

DISCOVERING THE IMPACT OF THE “NEW FEDERALISM” ON STATE POLICY MAKERS: A STATE ATTORNEY GENERAL’S PERSPECTIVE

JEFFREY A. MODISETT*

INTRODUCTION

The phrase “new federalism” connotes an asserted reinvigoration of states’ rights by the U.S. Supreme Court and other institutions. The expected result is placement of substantive limits on the federal government’s exercise of power over states and individuals. New federalism, as it has developed over recent years, has two related strands: judicial and legislative. The judicial strand refers to constitutional limits that the U.S. Supreme Court has placed principally on federal congressional power over states. Recent decisions include *United States v. Lopez*,¹ *Printz v. United States*,² and *Seminole Tribe of Florida v. Florida*.³

The legislative strand involves a congressional about-face in rethinking the presumption that national problems require a solution initiated or controlled by the federal government. In just the last few years, for example, Congress has eliminated the federal welfare entitlement and permitted states to experiment with their own welfare systems. And although perhaps less sweeping than welfare reform, elimination of the mandatory federal sixty-five-miles-per-hour speed limit on interstate highways—leaving state legislatures to enact speed limits they deem appropriate—is an excellent doctrinal example of the legislative strand.⁴

Together the changes emanating from both strands represent a significant trend of shifting power from the federal government to the states. It is no coincidence that the judicial changes have occurred with a Supreme Court that includes five justices appointed by Presidents Reagan and Bush and William Rehnquist’s elevation to Chief Justice. The legislative changes likewise follow the 1994 Republican takeover of Congress. But beyond the jurisprudential importance of the Court’s decisions and the ideology of Congress’ cession of power are the practical consequences of those decisions and philosophies to state policy-makers. Is this shift a positive redistribution of power to a level of government closer to the people? Or, is it an abdication of responsibility by the

* Attorney General of Indiana, 1997-present. B.A., University of California at Los Angeles; M.A., Oxford University; J.D., Yale Law School. The author gratefully acknowledges the assistance of Scott Chinn, Greg Ullrich, Jon Laramore, Geoffrey Slaughter, Carol Nemeth, Andy Hedges and Tom DeRue in researching and drafting this article.

1. 514 U.S. 549 (1995) (invalidating the federal Gun Free School Zones Act as beyond Congress’ commerce power).

2. 117 S. Ct. 2365 (1997) (invalidating portions of the Brady Bill commandeering state officials into federal service as violating the Tenth Amendment).

3. 517 U.S. 44 (1996) (holding that the federal courts lack jurisdiction to adjudicate certain claims brought by Indian tribes against unconsenting states).

4. National Maximum Speed Limit Act, 23 U.S.C. § 154, *repealed by* Pub. L. No. 104-59, 109 Stat. 577 (1995).

federal government to smaller governmental units unprepared to expend the significant effort and resources required to manage complex economic and social problems?

In my view, the devolution of federal power is generally a positive development. Too much, however, can be made of the supposed trend toward the new federalism. Not all of the federal government's relinquishment of power is progressive; not all of the power shifts that are progressive were initiated by the federal government; and the federal government continues to expand its power in some areas—at least formally. Thus, for state policy-makers, the practical effects of the new federalism must be measured in each discrete area of public policy.

As a state policy-maker and Indiana's chief legal officer, I have the opportunity to discover the impact of the new federalism in many areas of public policy. From that vantage point, I make four observations. First, an acute impact of the Supreme Court's new federalism is the live debate over Indian gaming among the competing sovereignties of states, Indian tribes, and the federal government. Second, the power shift from the national to state governments requires a determination of whether states, and more specifically state policy-makers, are prepared to take up the regulatory slack. If they are not, adjustments in state policy must be made—some quickly. Third, while the national government appears to continue attempting to expand its authority in some areas, upon closer analysis this ostensibly countervailing trend is more perception than substance. Real power is indeed shifting from the federal to state governments. Finally, offshoots of original concepts of federalism are at work today that fill gaps in federal exercise of power and fit well into the contemporary notion of expanded state powers.

