the previously existing federal-state pattern.<sup>25</sup>

## II

In recent times "Our Federalism" theorists have been concerned with process as well as substance. Those who object to the Burger Court's brand of federalism emphasize changes supposedly wrought by the Court in this area, specifically in the relationship between federal and state judicial systems. Citing *Younger v. Harris*<sup>26</sup> and *Stone v. Powell*,<sup>27</sup> critics focus on the Court's assertedly restrictive attitude toward the authority of the national courts to vindicate federal constitutional and statutory norms against state officials.<sup>28</sup> That focus is an exceedingly important one; maintaining adequate enforcement mechanisms for federally secured rights is, to my mind, nearly equal in importance to the rights themselves.<sup>29</sup> The criticism presently expresses a legitimate, but minor, concern. Empirical evidence is lacking on the impact of the Court's restrictive decisions on the quantity and proportion of federal rights now left unvindicated. Accordingly, the focus must be at the doctrinal level, and (with deference to those who think otherwise) here the degree of change does not as yet seem very large.

The Warren Court's expansive concept of constitutional guarantees was, not surprisingly, accompanied by a correspondingly expansive concept of fed-

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22. For recent elaboration of this theme, see Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977). But see Kaden, *supra* note 14, at 857-68.

23. E.g., *California v. United States*, 438 U.S. 645 (1978). For a collection of cases on statutory preemption, see Note, *A Framework for Preemption Analysis*, 88 YALE L.J. 363 (1978).

24. E.g., *United States v. Kimball Foods, Inc.*, 440 U.S. 715 (1979); *Ferri v. Ackerman*, 444 U.S. 193 (1979).

25. Nor do I detect any significant changes in the Court's attitude toward questions of unconstitutional burdens on commerce. E.g., *City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978); *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

26. 401 U.S. 37 (1971).

27. 428 U.S. 465 (1976).

28. See, for example, the articles cited in H. MONAGHAN, 1979 SUPPLEMENT, *supra* note 21, at 7 footnote.

29. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1392-97 (1973).

eral judicial authority to vindicate those guarantees.<sup>30</sup> A considerable lowering of access barriers to the federal trial courts occurred with respect to many of the traditional impediments, such as standing, ripeness, mootness, exhaustion of state administrative remedies, and abstention. I am in general sympathy with this judicial door opening philosophy, particularly in the Warren Court's willingness to permit prospective state defendants to become federal plaintiffs.<sup>31</sup> The latter result is not only salutary public policy, but consistent with the enormous congressional enlargement of federal judicial authority which followed the Civil War.<sup>32</sup>

But whatever the weight of one's bias in favor of national judicial authority, countervailing federalism concerns suggest the plausibility of some limits. The Burger Court has expressed concern in several areas. The first, represented by *Younger* and *Stone*, is federal judicial superintendence of the general administration of the state criminal process. With deference to those who think otherwise, it seems to me inconsistent with the premises of our federal structure to permit, absent extraordinary circumstances, lower federal court monitoring of state criminal convictions that have been reviewed by state supreme courts. Accordingly, *Stone v. Powell's* bar to collateral review of search and seizure claims is intuitively attractive. Nonetheless, I think the decision is hard to defend. The Court's statement that the exclusionary rule is not part of the fourth amendment right, but only a judicially fashioned, pragmatically-limited "remedy"<sup>33</sup> is not adequate: this explanation throws into doubt the Court's authority to apply the exclusionary rule on direct review from the state supreme courts.<sup>34</sup> Moreover, from an institutional perspective, the Court seems to have comparatively little running room to shape federal door closing doctrine in habeas cases to vindicate its view of an appropriate distribution of authority between federal and state tribunals. For, whatever the wisdom of its action, Congress seems to have codified relatively full federal collateral review of state criminal convictions.<sup>35</sup> The Court's few efforts at restructuring the reach of federal habeas have been marked by intellectual chaos<sup>36</sup> and, despite *Stone v. Powell* and a few other decisions,<sup>37</sup> the Court now seems reconciled,

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30. Monaghan, Book Review, 83 HARV. L. REV. 1753, 1754 (1970).

31. Cf. Note, *Declaratory Relief in the Criminal Law*, 80 HARV. L. REV. 1490 (1967).

32. *Mitchum v. Foster*, 407 U.S. 225, 238-43 (1972).

33. 428 U.S. at 486-87.

34. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1, 3-10 (1975).

