

“La Via Duesovranesca”

-or-

Toward a Theory of the Liberty-Protective Attributes of Dual-Sovereign Democratic Systems

(Proposal of Study for the J.S.D. Program at New York University)

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In his concurrence in *United States v. Lopez*, Justice Kennedy wrote favorably of “the theory that two governments accord more liberty than one,” citing to The Federalist Papers as well as to more recent sources.² But the “theory” to which he alluded is sketchy at best, being perhaps better described as a “founding notion” with considerable normative and descriptive content that has evolved over time, in the United States and elsewhere.³

To the extent that this “founding notion” has validity, i.e., that there are indeed liberty-protective mechanisms inherent in and unique to dual-sovereign democratic systems, the nature of such mechanisms is worthy of more scholarly exploration than has occurred. Does pitting one sovereign against the other truly protect the liberties of the individual? If so, does it do so in a way that is qualitatively different from the manner in which liberties are protected in

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² 514 U.S. 549, 576 (Kennedy, J., concurring).

³ Although Justice Kennedy credits the United States with the origination of that “founding notion,” earlier origins are apparent. For example, secular governments in first-millennium Europe competed with the papacy for power, almost certainly with some rights-protective consequences resulting from that dual-sovereign (although hardly democratic) arrangement. (Recognition of this history is the basis for my choice of language in the shorter alternative title to this proposal.)

unitary systems? If so, what is it about dual sovereignty that matters? How does it serve to protect individual liberty (if indeed it does at all)? Whether or not it does, might its dangers to liberty nonetheless actually outweigh its utility? What normative principles can be extrapolated from any conclusions that may be reached in answering the foregoing questions?

As a preliminary consideration in describing the framework within which I intend to address this area of inquiry, a definitional distinction should be made.

Federalism versus Dual Sovereignty

One commentator, William Thro, provides a good working definition of dual sovereignty, describing it as a constitutional theory that “views the Constitution as dividing sovereignty between the States and the National Government, vesting specific powers in both sovereigns, and forbidding one sovereign from interfering with the other sovereign’s exercise of its powers.”⁴ As Thro notes, there may be federalism without dual sovereignty: he cites Canada and Australia as examples.⁵ Similarly, Germany’s federalism is one in which the member states’ (Länder’s) role is formally and functionally significant in executing federal (Bund) law, a type of federalism that has been described as “interlocking” federalism (as contrasted with the “separate-sphere” federalism of the United States).⁶ Although it is possible

⁴ William E. Thro, *That Those Limits May Not Be Forgotten: An Explanation of Dual Sovereignty*, 12 *Widener L.J.* 567, 569 (2003).

⁵ *Id.* at 569 n.11 (“ As Canada and Australia demonstrate, it is possible to have “federalism” without regarding sovereignty as divided.”).

⁶ Fritz W. Scharpf, *Die Politikverflechtungs-Falle: Europaeische Integration und deutscher Foederalismus im Vergleich*, 26:4 *Politische Vierteljahresschrift* 324 (1985).

to conceive of dual sovereignty in the absence of federalism,⁷ for practical descriptive purposes it makes sense to speak of dual sovereignty as a characteristic of (or a theory applied in the administration of) some, but by no means all, federal systems. The paradigmatic example of a federal system in which dual sovereignty plays a significant role is, of course, the United States.

Toward the Theory

In an earlier writing (“Toward An Embryology of Federal Systems,” 2000)⁸ I proposed that insights into the workings of federal systems may be gained by recognizing that they are “dissipative systems”:

Both living organisms and other complex systems, such as systems of government . . . are among the entities that the Belgian Nobel laureate Ilya Prigogine has described as “dissipative systems.” (“Dissipative” refers to the system’s ability to dissipate *entropy*, thus maintaining and increasing internal complexity.) “Dissipative system” is formally defined as “one for which the driving force is the nonequilibrium flux of matter and energy through the system that increases order and sustainability in the system but makes reversing the system impossible.” (*citing* Stuart Kauffman, *At Home in the Universe: The Search for Laws of Self-Organization and Complexity* (1995), at 20-21.)

The useful elements in this model, as developed in the paper, relate to the recognition that the system is *dynamic*, i.e., that it grows and develops over time. In “Toward An Embryology of Federal Systems,” I posited that the development of federal systems may be

⁷ A historical example would be the secular governments and the papacy in first-millennium Europe as mentioned in footnote 3, but I am hard-pressed to find any modern example.