I. INDIAN GAMING: AN AREA CLEARLY IMPACTED BY THE NEW FEDERALISM

Legal and illegal gambling are on the rise in the United States.⁵ In spite of, or perhaps because of, the rise in gambling, many states want the opportunity to prohibit or strictly regulate any further expansion of gambling within their borders. However, as applied to Indian gaming this becomes difficult because under federal law states have little say in, and almost no regulatory control over, Indian lands. In most cases, states have no criminal or civil jurisdiction over Indian lands. Regulation is left to tribal authorities and the federal government.⁶

Gaming on Indian lands is governed by the Indian Gaming Regulatory Act ("IGRA").⁷ IGRA has at least two important features that implicate states' rights. With some significant and controversial exceptions, Indian tribes cannot establish casino-style gambling and other games such as bingo, lotteries, and pull

5. See ROBERT GOODMAN, *THE LUCK BUSINESS* 2-3 (1995).

6. See *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

7. 25 U.S.C. §§ 2701-2721 (1994).

tabs on lands tribes acquired after October 17, 1988.⁸

Until October 1996, the U.S. Department of Interior ("Interior") took the position that states had no right to challenge judicially its decision to take land in trust for a tribe for gaming purposes. In classic "Catch-22" fashion, Interior argued that a land-acquisition decision was not ripe for challenge by a state until the land was actually acquired, and once the land was acquired, the decision was unreviewable under the federal Quiet Title Act.⁹ Interior maintained that untenable position until it reached the U.S. Supreme Court in *Department of Interior v. South Dakota*.¹⁰ Interior then did an about-face, quickly promulgating rules that provided for judicial review, thus mooted the case.¹¹ Justice Scalia, for one, signaled his displeasure at Interior's strategic maneuvering at the state's expense.¹²

In some instances, federal law purports to require states to negotiate a compact with a tribe that intends to conduct gaming on Indian land.¹³ A state that negotiates a compact with a tribe may try to obtain some regulatory power and fees or taxes. But what if the state refuses to negotiate a gaming compact or the state and the tribe cannot agree to terms? Until March 1996, it was thought that IGRA itself solved this problem by permitting tribes to sue states in federal district court.¹⁴ However, in *Seminole Tribe of Florida v. Florida*,¹⁵ the U.S. Supreme Court held that provision of IGRA unconstitutional.¹⁶ The Court held that Congress could not, under the Eleventh Amendment, use its Indian Commerce Clause power to haul non-consenting states into federal court.¹⁷

In the wake of *Seminole Tribe*, Interior is in the process of promulgating rules for approval and enforcement of gaming compacts in which states are deemed to have refused to bargain in good faith.¹⁸ In short, Interior appears to be taking the position that the executive branch may do what the Eleventh Amendment prohibits federal courts from doing: forcing a gaming compact on an unconsenting state. Last year, Congress placed a moratorium on consideration of most tribal-state gaming compacts because of Interior's threat to administratively adjudicate whether a state had negotiated in "good faith" and design a gaming compact accordingly.¹⁹ In June 1998, I signed a letter with

8. 25 U.S.C. § 2719 (1994).

9. 28 U.S.C. § 2409a (1994).

10. 519 U.S. 919 (1996) (mem.).

11. *Id.* at 920 (Scalia, J., dissenting); 25 C.F.R. § 151.12 (1998).

12. *Department of Interior*, 519 U.S. at 921. Justice Scalia characterized Interior's legal position as follows: "'Heads I win big,' says the Government; 'tails we come back down and litigate again on the basis of a more moderate Government theory.'" *Id.*

13. 25 U.S.C. § 2710(d)(3)(A) (1994).

14. 25 U.S.C. § 2710(d)(7) (1994).

15. 517 U.S. 44 (1996).

16. *Id.*

17. *Id.* at 53-71.

18. See 63 Fed. Reg. 3289-01 (Jan. 22, 1998).

19. That moratorium will expire at the end of the 1998 federal fiscal year. See Pub. L. No.

twenty-four other state attorneys general objecting to Interior's proposed rulemaking arguing in part that the Secretary of Interior lacks power to circumvent *Seminole Tribe's* prescription of Eleventh Amendment immunity.

Whatever the outcome of the sovereignty battles between states, tribes, and the federal government, it is clear that the Supreme Court's *Seminole Tribe* decision and the Eleventh Amendment principles that underlie it form the backdrop for resolution of the issues.²⁰ Thus, in this area, the new federalism (as propounded by the Court) does impact state policy-makers in a direct and continuing way.²¹

II. CAN STATE POLICY MAKERS FILL THE VOID NEW FEDERALISM CREATES?

One major trend in federal-state relations over the last decade is the shift of power from the federal government to the states in several areas of substantive policy, including welfare reform and, to a lesser extent, environmental enforcement. This trend is a challenge to states, especially "small-government" states like Indiana, to find the best solutions for these problems that our national government has been unable to solve.