35. Justice Brennan's dissent in *Powell* seems to speak directly to this issue. 428 U.S. at 518-19.

36. See, for example, 1977 SUPPLEMENT TO HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM (2d ed. 1977) at 256-58.

37. E.g., *Wainwright v. Sykes*, 433 U.S. 72 (1977) (failure to raise federal claim in state proceeding works forfeiture of habeas review absent a showing of cause for the default and actual prejudice). For penetrating comment, see Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 COLUM. L. REV. 1050 (1978).

however reluctantly, to the availability of federal collateral attack, at least for claims challenging the reliability of the conviction.<sup>38</sup>

Federal judicial interference with pending state criminal proceedings has been a matter of concern to the Burger Court and to its critics. The holding of *Younger v. Harris*, if not its inflated language, seems to be a sound application of the "federal common law"<sup>39</sup> which normally should govern the distribution of authority between the federal and the state courts. Moreover, the *Younger* result is not foreclosed by the generalized language of the statutes conferring jurisdiction upon the federal trial courts.<sup>40</sup> More troublesome for me is the reverse preemption doctrine of *Hicks v. Miranda*,<sup>41</sup> permitting a subsequently filed state court proceeding to abort a prior federal proceeding. The objections to that holding are convincingly stated in the dissenting opinion.

Once again, however, one needs to keep the entire picture in mind. Neither *Younger v. Harris* nor the various other judicially fashioned door closing devices such as the various abstention doctrines<sup>42</sup> have seriously curtailed access to the federal courts for the purpose of testing the constitutional validity of state statutes and administrative practices. Every Term of Court bears witness to that fact.<sup>43</sup> Access to the federal trial forum exists even with respect to state criminal statutes, as *Steffel v. Thompson*,<sup>44</sup> *Doran v. Salem Inn, Inc.*,<sup>45</sup> and *Wooley v. Maynard*<sup>46</sup> make clear, at least if the federal plaintiff has not violated the statute before initiating the challenge.<sup>47</sup> Justice Rehnquist's efforts

38. *E.g.*, *Jackson v. Virginia*, 443 U.S. 307 (1979) (sufficiency of evidence to support state criminal conviction); *Rose v. Mitchell*, 443 U.S. 545 (1979) (grand jury discrimination). See *The Supreme Court, 1978 Term*, 93 HARV. L. REV. 60, 210-18 (1979). I do not wish to suggest that the limitations potentially suggested by the current cases would not work some significant changes. Indeed, I think the habeas cases represent the strongest illustrations of such change.

39. P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (2d ed. 1973) at 427. Indeed, I would have thought prior to *Mitchum v. Foster*, 407 U.S. 225 (1972) that Congress had mandated such a result in 28 U.S.C. § 2283. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977).

40. For the opposite view see articles cited in H. MONAGHAN, 1979 SUPPLEMENT, *supra* note 21, at 7, n.7-4. On the current statute of *Younger*, see *Moore v. Sims*, 442 U.S. 415 (1979). I should add that, though the justifications are less compelling, I would extend *Younger* to pending civil proceedings, even between private parties. *Kenner v. Morris*, 600 F.2d 22 (6th Cir. 1979) (declining to interfere in a domestic relations matter pending in state court).

41. 422 U.S. 332 (1975).

42. See, for example, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289 (1979).

43. *E.g.*, *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256 (1979); *Parham v. J. R.*, 442 U.S. 584 (1979).

44. 415 U.S. 452 (1974).

45. 422 U.S. 922 (1975).

46. 430 U.S. 705 (1977). Compare Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. CHI. L. REV. 636 (1979).

47. On this specific issue see also *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975) and the discussion in the HART & WECHSLER, 1977 SUPPLEMENT, *supra* note 36, at 179-81. For perceptive discussion of the preclusive and stare decisis effects of federal declaratory decrees, see Shapiro, *State Courts and Federal Declaratory Judgments*, 74 NW. U. L. REV. 759 (1979).

at a more general lockout—exemplified in an extraordinary dissent in which he would have held that invocation of an “optional” state administrative proceeding requires a litigant to utilize state *judicial* remedies—has not carried a majority of the Court.<sup>48</sup>

