VERTICAL LEARNING: ON BAKER AND RODRIGUEZ'S "CONSTITUTIONAL HOME RULE AND JUDICIAL SCRUTINY"

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INTRODUCTION

In *Constitutional Home Rule and Judicial Scrutiny*,[1] Lynn Baker and Daniel Rodriguez start an important conversation about an interesting and understudied puzzle.[2] In one view of vertical federalism, the federal government is understood as constrained to enumerated powers, states retain plenary police power, and local governments are traditionally creatures of the state. This view yields something of structural constitutional bell curve that situates the heart of sovereignty at the state level, leaving the federal government and local governments with forms of limited authority on either end. Despite this seemingly privileged state position, however, federal courts seem unwilling in the main to protect states from federal power in direct conflicts arising under the Tenth Amendment. Local governments asserting arguably equivalent home rule constitutional provisions as a shield against those same states more often get their day in state court.

To Baker and Rodriguez, this conundrum can be understood largely as a question of differing self-conceptions of judicial competence at the federal and state level. State courts are comfortable with routinely deciding whether a matter is "local" or of "statewide concern" in interpreting constitutional home rule provisions. The U.S. Supreme Court, by contrast, has declared that divining a line between proper federal and state authority—at least in the context of state regulatory immunity under the Tenth Amendment—is functionally "unworkable."[3]

Baker and Rodriguez's tentative conclusion from this juxtaposition is that the federal courts—and it would seem, by extension, critics of resurgent state-centered federalism jurisprudence—should look to the state example and stop worrying so much about the difficulty of developing an elegant theory of governance scale that would, ex ante, provide

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1. Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 DENV. U. L. REV. 1337 (2009).

2. Baker and Rodriguez's article is the first part of a larger project that will examine in depth the parallels between federalism and localism as a case study in comparative domestic constitutional law. *See id.* at 1372.

3. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) ("[T]he attempt to draw the boundaries of state regulatory immunity in terms of 'traditional governmental function' is not only unworkable but is also inconsistent with established principles of federalism."); *see* Baker & Rodriguez, *supra* note 1, at 1364-65 (discussing *Garcia*).

clear theoretical lines between levels of governments. State courts, they argue, have proven adept at developing a constitutional common law in this area and the federal courts should learn from this example. As Baker and Rodriguez put it, "if the state courts are in fact doing a good job" developing a jurisprudence to police the state-local boundary under constitutional home rule, "it would suggest that the task is far from impossible and, indeed, that the U.S. Supreme Court might do well to follow the state courts' lead."[4]

This is a compelling argument in many respects, but worthy of some caution. In this brief comment, I want to suggest ways in which Baker and Rodriguez may be overly dismissive of the pragmatics of federal-court review of federal-state conflicts and conversely overly sanguine about the efficacy of state-court supervision of the state-local divide. Ultimately, the question should be not whether state courts are forging a path that federal courts have mistakenly abjured, but rather under what circumstances *any* court reviewing vertical constitutional conflicts should displace the political process that has created the conflict in the first place.

There are no easy answers here, and Rodriguez and Baker have persuasively framed a parallelism that deserves serious attention. It is worth asking, however, when it is justified to displace normative debates about specific policy disputes into the realm of judicial review of governmental scale, rather than as a practical matter to leave those debates, as federal courts often do, to the give and take of intergovernmental collaboration and conflict. It may be that in answering this question, it is state courts that have lessons to learn from their federal counterparts, rather than the other way around.

I. A (PARTIALLY) UNIFIED DISCOURSE OF VERTICAL CONSTITUTIONAL STRUCTURE

In reflecting on Baker and Rodriguez's project, it is useful to start with a little taxonomical brush clearing. It is well rehearsed that vertical intergovernmental conflicts—federal versus state as well as state versus local—involve a handful of recurring patterns. In one pattern, the question is whether the relevant government has the power to act—in local government parlance, the power of initiation.[5] The second pattern involves questions of preemption and immunity, where power to act runs

4. Baker & Rodriguez, *supra* note 1, at 1365.

5. *See* Daniel Rodriguez, *Localism and Lawmaking*, 32 RUTGERS L.J. 627, 637-42 (2001) (discussing local legal power to act and local legal immunity). Questions of baseline authority to act and intrinsic limitations on that authority are not limited to local government. The same issue arises at the federal level, see, for example, United States v. Georgia, 546 U.S. 151 (2006) (determining the scope of Congress' powers under Section Five of the Fourteenth Amendment), and the state level, see, for example, Mun. City of South Bend v. Kimsey, 781 N.E.2d 683 (Ind. 2003) (striking down a state statute as violating a state constitutional prohibition on special legislation).