In the welfare-reform arena, the federal government has largely ended the cookie-cutter approach of prescribing national standards for administering the primary program for assistance to families, Aid to Families with Dependent Children ("AFDC").²² Now, it sends block grants to states to develop their own programs. While the new federal Temporary Assistance for Needy Families ("TANF")²³ legislation does establish some standards—including five-year time-limit and work requirements—states are free to spend the block grants in a variety of ways: for direct payments to families, child care subsidies, and

105-83, 111 Stat. 1543, 1569 (1997). Congress has considered, but not passed, a moratorium specifically tailored to Interior's proposed post-*Seminole* regulations. See Sen. Amend. No. 2133, S. 1768, 144 Cong. Rec. S2553-02 (March 25, 1998).

20. Cf. *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S. Ct. 2028 (1997) (action by tribe against state was in nature of quiet title action, was barred by Eleventh Amendment, and did not fall within *Ex Parte Young* exception).

21. We also face other aspects of Eleventh Amendment jurisprudence on a routine basis. In fact, over the past year, my office authored two *amicus curiae* briefs involving federal jurisdiction and Eleventh Amendment issues in the U.S. Supreme Court. In both cases, the Court accepted our positions and reached "pro-state" results. See *International College of Surgeons v. City of Chicago*, 118 S. Ct. 523 (1997) (federal court may exercise supplemental jurisdiction over state claims calling for deferential review of administrative decision); *Wisconsin Dep't. of Corrections v. Schacht*, 118 S. Ct. 2047 (1998) (state defendants may remove entire cases to federal court even when one or more claims in a case is barred by the Eleventh Amendment). In both cases, we argued that a proper view of federalism places states, as litigants, on par with other litigants regarding removal jurisdiction under 28 U.S.C. § 1441 (1994).

22. 42 U.S.C. § 601 (Supp. II 1996).

23. 42 U.S.C. § 603 (1994 & Supp. II 1996).

education and training.²⁴

Under this initiative, states have been successful in moving families off welfare rolls, but the evidence is more mixed about states' successes in actually assisting families in moving out of poverty. Several recent studies show that many families are not economically better off under the current welfare reform even though they are no longer receiving benefits.²⁵ This may be a warning sign that some states are not prepared to handle the complex issues arising from the shift of responsibility for administering welfare from the federal government to the states.

In the area of environmental law, the Environmental Protection Agency also has given the states a good deal more flexibility and freedom in enforcing the federal environmental laws that have been a primary tool for regulation in states like Indiana.²⁶ The rhetoric in environmental enforcement always has been that the states will accomplish it with loose supervision from Washington, but lately this philosophy has become more of a reality. While Washington sets the broad goals, states are given a good deal of freedom in determining how to meet the goals.

With the freedom, and often the responsibility, to make policy in these areas, an important question is whether states are up to the task. Indiana, for example, prides itself on its citizen-legislature, and our legislature remains part-time. It could be argued that Indiana and some other states have been able to maintain part-time legislatures because Congress, with its enormous staff and research capabilities, has sifted the data, done the research, and written the law in so many areas. I am not advocating that the Indiana General Assembly dramatically increase its staff and research budget or that it become a full-time body as a reaction to new federalism. But, I am raising the question, as Congress diminishes its welfare-administration and environmental enforcement responsibilities to name two, whether states are prepared to make the increasingly complex and sophisticated policy judgments the new federalism requires.

My concern has multiple layers. If some states cannot keep up with the demands of these new responsibilities, even more power will be ceded to special interests who have resources in those states. Special interest groups, it seems, always have data and they always have influence.²⁷ Just look at the continued

24. *Id.*

25. Compare Ken Ellingwood & Virginia Ellis, *After Welfare, Low Wages Remain a Stubborn Fact*, L.A. TIMES, Feb. 8, 1998, at A30, and Judith Havemann, *Study Praises Oregon Welfare Reform Results*, WASH. POST, June 24, 1998, at A3, with Barbara Vobejda, *Welfare Reform in Minnesota Reduces Poverty*, WASH. POST, Aug. 28, 1997, at A14.