Justice Rehnquist’s view should not prevail. At base, it would cut deeply into the concept of federalism embodied in the great watershed decisions in *Ex parte Young*<sup>49</sup> and *Home Telephone & Telegraph Co. v. City of Los Angeles*.<sup>50</sup> Since those cases, it has been clear that any reasonably well focused constitutionally-based controversy between private parties and state officials can be litigated in the federal courts;<sup>51</sup> and, once there, the federal courts possess ample remedial power to vindicate any federally established rights. The Court is, to be sure, not sympathetic to entertaining these controversies when they involve potentially sweeping “structural” decrees requiring a close, ongoing monitoring of state governmental institutions.<sup>52</sup> But, even in this context, access to the federal courts is available when federal constitutional rights are sharply implicated.<sup>53</sup> The central fact is that the Burger Court has not closed the doors of the federal courts through wholesale reversal of jurisdictional doctrine. The Court’s one constitutionally-grounded remedy-restricting rule, *Edelman v. Jordan*,<sup>54</sup> another academic must, is of little functional consequence. While it insulates the state treasury from damage claims, it does not bar federal actions against state officials to bring about prospective compliance with federal norms.<sup>55</sup> Nor does it bar damage actions where Congress, acting under the Civil War Amendments, strips away sovereign immunity.<sup>56</sup>

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48. *City of Columbus v. Leonard*, 443 U.S. 905 (1979). 61 L.Ed. 2d 872 (dissenting from denial of certiorari). Justice Rehnquist’s view is precisely opposite to mine. Pressure should force, not discourage, an “optional” state administrative remedy. This would mean abandonment of the sometimes woodenly stated doctrine that exhaustion is not required in § 1983 actions. *E.g.*, *Ellis v. Dyson*, 421 U.S. 426, 432-33 (1975) (dictum). A far more discriminating approach is necessary. See Powell, J., concurring in *Runyon v. McCray*, 427 U.S. 160, 186 (1976); Comment, *Exhaustion of State Administrative Remedies in Section 1983 Cases*, 41 U. CHI. L. REV. 537 (1974).

49. 209 U.S. 123 (1908).

50. 227 U.S. 278 (1913).

51. Under *Home Telegraph*, this is true even if the challenged official conduct is assumed to be illegal under state law. Of course under the rule of *Siler v. Louisville & Nashville R. Co.*, 213 U.S. 175 (1909), the state ultra vires issue should be reached and decided first. But the rise of absence doctrine requires, ordinarily, resort to the state courts to pass on doubtful state law issues. For an influential analysis of absence, see Field, *Absenteeism in Constitutional Cases: The Scope of the Pullman Absenteeism Doctrine*, 122 U. PA. L. REV. 1971 (1974).

52. *O’Shea v. Littleton*, 414 U.S. 488 (1974); *Rizzo v. Goode*, 423 U.S. 362 (1976).

53. *E.g.*, *Dayton Board of Education v. Brinkman*, 99 S. Ct. 2971 (1979); *Columbus Board of Education v. Penick*, 443 U.S. 449 (1979); Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978): see also the articles cited in H. MONAGHAN, 1979 SUPPLEMENT, *supra* note 21, at 22.

54. 415 U.S. 651 (1974).

55. *Id.* at 664, citing the “watershed” decision in *Ex parte Young*.

56. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976); *Milliken v. Bradley*, 433 U.S. 267 (1977). See also *Hutto v. Hinney*, 437 U.S. 678 (1978). But § 1983 has been held not to embody a congressional intention to strip the states of their immunity. *Quern v. Jordan*, 440 U.S. 332 (1979). The

Nor does it apply in any form to § 1983 damage actions against "individual" officials or, indeed, to suits against county and municipal bodies.<sup>57</sup>

### III

Despite the general thrust of *Ex parte Young* and *Home Telephone & Telegraph*, the Court has shown obvious discomfort over federal trial court supervision of a second area of state routine: the hiring, promotion and discharge of state employees, including any alleged "defamation" occurring in the course of these procedures.<sup>58</sup> The typical claim is not one of violation of a specific constitutional right or of an impermissible class-based discrimination.<sup>59</sup> Rather, the paradigm involves a disgruntled state employee separated from public employment and/or criticized, whose disgruntlement is translated into claims that the termination decision was "arbitrary" (i.e., wrong), or involved "defamation" (i.e., criticism).<sup>60</sup> While it is possible to view these cases as involving constitutional torts because the state is the employer or actor, they do not in fact sharply implicate constitutional values. One can, therefore, sympathize with the desire to prevent automatic "appeals" of these cases to the federal trial courts. To be sure, the Court has extended its inhospitality to these suits to the arguably very different problem of challenges to the sufficiency of the procedural framework for making the termination decision.<sup>61</sup> That extension is at least plausible for the apparent fear is that the federal trial courts will become mired in a Serbonian bog of minute procedural challenges.