into the (potentially) disabling authority of another level of government.[6] And in the interstices of these conflicts, courts must grapple with complications that relate to whether the source of asserted authority or immunity is constitutional or legislative.[7]

I mention these basics to point out that from the panoply of potential vertical conflicts, Baker and Rodriguez draw their lessons about state-court jurisprudence from a relatively narrow subset. In particular, Baker and Rodriguez highlight (granted, not exclusively) the parallelism between state court review of local immunity under constitutional, *imperio in imperium*, home rule[8] and federal court review of state immunity under the Tenth Amendment.[9]

This is an intriguing ground of unification between federal-state and state-local conflicts, but it is not the only parallelism between these two arenas. Federal courts, for example, have proven perfectly capable of wading into vertical constitutional conflicts in the context, for example, of federal preemption.[10] Similarly, federal courts have adjudicated federal-state conflicts over the Commerce Clause outside Tenth-Amendment constraints,[11] the Spending Clause,[12] and other sources of federal power.

Taking these types of cases as a whole, it is worth remembering that federal courts have developed a jurisprudence of federal-state allocation of power through the very kind of case-by-case, common-law-like adjudicative accretion that Baker and Rodriguez rightly identify with the work of state courts interpreting home rule provisions.[13] This is not to say that this federal jurisprudence is necessarily internally coherent or normatively defensible in any given instance. Nor is this to argue that in these cases, the U.S. Supreme Court and other federal courts are confronting the nature of reserved state sovereignty as directly or explicitly as the Court did in *Garcia* and the case it overturned, *National League of*

6. As with questions of the authority to act, there is consistency about disputes over immunity and preemption at varying levels of intergovernmental conflict. This question arises whenever a federal statute potentially displaces state authority, see, for example, Wyeth v. Levine, 129 S. Ct. 1187 (2009), and arises in very similar terms whenever a state statute potentially displaces local authority, see, for example, City of Davenport v. Seymore, 755 N.W.2d 533 (Iowa 2008).

7. On this score, again, there is parallelism, although its texture may be more nuanced. In many federal-state conflicts, there is both a statutory question (can the federal regime coexist with the state regime?) and a constitutional question (if not, does the federal government prevail as a matter of the Supremacy Clause, or is there some protection, from the Tenth Amendment or otherwise, that immunizes the state?). Likewise, state courts grappling with state-local conflicts often have to resolve both a predicate statutory and then a subsequent constitutional question.

8. *See* Baker & Rodriguez, *supra* note 1, at 1349-64.

9. *Id.* at 1364-65.

10. *See, e.g.*, Wyeth, 129 S. Ct. 1187.

11. *See, e.g.*, Gonzales v. Raich, 545 U.S. 1 (2005).

12. *See, e.g.*, South Dakota v. Dole, 483 U.S. 203 (1987).

13. For a thoughtful discussion of the accretive, common-law-like approach to federalism disputes evident at the federal level, see Ernest A. Young, *Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments*, 46 WM. & MARY L. REV. 1733 (2005).

Cities v. Usery.[14] Nonetheless, although the question confronting the Court in these cases is less the abstract meaning of the spheres of "national" and "state" authority or even the direct question of the scope of state sovereignty, federalism cases are rife with such concerns nonetheless. In divining the lessons that federal courts might learn from their state-court counterparts, we should thus not underestimate the breadth of the role that federal courts play in policing federal-state conflicts, even if in many situations the outcome is some form of vindication of federal supremacy.

II. IS VERTICAL STRUCTURAL CONSTITUTIONAL LAW REALLY A QUESTION OF JUDICIAL COMPETENCE?

What, then, of Baker and Rodriguez's paradigm comparison—Tenth Amendment timidity at the federal level versus a work-a-day constitutional home rule jurisprudence at the state level? If Baker and Rodriguez's central argument is about judicial competence to decide questions of intergovernmental power conflicts, then it is worth pausing to think about how courts approach that task.

We might think of three modes of analysis here, although they overlap significantly in practice (and this is hardly an exhaustive list). First, there are formalist approaches to dividing vertical power. As Baker and Rodriguez note, courts look to the relevant constitutional text, historical practice, and seemingly fixed categories to discern binding principles to follow.