⁸ <http://homepages.nyu.edu/~jmm257/embryofed.pdf>

divided into stages relating to the ability/propensity of the federal judicial body to police the boundaries of the federal power, and I examined the constitutional history of the United States and, to a lesser extent, the European Union, in developing the model.

Synthesizing this “dissipative-system embryological model” with the earlier-discussed premise that dual-sovereign systems are a subset of federal systems (i.e., that federalism may exist without dual sovereignty) generates a hypothesis: that the “dual-sovereign” type of federal system differs in some fundamental “embryological” way from systems without dual sovereignty as an element. Continuing to draw from the biological perspective, one could posit that the latter type of systems are more “unitary,” i.e., more like single organisms, whereas systems in which dual sovereignty is a significant element are akin to biological entities such as the lichen, where two “organisms” interact with each other in complex ways.⁹

In what ways, if any, are dual-sovereign systems likely to be inherently protective of individual rights and liberties in ways that unitary systems are not? In addressing this question, two things must be considered: (1) the distinction between “unitary” and “dual-sovereign” is more a continuum than a binary choice, since certain (and perhaps all) federal systems exhibit some characteristics of each; and (2) other elements, such as the nature and extent of popular sovereignty/democratic principles inherent in the system, obviously play a role, which may be difficult to parse empirically from that of the dual-sovereignty element.

⁹ A lichen consists of an alga and a fungus living in a symbiotic arrangement. The alga is able to process inorganic materials from the environment using sunlight (photosynthesis), supplying the fungus with organic materials. The fungus, in turn, supplies carbon dioxide to the alga. Lichens are a primordial life form comprised of two separate and distinct species.

Those caveats having been articulated, a concrete example of a particular type of liberty interest will next be examined in order to illustrate one way in which the American dual-sovereign system may indeed have shown itself be inherently liberty-protective. Drawing from that example, the theoretical approach I have begun to describe will be further developed.

Freedom from Unreasonable Searches and Seizures

In another writing (“The Copper Platter and the Silver Chair: Federalization of Criminal Law, State Procedural Protections, and Competing Theories of Constitutionalism,” 2003)¹⁰ (the “Copper Platter” paper), I began by examining the phenomenon of state high courts’ holding their police to higher standards than would be applicable under federal Fourth-Amendment case law, thereby excluding from state criminal prosecutions evidence that had been obtained in violation of search-and-seizure provisions set forth in state constitutions (as those provisions were to be interpreted by the state courts even if textually identical to those in the federal constitution). This phenomenon has been described variously as “state court activism,”¹¹ the “new federalism,”¹² and “independent state search-and-seizure

¹⁰ <http://homepages.nyu.edu/~jmm257/copperplatter.pdf>

¹¹ See, e.g., Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 Va. L. Rev. 1085 (1982).

¹² See, e.g., Robin B. Johansen, *The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 Stan. L. Rev. 297 (1977).

constitutionalism,”¹³ to name but a few of the labels that scholars have given it. (For purposes of this proposal, I shall use the lattermost, which is the most descriptive.)

The sound reason for upholding search-and-seizure protections (whether set forth in the federal or state constitutions) by excluding illegally obtained evidence is that doing so removes the incentive for police to obtain evidence illegally, thereby protecting the rights and liberties of innocent persons who may never be charged with a crime, as well as those of defendants (innocent and guilty alike).¹⁴ Although the misconception that constitutional search-and-seizure protections and the exclusionary rule exist merely to protect “defendants’ rights” is widespread, and has even found its way into scholarly literature,¹⁵ it is the benefit to the general citizenry, in protecting them from unreasonable searches and seizures by the agents of government, that is of paramount concern.

The dual-sovereign system of the United States has yielded the phenomenon of independent state search-and-seizure constitutionalism. Without dual sovereignty, the development simply would not have occurred. Accordingly, it is a paradigmatic example of a

¹³ See, e.g., Robert M. Pitler, *Independent State Search-and-seizure Constitutionalism: the New York State Court of Appeals’ Quest for Principled Decisionmaking*, 62 Brook. L. Rev. 1 (1996).

¹⁴ See, e.g., Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 Mich. L. Rev. 907 (1983); *Arizona v. Hicks*, 480 U.S. 321 (1987) (“Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all”).