26. See, e.g., Clean Air Act Amendments 1990, P.L. 101-549, 104 Stat. 2399 (codified as amended at scattered sections of 42 U.S.C. §§ 7400-7699) (allowing choice of methods to meet federally-set clean air standards).

27. The Indiana Lobby Registration Commission reports that the number of lobbyist has increased steadily over the last few years. The number of compensated lobbyists has increased from 632 in 1995 to 653 in 1996 to 676 in 1997. Half-way through the 1998 reporting year, there were 636 compensated lobbyists. The trend is the same for employer lobbyists.

success of the tobacco lobby in many state legislatures despite strong public sentiment against them.²⁸ If the Indiana General Assembly has to assume responsibility for crafting welfare or environmental policy, but their own legislative staff and other government agencies are not able to give the General Assembly the information it needs, interest groups will have even more influence in promoting their agendas. This phenomenon will likely be especially evident in areas like telecommunications and utility deregulation, where the industries are well stocked with information *and* influence.

The shift of power to the states also raises questions about public scrutiny and involvement. My office has been active in ensuring that Indiana's laws requiring open meetings and access to records are followed and enforced.²⁹ When policy-making is done in a single location, it is easy for national media to focus on and scrutinize that policy-making. Most national news organizations have large staffs in Washington covering Congress, the White House, and even the regulatory agencies. When policy-making is dispersed, news media are challenged to make sure that they follow what is happening in fifty state capitals among fifty legislatures and countless state agencies.³⁰

With policy-making shifting to the states, it is even more important for the media to ensure vigilantly that decisions are subject to public scrutiny. The media will have to become more sophisticated in following the debates that take place in the halls of the legislature as well as administrative developments in the hundreds of regulatory agencies in each state.³¹ Unless the media live up to this challenge, public involvement in and scrutiny of important decisions will fall unacceptably short.³²

28. The Indiana General Assembly, for example, overrode then-Governor Evan Bayh's veto of a bill, popularly known as S.B. 106, that preempts local governments from regulating the sale, distribution, and display of cigarettes. *See* IND. CODE ANN. §§ 16-41-39-1 to -3 (West Supp. 1998). It is one of the tobacco industry's perpetual goals to have laws made at the "highest" level of government.

29. *See* Indiana Open Door Law, IND. CODE ANN. §§ 5-14-1.5-1 to -8 (West 1989 & Supp. 1998); Indiana Access to Public Records Act, IND. CODE ANN. §§ 5-14-3-1 to -10 (West 1989 & Supp. 1998); Kyle Niederpruem, *The State of Secrecy*, INDIANAPOLIS STAR, Feb. 22, 1998, at A1.

30. The American Journalism Review has completed a comprehensive and striking study of the decrease in media resources expended on state governments at the same time those governments have become more important decision-makers. *See* Charles Layton & Mary Walton, *Missing the Story at the Statehouse*, AM. JOURNALISM REV., July/August 1998, at 43. This fascinating study validates the existence of the link between the new federalism, the increased importance of state government in the daily lives of citizens, and the need for greater media coverage of state-house issues. *Id.* at 46.

31. Layton and Walton demonstrate that there are fewer reporters covering state houses and that increasingly the reporters that do lack significant experience. *Id.* at 44, 52.

32. According to Layton and Walton, Indiana has experienced a decrease, as many states have, in print media resources directed at state-house coverage. *Id.* at 60.

III. OSTENSIBLE AGGRANDIZEMENT BY THE FEDERAL GOVERNMENT AND THE ECHO EFFECT

In the criminal-law area, federal statutory authority has been increasing. Congress has been expanding the federal criminal code to cover more criminal conduct such as carjacking,³³ and has expanded the number of federal homicides subject to the death penalty.³⁴ But do these federal statutes really amount to a federalization of criminal law? And is this federalization a rebuttal to the premise of new federalism?