Next, there is a basic pragmatist reasoning that informs many federalism and localism decisions. Here, courts are trying to discern whether a given division of labor between levels of government produces "better" outcomes. These outcomes can be argued on any number of grounds—experimentalism yields diversity in policy approaches; local or state or federal officials have the resources/political incentives/relevant expertise/fill-in-the-blank advantage to solve this particular problem; situating authority at this or that level provides more accountability; and so forth. These are all practical judgments about collective welfare that courts try to get at by using rough proxies in vertical constitutional structure and comparative institutionalism.

Finally, there are various normative screens that courts apply to resolve vertical conflicts. These normative screens can relate to values we associate with federalism or localism, or they might perhaps more implicitly relate to whatever the underlying regulation addresses. Thus, while a court that might not rely on a testable hypothesis that subsidiary yields more efficient or distributionally just outcomes, the court may nonetheless decide that a system that devolves power and responsibility

14. 426 U.S. 833 (1976).

to the smallest practical unit of government is preferable given (small d) democratic values. But a court might also decide that—for reasons that have nothing to do with values associated with vertical structure—validating or invalidating civil rights, property rights, the rights of gun owners and the like is best served by locating power at any given level of government.

In assessing what courts are "essentially doing when they review state/local conflicts" and the insights that this analysis yields for "larger matters of judicial capability and doctrinal efficiency,"[15] Baker and Rodriguez highlight the line between pragmatism and normativity unmoored by the actual values of federalism or localism, however indeterminate. It is at this juncture that I think we need to pause.

To begin, Baker and Rodriguez seem to acknowledge that formalism is not doing much real work here. At the federal level, the text of the Tenth Amendment is famously opaque[16] and there was good reason for the Court to throw up its hands in *Garcia* over the quest for defensible indicia of historical tradition embedded in that text.[17] At the state/local level, there is perhaps more text and tradition on which to rely, but is "local" or "municipal" or "statewide concern" as an intrinsic guide any less tautological?[18]

Turning then to the other two approaches, Baker and Rodriguez find in the state court experience pragmatic, if not perfect, judgments about comparative institutional competence between local and state governments. As they put it, courts in constitutional home rule cases are really making judgments about the "best institutions to implement intrastate public policy,"[19] which is essentially an assessment of appropriate governance structure.

This is certainly a more promising ground for defending the courts' work in vertical constitutional conflicts than plain formalism, but here is where the line between pragmatic and normative judgment gets tricky. There is a good argument that, in run-of-the-mill vertical conflicts, pragmatism is as functionally indeterminate as formalism. For every

15. Baker & Rodriguez, *supra* note 1, at 1339.

16. *See* New York v. United States, 505 U.S. 144, 156-57 (1992) (Tenth Amendment "restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, . . . is essentially a tautology"); *see also* Lynn A. Baker, *Conditional Federal Spending After* Lopez, 95 COLUM. L. REV. 1911, 1924 n. 47 (1995) (discussing the source of Tenth Amendment protection for states).

17. *Cf.* Young, *supra* note 13, at 1736 ("[I]t seems fair to say that although those sources of law have been highly relevant to the Court's enterprise, neither text nor history has dictated many of the resulting doctrines.").

18. Baker and Rodriguez cite to various categorical distinctions state courts have made in home rule cases, such as "health, safety, and welfare," land use, employee relations, civil rights, and taxing. Each of these categories, however, represents more of a starting point for analysis that hardly determines the conclusion and their own analysis underscores the internal contradictions evident within the categories. *See* Baker & Rodriguez, *supra* note 1, at 1356-64.

19. *Id.* at 1354.

claim about Brandeis's laboratories of democracy, one can make an equally compelling counter-argument about economies of scale or the benefits of uniformity.

The *Telluride* decision,[20] which Baker and Rodriguez cite, illustrates this well. By what pragmatic metric can a court really say that "rent control" is a matter of local, state, or mixed concern, if the question is about comparative governance capabilities? Obviously, the Colorado Supreme Court got there, finding the matter to have both local and statewide implications.[21] The court's discussion of extraterritorial impact and the value of uniformity could as easily have been replaced with debates about the instrumental value of local control of housing markets and the interests of vulnerable renters. I could make similar arguments about the regulation of firearms, civil rights, competition over tax revenues, and the other staples of home rule jurisprudence that Baker and Rodriguez discuss.