¹⁵ See, e.g., William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 Yale L.J. 1, 6 (1997) (referring to “defendants’ rights” in the context of a discussion of the exclusionary rule).

liberty-protective “mechanism” inherent within a dual-sovereign system. Where, as in the United States, federally guaranteed liberties have generally become applicable as against the states, but where state courts are generally free to look to their own state constitutions to set higher standards than do the federal courts, the “pendulum swings” of greater and lesser “liberty-protectiveness” in judicial interpretation will tend to be ameliorated by a “ratchet”¹⁶ phenomenon whereby the higher degree of protection (state or federal) generally applies.¹⁷ As Justice Brennan wrote in his famous 1977 article, *State Constitutions and the Protection of Individual Rights*, after having first outlined some of the then-recent retrenchments in various areas of protection of liberties by the Burger Court’s majority, “state courts have independently considered the merits of constitutional arguments and declined to follow opinions of the United States Supreme Court they find unconvincing, even where the state and federal constitutions are similarly or identically phrased.”¹⁸ Justice Brennan next quoted a passage from a Hawaii Supreme Court opinion, which noted that “while this results in a divergence of meaning between words which are the same in both federal and state constitutions, the system of federalism envisaged by the United States Constitution tolerates

¹⁶ The “ratchet” metaphor, implying a capacity to move liberty-protectiveness in one direction, is borrowed from the subsequent gloss placed on Justice Brennan’s analysis in *Katzenbach v. Morgan*, 384 U.S. 641 (1966), used there in the context of Congress’s power to move in one direction under section 5 of the Fourteenth Amendment.

¹⁷ Of course, the foregoing is an oversimplification. Other factors, not the least of which is the expansion of the federal criminal jurisdiction, undermine independent state search-and-seizure constitutionalism. This is the subject of my “Copper Platter” paper.

¹⁸ 90 Harv. L. Rev. 489 (1977).

such divergence where the result is greater protection of individual rights under state law than under federal law”¹⁹

Returning to the initial distinction between dual sovereignty and federalism, the observation may be made that only the former would be likely to foster a development such as independent state search-and-seizure constitutionalism. From the perspective of the “dissipative systems” model, it would be only the “separate organisms” arrangement that would create conditions favoring such a development, whereby the federal courts’ initial expansion of liberties as against the states would be followed by the state courts’ preservation of that expansion given a subsequent “ebbing” of the federal liberties-protective “tide” (cf. the “pendulum swing” metaphor introduced earlier).

Counterweights

While independent state search-and-seizure constitutionalism is an example of a healthy “lichen” of a liberties-protective dual-sovereign system,²⁰ examples of “pathologies” within that same system abound. Chief among these is the recently exploding Supreme Court doctrine of state sovereign immunity, which appears to be based on a conception of states’ rights that, while strong on sovereignty, is potentially weak on liberty. In a recent opinion, the Supreme Court stated that “[t]he preeminent purpose of state sovereign immunity is to

¹⁹ *Id.* at 500 (citing *State v. Kaluna*, 55 Hawaii 361, 369 n.6, 520 P.2d 51, 58 n.6 (1974)).

²⁰ *See supra* footnote 9 and accompanying text.

accord States the dignity that is consistent with their status as sovereign entities.”²¹ To the extent that this developing approach reduces the ability of private litigants to assert constitutional claims against state actors in federal court, it is hardly liberty-protective.

An additional outgrowth of dual sovereignty in the United States that has received wide scholarly attention (mostly in the form of condemnation) is the dual-sovereign exception to double jeopardy, which permits criminal defendants to be tried successively in state and federal proceedings for separately defined crimes arising out of the same act.²²

One other, more subtle “pathology” is that which I explored in some depth in my “Copper Platter” paper (alluded to in footnote 17, *supra*). As the number and variety of crimes defined under federal law increases (a trend that is well under way and shows no serious signs of abating, *Lopez* notwithstanding), the less meaningful the aforementioned liberty-protective phenomenon of independent state search-and-seizure constitutionalism becomes, since the more crimes exist under federal law and may be prosecuted in federal court, the more opportunities there will be for state police officers to give evidence in such

²¹ *Federal Maritime Commission v. South Carolina State Ports Authority*, 535 U.S. 743, 760 (2002).