Nonetheless, the route taken to close the federal courthouse to these public employment challenges is another matter. Constrained by its precedents from rejecting these challenges on jurisdictional grounds, the Court has opined that the public employee's interest in his reputation or in continued specific employment are not, standing alone, part of the liberty or property protected by the fourteenth amendment, at least for purposes of procedural

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circuits have given *Edelman* limited scope even in the Article 1, § 8 context. *E.g.*, *Jennings v. Illinois Office of Ed.*, 589 F.2d 935 (7th Cir. 1979); *Mills Music, Inc. v. Arizona*, 591 F.2d 1278 (9th Cir. 1979); *Peel v. Florida Dep't of Transportation*, 600 F.2d 1070 (5th Cir. 1979).

57. Municipalities and counties are "persons" for purposes of § 1983. *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978). *See also Lake County Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979).

58. *Paul v. Davis*, 424 U.S. 693 (1976) involved defamation of a private individual rather than a public employee. But I think *Paul* is a typical application of the rationale, and that the routine context is criticism made in connection with public employment. *See Codd v. Velger*, 429 U.S. 624 (1977); *Monaghan, Of "Liberty" and "Property,"* 62 CORNELL L.J. 405, 443 n.235 (1977).

59. Of course, when claims of this character are implicated, access to the federal trial courts is available. *E.g. Perry v. Sindermann*, 408 U.S. 593 (1972).

60. *E.g.*, *Vruno v. Schwarzwald*, 600 F.2d 124 (8th Cir. 1979); *Needleman v. Bohlen*, 602 F.2d 1 (1st Cir. 1979); *Clark v. Whiting*, 607 F.2d 634 (4th Cir. 1979).

61. *Bishop v. Wood*, 424 U.S. 341 (1976). The decisions would, of course, permit a state to establish a sufficient interest in specific public employment to constitute property, and thereby to commit itself to constitutionally adequate termination procedures.

due process.<sup>62</sup> I have reviewed these developments elsewhere.<sup>63</sup> Suffice it to say that what we see is a form of what psychologists call displacement—the desire to close the doors of the federal *trial* courts to certain kinds of substantive and procedural claims,<sup>64</sup> an essentially jurisdictional concept, has been resolved by the narrowing scope of *substantive* constitutional guarantees.

Here, as elsewhere, displacement has its costs. The practical impact of the Court's concern with liberty and property is largely confined to claims by public employees; it has not barred the Court from addressing the merits of the procedural and substantive due process claims of private parties.<sup>65</sup> However, the general doctrine leaves the profession with a feeling that meaningful distinctions seldom exist between interests held to satisfy the threshold of liberty and property and those that do not.<sup>66</sup> Patent anomalies have appeared: a woman discharged from an untenured position with a Congressman on gender-based grounds has a right of action under the due process clause of the fifth amendment despite the fact that neither liberty nor property is involved in a specific, probationary position.<sup>67</sup> Moreover, not only is a probationary employee's interest in a specific job not liberty or property, neither is her interest in her reputation. Yet if defamation occurs in the discharge of an untenured employee, a name-clearing administrative hearing is required.<sup>68</sup> In law, as in mathematics, summing zeros does not lead to a total greater than zero.

Erratic and anomalous application of a doctrine requiring identification of

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62. It eludes me how the result can be any different for purposes of substantive due process. Monaghan, *supra* note 58, at 421 n.112.

63. Monaghan, *supra* note 58.

64. Bishop v. Wood, 426 U.S. 341, 349-50 (1976) makes this plain:

The federal court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies. We must accept the harsh fact that numerous individual mistakes are inevitable in the day-to-day administration of our affairs. The United States Constitution cannot feasibly be construed to require federal judicial review for every such error . . . . The Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions.

See also, for example, the cases cited in note 60. Of course, the manipulation of the content of "due process" has relevance at the federal level also. *E.g.*, Arnett v. Kennedy, 416 U.S. 134 (1974). But given the ample statutory and administrative protection afforded to federal employees, it is not clear that the matter has much practical importance in the federal government.

65. *E.g.*, Mackey v. Montrym, 443 U.S. 1 (1979); Barry v. Barchi, 443 U.S. 55 (1979); Martinez v. California, 100 S. Ct. 553 (1980). *But see* Leis v. Flynt, 439 U.S. 438 (1979).

66. Compare Bishop v. Wood, *supra* note 61, with Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978). See H. MONAGHAN, 1979 SUPPLEMENT, *supra* note 21, at 171-72.