Upon closer scrutiny, a good argument can be made that these new federal laws create more image than substance. Despite this increased federal statutory authority, the federal government continues to play a limited role in investigating and prosecuting criminal defendants in Indiana. By comparing the number of criminal filings in state and federal court and the number of state and federal law enforcement officers in Indiana, it is obvious that day-to-day law-enforcement activity remains primarily a state and local function. Almost all criminal offenders in Indiana are arrested by local or state law enforcement; if convicted, they are sentenced before state judges;³⁵ if the sentence is suspended, they are placed on county probation;³⁶ if the sentence is executed, they are sent to state prison and eventually released from state prison to state parole.³⁷

Today, there are approximately 3000 federal criminal laws on the books covering more criminal offenses than ever before.³⁸ In recent years, Congress has been expanding the federal criminal code to punish not just crimes on government property or affecting interstate commerce but conduct already criminalized by the states. The Federal and Indiana criminal codes have concurrent jurisdiction over many crimes including nonsupport of a child,³⁹ auto theft,⁴⁰ arson,⁴¹ and various drug⁴² and gun offenses.⁴³

This dual sovereignty over criminal offenses has created an overlap in jurisdiction and blurred lines of demarcation for federal and state investigators. As Marion County Prosecutor from 1991 through 1994, I filed criminal charges

33. 18 U.S.C. § 2119 (1994 & Supp. II 1996).

34. 18 U.S.C. § 3592(c)(1) (1994 & Supp. II 1996).

35. IND. CODE ANN. § 35-50-1-1 (West 1998).

36. IND. CODE ANN. §§ 11-13-1-1 to -10 (West 1982 & Supp. 1998).

37. IND. CODE ANN. §§ 11-13-3-1 to -10 (West 1982 & Supp. 1998); IND. CODE ANN. § 35-50-6-1 (West 1998).

38. See Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247, 251 (1997).

39. 18 U.S.C. § 228 (1994 & Supp. II 1996); IND. CODE ANN. § 35-46-1-5 (West 1998).

40. 18 U.S.C. § 2119 (1994); IND. CODE ANN. § 35-43-4-2.5 (West 1998).

41. 18 U.S.C. § 844 (1994 & Supp. II 1996); IND. CODE ANN. §§ 35-16-1-1 to -3 (repealed 1976).

42. 18 U.S.C. § 922 (1994 & Supp. II 1996); IND. CODE ANN. §§ 35-48-1 to -7 (West 1998).

43. 18 U.S.C. § 921 (1994 & Supp. I 1995 & Supp. II 1996); IND. CODE ANN. § 35-47-2-3 (West 1998).

for state-law violations that federal agents investigated. Drug Enforcement and U.S. Customs agents made arrests for state drug crimes. U.S. Postal Inspectors and U.S. Treasury agents filed state charges of forgery and fraud on a financial institution in state court. The FBI even provided some assistance to my office with a prominent rape investigation, prosecution, and conviction. We had federal and local law-enforcement officers working side by side on a drug task force and on a fugitive-warrant team.

Now, as Attorney General, I oversee state investigators who ferret out fraud in the federal Food Stamp and Medicaid programs.⁴⁴ These state investigators have not been subject to a *Printz*-like⁴⁵ commandeering by the federal government to perform this function. The federal government provides adequate funding for the investigators, which my office accepts with due appreciation.

Despite the expanded scope of the federal criminal code and the dual jurisdiction of federal and state authorities, criminal enforcement in Indiana remains primarily a state and local function. This can be determined by comparing the number of state and federal criminal cases filed, and the number of state and federal law-enforcement officers serving in Indiana. In 1997, nearly 50,000 felony criminal cases were filed in Indiana state courts,⁴⁶ while only 367 criminal cases were filed in Indiana's two federal courts.⁴⁷ Since 1986, the number of state felony cases filed has risen steadily from 35,000 to 50,000.⁴⁸ Indiana courts have also seen increased filings in misdemeanor cases and juvenile delinquencies. The number of federal criminal cases filed in Indiana on the other hand has not risen or kept pace with the number of state cases filed. The period between 1995 and 1997 showed the fewest criminal filings in Indiana federal courts than in any other three year period since 1986.⁴⁹

In 1997, Indiana employed 11,000 state and local full-time police officers.⁵⁰ In 1996, there were 74,500 full-time federal law enforcement officers, only 629 of whom were assigned in Indiana, and only 288 of those federal law-enforcement officers assigned in Indiana had police-response and criminal-

44. See 7 U.S.C. § 2020 (1994 & Supp. II 1996) (transferring administration of food stamp program to state); IND. CODE ANN. § 4-6-10-1 to -3 (West 1991 & Supp. 1998) (outlining the Medicaid Fraud Control Unit); IND. CODE ANN. §§ 12-13-7-1 to -2 (West 1994) (empowering Family and Social Services Administration's Division of Family and Children ("DFC") to administer food stamp program). The Attorney General's office enforces food stamp fraud by agreement with DFC.