²² See, e.g., Kenneth M. Murchison, *The Dual Sovereignty Exception to Double Jeopardy*, 14 N.Y.U. Rev. L. & Soc. Change 383 (1986); Susan N. Herman, *Double Jeopardy All Over Again: Dual Sovereignty, Rodney King, and the ACLU*, 41 UCLA L. Rev. 609 (1994); Christina Gayle Woods, Comment, *The Dual Sovereignty Exception to Double Jeopardy: An Unnecessary Loophole*, 24 U. Balt. L. Rev. 177 (1994); Robert Matz, Note, *Dual Sovereignty and the Double Jeopardy Clause: If At First You Don’t Convict, Try, Try Again*, 24 Fordham Urb. L.J. 353 (1997); Erin M. Cranman, *The Dual Sovereignty Exception to Double Jeopardy: A Champion of Justice or a Violation of a Fundamental Right?*, 14 Emory Int’l L. Rev. 1641 (2000).

proceedings even where the evidence would be inadmissible in the courts of their own states. (The phenomenon of state and local police “seizing evidence in apparent violation of the state Constitution” and delivering it to federal prosecutors for indictment and trial under federal criminal statutes was observed and commented upon as early as 1977 by a then-state-court judge who has since been appointed to the federal bench.²³) This subtle but real detraction from the benefits of independent state search-and-seizure constitutionalism may arguably be viewed as the inevitable result of a failure in American federalism that has allowed the central power to grow too great, thereby invading the spheres of exclusive competences of the states. One may even view the phenomenon of the growth of the commerce power (from the New Deal until 1995) into the basis for federal legislation in virtually all substantive areas including criminal law as *specifically* a failure in the application of principles of dual sovereignty.

However one views the proper scope of the federal power (which is not a central question to my thesis), it is reasonably clear from the foregoing examples of various American constitutional phenomena that dual sovereignty may be associated with both liberty-protective characteristics and with mechanisms that work in quite the opposite direction.

²³ Donald E. Ziegler, *Constitutional Rights of the Accused--Developing Dichotomy Between Federal and State Law*, 48 Pa. B.A.Q. 241, 251 (1977). The terms derives from the earlier-recognized but now defunct “Silver Platter Doctrine,” whereby federal law enforcement officials offered evidence in state court that would have been inadmissible in federal court. Judge Ziegler is now the Chief Judge of the United States District Court for the Western District of Pennsylvania.

The Need for a Theory

Interestingly, in terms of correlation of adherence to viewpoints, it appears that many of those who favor a strengthening of state sovereign immunity also favor placing limits on the commerce power, thereby preventing or at least slowing the continued expansion of the federal criminal jurisdiction by the enactment of new statutes defining federal crimes, whereas those who would avoid so limiting the commerce power tend also to worry about the Court's recent "beefing up" of state sovereign immunity. I find myself in neither "camp," being worried both by the expansion/extension of sovereign immunity doctrines *and* by the continued expansion of the federal criminal jurisdiction and other phenomena resultant from the Court's having abandoned, until *Lopez*²⁴ and *Morrison*²⁵ at least, any role in limiting Congress to its enumerated powers. Although I trust that I am not alone, I carefully watched the show of hands in the mostly-lawyer audience following a conjoined public debate on these two issues at the City Bar Association a few years ago, and was unable to find a single audience member other than myself who departed from the pairing of perspectives articulated at the beginning of this paragraph.

What does this observation have to do with my attempt at a theory of the liberty-protective attributes of dual-sovereign democratic systems and my proposed J.S.D. thesis? If nothing else, it illustrates that majorities of legal thinkers appear to polarize these issues along

²⁴ *United States v. Lopez*, 514 U.S. 549 (1995).

²⁵ *United States v. Morrison*, 529 U.S. 598 (2000).

theoretical lines that may have less to do with liberty-protective mechanisms than with such conceptual models as “states’ rights versus federal supremacy” or “liberalism versus conservatism.” A student observer of the federal public defenders in the wake of *Lopez* had this to say:

Interestingly, the recurring use of *Lopez* by federal public defenders reveals a serious rift in the liberal/left constituency of the Democratic Party. Most federal public defenders support an interventionist national government. Yet their sustained attacks on the federalization of state crime undermine the legitimacy of Congress’ power to intervene in other public policy areas. Since the New Deal, for example, the Court’s expansive reading of the Commerce Clause has been employed to prohibit discrimination on the basis of race. If *Lopez* proves to be more than an aberration, the legal foundation of the civil rights and social programs promulgated by the New Deal and Great Society may be destroyed. Consequently, the federal defenders’ advocacy of *Lopez* has not been enthusiastically embraced by all traditional liberals. For many in the civil rights community, the promotion of *Lopez* is an anathema.²⁶

Similarly, the fact that all but one Supreme Court justice (Kennedy) who voted with the majority in *U.S. Term Limits v. Thornton*²⁷ dissented in *Lopez* illustrates that the theoretical underpinnings of dual sovereignty are, at best, not widely agreed upon. One would think that the intrusion of the one sovereign into the other’s political process (*U.S. Term Limits*) would be as “taboo” as the expansion of the powers of one sovereign into areas beyond its enumerated powers (*Lopez*). Yet only one justice appears to have seen it that way.