67. The problem is ignored in Davis v. Passman, 442 U.S. 228 (1979). How does the equal protection component of the fifth amendment due process clause even begin to operate if the nontenured claim to specific employment constitutes neither liberty or property? The substantive right to be free from discrimination exists only if it implicates a liberty or property interest. Monaghan, *supra* note 58, at 421-22, particularly at note 112.

68. *E.g.*, Codd v. Velger, 429 U.S. 624 (1977). See Lyons v. Sullivan, 602 F.2d 7, 11 (1st Cir. 1979), *cert. denied*, 100 S. Ct. 159 (1979). Owen v. City of Independence, 589 F.2d 335 (8th Cir. 1979), *cert. granted*, 100 S. Ct. 42 (1979).

discrete liberty or property interests is not, however, my most serious objection to the Court's new obsession. Most disturbing is that the entire development has proceeded in ignorance of fundamental assumptions of the constitutional order established by over seven decades of precedent: the terms life, liberty and property were to be read as a unit so to embrace every interest valued by sensible persons. The core constitutional issue, in that view, should always center upon justification for the challenged state action.<sup>69</sup> No case has been made, on the grounds of either principle or policy, for reverting to an atomistic approach to the life, liberty, or property protected by the amendment.<sup>70</sup> In any event, I think it is obvious that federalism considerations will not suffice to create such a case.

#### IV

The Burger Court has not materially altered the central role of the federal courts in monitoring state activity; at most, it has affected the margins. But that is not the end of the matter for the role of the federal courts should not be viewed as an unfluctuating constant.<sup>71</sup> Rather, the nature and direction of federal trial court intervention should be responsive to current political necessities. Nineteen eighty is not 1954; the state courts, trial as well as appellate, cannot be assumed to be now unresponsive to claims of federal right. Accordingly, we need to reexamine the role of the federal trial courts in light of the current needs of federalism. For several reasons such reexamination must come from Congress rather than from the Court. First, the existing federal statutory pattern, the accumulated jurisdictional precedents, and the case-by-case nature of adjudication sharply restrict the possibility for the Supreme Court to develop rationally an appropriate distribution of authority between the national and the state courts. Second, decisions concerning the appropriate distribution are essentially political in character. Even if congressional veto power is ultimately reserved, delegation to the Court of the authority to define the appropriate scope of federal trial court supervision of state officials would materially impair the Court's ability to stay, or to appear to stay, above the hue and cry of political issues.

Ultimately, of course, we search for criteria for the exclusion or curtailment of federal jurisdiction. This includes consideration of such diverse and frequently elusive factors as: the volume of litigation; the nature and relative importance of the underlying federal interests; the proportion of meritorious to nonmeritorious claims; and the impact of federal court intervention on legitimate state interests. I am, of course, not suggesting the desirability of any

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69. Monaghan, *supra* note 58, at 411-14.

70. This is true whether the language of constitutional law is viewed as a special language or as ordinary language in a special setting. J. BRIGHAM, *CONSTITUTIONAL LANGUAGE, AN INTERPRETATION OF JUDICIAL DECISION* (1978).

71. H. FRIENDLY, *FEDERAL JURISDICTIONS: A GENERAL VIEW* (1973).

wholesale reexamination of the jurisdiction of the federal trial courts, nor could one reasonably expect any such result given the general force of inertia and the special force of those interests presently satisfied, in whole or major part, with the existing distributional pattern. It is possible, however, that a limited and meaningful assessment could come about with respect to specific categories of cases or on specific issues. I think that federal habeas jurisdiction should be overhauled. Given the fundamental presuppositions concerning the role of the state courts in the federal system, the existing jurisdiction is devoid of a coherent theoretical justification. Careful consideration should also be given to whether certain types of litigation, such as challenges to zoning regulations as uncompensated takings, should be excluded altogether. Other challenges might be sharply curtailed, as in the area of public employment and wrongful denial of statutory entitlements. Even if there is no exclusion, the conditions governing the availability of federal relief need reassessment. Focused legislative attention, for example, should be given to such matters as the extent to which exhaustion of administrative remedies should be required and when abstention is appropriate.

#### V

If one returns from fancy to fact, it seems plain to me that "Our Federalism" has, in recent history, been a political doctrine. It has recognized the legal supremacy of national political authority and the central and legitimate place of the national courts in the vindication of federal rights and interests. One can quarrel about the details, but taken in the main, the Burger Court has left intact the federal edifice bequeathed by its predecessors.