This is not to say that such debates are irresolvable, but rather that the tools available to courts—state and federal—to make fine-grained assessments about comparative institutional competence and the appropriate scale of governance have significant limitations. If the empirical ground for preferring one level of government to another is contestable, it leaves the sinking suspicion that what is really driving decisions are normative judgments about what Baker and Rodriguez called "substantive regulatory choices."[22]

Baker and Rodriguez acknowledge that how they assess structural doctrine "is bound up with" their views about underlying substance,[23] which is perfectly legitimate (indeed, perhaps inevitable) from a scholarly perspective. The problem arises when courts engage in the same melding between judgments about structure and substance, with normative judgments about substantive policy being decided through proxies about government scale that are imperfect at best. I think much of what gives pause to critics of federalism decisions that purport to discern a clear line between spheres of state and federal authority, under the Tenth Amendment and in other areas, has to do with a certain discomfort with how elusive it is in practice to disaggregate these two strands of value judgment.

All of this suggests that state courts, no less than their federal counterparts, should be as transparent as possible about their grounds of deci-

20. Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30 (Colo. 2000).

21. The court also invokes a categorical view, asking whether the issue is one "traditionally regulated at the state or local level." *Id.* at 39. Land use is about as paradigmatically local as an issue gets, but the Court gave this tradition almost no weight, finding instead that "rent control" is an issue that states have taken interest in.

22. Baker & Rodriguez, *supra* note 1, at 1345.

23. *Id.* at 1348.

sion in refereeing state-local disputes. Discerning some inherent meaning in concepts like "local" and "statewide" can prove a tempting ground on which to make proxy judgments about the merits of whatever it is the state and local governments are fighting over in the first place.

III. LEARNING FROM *GARCIA*: IS THERE ANYTHING TO THE POLITICAL SAFEGUARDS OF LOCALISM?

If there are intrinsic reasons for being cautious about the "judicial capability and doctrinal efficacy"[24] of dividing state from local, might that intuition be bolstered by importing a state-local version of the well-worn move at the federal level of giving weight to structural political protections?[25] In other words, can we have any faith in the "political safeguards of localism"?[26]

Baker and Rodriguez say no, arguing that localities are even more underrepresented in state structure than the states are in the U.S. Senate, primarily because representation in state legislatures does not "respect the geographic boundaries of municipalities."[27] This is true, but it ignores the incentives that state representatives have to be sensitive to local constituencies nonetheless. It also underplays the ability that local governments or groups of local governments have to promote their collective self-interest in local autonomy, even if they may not have a stake in any one particular state-local conflict.

I do not profess to know whether, empirically, these safeguards are sufficient in all instances to protect local governments from the state legislature (or, conversely, adequate to protect statewide interests when localities prevail). At this juncture, however, I think that there is enough of an argument to suggest caution about any theory of less-than-deferential judicial review predicated on the assumption of the inherent political vulnerability of local governments.

It is certainly true that courts are limited in their ability to probe explicitly whether local governments and the citizens they represent can adequately protect themselves in the state political process. That is an important question nonetheless to attempt to answer before stepping too eagerly into the business of overriding that very political process. Trusting the judiciary to make hard substantive calls (in the name of governmental scale, no less) risks obscuring the real choices facing the political system.

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24. *Id.* at 1339.

25. For all the well-aimed bricks that have been thrown at its edifice, see, for example, Baker, *supra* note 16, at 1939-47, Herbert Wechsler's *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954), remains an influential articulation of the rationale for limited judicial oversight of federal-state conflicts.

26. Rodriguez, *supra* note 5, at 630 n. 16.

27. Baker & Rodriguez, *supra* note 1, at 1368.

CONCLUSION

What comparative lessons do state court decisions on constitutional home rule hold for those evaluating the jurisprudence of federalism? In asking this question, Baker and Rodriguez—both in *Constitutional Home Rule and Judicial Scrutiny* and in the larger project it presages—are mining a valuable and underappreciated vein of experience. That state courts have managed to forge workable approaches to divining the line between local and state, however, does not necessarily mean that the U.S. Supreme Court is wrong to tread carefully when faced with clashes between states and the federal government. This is particularly so in the heartland of cases on which Baker and Rodriguez focus, in the Tenth Amendment context, where the *horizontal* comparative institutional question is most stark because the moorings provided to the Court are hardest to grasp. The U.S. Supreme Court cannot avoid the task any more than state courts can avoid deciding constitutional home rule cases, but there is something to be said for the reticence with which the Court approaches the task.