I mention all this because it at least points up the fact that a cohesive theory of dual

²⁶ Andrew Weis, Note, *Commerce Clause in the Cross-hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 Stan. L. Rev. 1431, 1464 (1996).

²⁷ 514 U.S. 779 (1995).

sovereignty is desperately needed. One that takes into account the liberty-protective element that, according to Justice Kennedy in his concurrence in *Lopez*, is an essential attribute of dual sovereignty,²⁸ certainly ought to be explored and refined. I have found little in scholarly literature that does so.

In addressing the question of whether and to what extent dual sovereignty is by its very nature protective of individual liberty (the “Kennedy assertion,” and the essence of my J.S.D. proposal), I am not prejudiced by any foregone conclusions. Having now engaged in several years of comparative constitutional study in the course of pursuing my LL.M. degree, what began as an essentially unquestioned assumption to the effect that federalism and dual sovereignty unerringly favored the protection of liberty has now been tempered by, among other things, a recognition that a variety of systems (including totally unitary systems as well as federal systems in which dual sovereignty plays little, if any, role) have very effective mechanisms for the protection of civil liberties. With that recognition has come the abandonment of my earlier assumption, coupled with a desire to test the underlying hypothesis that drove it.

I remain fascinated by the concept of dual sovereignty, perhaps in part because it mirrors the theme of adversarial justice that permeates the common-law tradition in which I was trained. The idea that liberty may be preserved or enhanced by pitting one sovereign

²⁸ See *supra* footnote 2 and accompanying text. The sum and substance of his commentary is that “freedom was enhanced by the creation of two governments, not one.” 514 U.S. at 576.

against another is, after all, not too far distant a notion from the common-law axiom that posits that truth and justice will come from the pitting of one zealous advocate against another.²⁹

Methodology

How does one determine whether and to what extent there are indeed liberty-protective mechanisms inherent in and unique to dual-sovereign democratic systems, and then proceed to identify and analyze these mechanisms? Comparative and historical study is an obvious starting point. The most readily identified modern federal democratic systems in which dual sovereignty plays a role are those of the United States, the European Union, and Belgium, but this list is not exhaustive. The historical analysis should also include some in-depth examination of the non-democratic dual-sovereign arrangement mentioned in footnote 3, i.e., secular governments and the papacy in first-millennium Europe.

An analytical framework is essential. As introduced sparingly at the outset of this paper (see footnote 8 and accompanying text), I have begun formulating a “dissipative-system embryological” model that will, I hope, inform my understanding whether or not a thorough explication of that model surfaces visibly in the product of my efforts (should I be given the opportunity to make those efforts within the J.S.D. program). This conceptual model assumes, among other things, that no system is static and that an understanding of the growth and

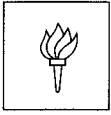
²⁹ Reminiscent of this linkage between the common law and adherence to the concept of sovereignty is a comment made by a recent observer of the U.K.’s role in the European Union: “For historical reasons, sovereignty has always seemed more important to Britons and Americans than to their European cousins.” Michael Gonzalez, *Why Europe Needs Britain*, 108 Policy Review (2001).

evolution of a system over time may be enhanced by identifying discrete stages of development. As many commentators observe, in federal systems there is an inevitable accretion of power in the central government over time.³⁰ The role of dual sovereignty in the context of this phenomenon may be important and will be examined.

The American experience obviously provides the richest source material for analysis because it has undergone more than two centuries of development, including stages of instability (e.g., the Civil War). That, coupled with my own familiarity with American constitutional law, will inevitably favor my development of my thesis with a preference toward analyzing U.S. constitutional history. One element I should like to develop upon, and which has been introduced in the foregoing pages, is the nature and extent to which the expansion of the federal criminal jurisdiction has thwarted the liberty-protective effect of the dual-sovereign-driven phenomenon of independent state search-and-seizure constitutionalism. This topic both lends itself well to empirical and statistical study and would yield independently valuable data that could meaningfully be incorporated into my overall analysis.

In sum, I propose to study dual sovereignty and its implications on the preservation of civil liberties, with a focus on the American experience that is informed by comparative and historical study.

³⁰ See, e.g., Mark Tushnet, *Federalism and Liberalism*, 4 *Cardozo J. Int'l & Comp. L.* 329, 333 (1996) (“Notwithstanding the constitutional allocation of powers, federal systems drift toward centralization.”).



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