45. See *Printz v. United States*, 117 S. Ct. 2365 (1997).

46. See SUPREME COURT OF INDIANA, DIVISION OF STATE COURT ADMIN., VOL. I 1996 JUDICIAL REPORT (1996) [hereinafter SUPREME COURT OF INDIANA].

47. See ADMINISTRATIVE OFFICE OF U.S. COURTS, STATISTICS DIV., TABLE D-3, "CASES, U.S. DISTRICT COURTS" (1986-1996) [hereinafter ADMINISTRATIVE OFFICE OF U.S. COURTS].

48. See SUPREME COURT OF INDIANA, *supra* note 46, at 62-63.

49. See ADMINISTRATIVE OFFICE OF U.S. COURTS, *supra* note 47.

50. See INDIANA LAW ENFORCEMENT TRAINING BD., INDIANA LAW ENFORCEMENT DEPARTMENTS AND OFFICERS (1997).

investigation duties.⁵¹

The federal government always has been, and continues to be, proficient at passing laws, collecting statistics, garnering publicity, and handing out money (not necessarily in that order). Indeed, in the area of law-enforcement policy, the federal government influences Indiana with policy initiatives tied to federal spending. The Indiana Criminal Justice Institute⁵² reports that the federal government provided over \$32 million in grants, awards, and agreements for criminal-justice programs.⁵³ The funding includes money for crime-victim assistance, victim-compensation benefits, violence-against-woman programs, traffic safety, juvenile programs, and criminal-history improvement. The level of funding has increased each year since 1994.⁵⁴ President Clinton's law-enforcement policy initiative to use federal funding to put additional police on the streets has funded 673 additional police officers for 212 state and local police agencies in Indiana. Echoing this policy initiative of providing funding for additional police officers, Indiana Governor Frank O'Bannon created the Law Enforcement Assistance Fund.⁵⁵ State money from this fund has paid to hire, train, and equip 453 new police officers for 328 law-enforcement agencies through grants from the Indiana Criminal Justice Institute.⁵⁶

In the area of criminal procedure, Indiana's rules and statutes are very different from federal criminal procedures. Indiana prosecutors can charge any crime by information or grand-jury indictment.⁵⁷ Indiana rules and statutes vary from federal procedure on speedy trials,⁵⁸ discovery,⁵⁹ sentencing,⁶⁰ credit time,⁶¹ post-conviction relief,⁶² and the appellate process.

Even though state criminal laws and procedures often differ significantly from federal, one incident of increased federal power in this century has been a focus on federal constitutional rights almost to the exclusion of state-created rights. In many states, including Indiana, the development of state constitutional

51. See BRIAN A. REAVES, U.S. DEP'T OF JUSTICE, *FEDERAL LAW ENFORCEMENT OFFICERS*, 1996 (1996).

52. IND. CODE ANN. §§ 5-2-6-1 to -16 (West 1989 & Supp. 1998).

53. See INDIANA CRIMINAL JUSTICE INST., *FEDERAL GRANTS, AWARDS AND AGREEMENTS* 3 (1998) (on file with the author).

54. See *id.* at Table, FFY 1994-1997.

55. IND. CODE ANN. §§ 5-2-13-1 to -10 (West 1997 & Supp. 1998).

56. See Governor Frank L. O'Bannon, Press Release (Sept. 26, 1997).

57. See IND. CODE ANN. § 35-34-1-1 (West 1986 & Supp. 1994).

58. Compare IND. CRIM. RULE 4, with 18 U.S.C. §§ 3161-3174 (1994).

59. Compare IND. R. CIVIL P. 26-37, with FED. R. CIVIL P. 26-37; IND. R. CRIM. P. 2, with FED. R. CRIM. P. 16-17.

60. Compare IND. CODE ANN. § 35-50-2 (West 1998), with 18 U.S.C. §§ 3551-94 (1994 & Supp. II 1996) (federal sentencing guidelines).

61. Compare IND. CODE ANN. § 35-50-6-3 (West 1998), with 18 U.S.C. § 3624(b) (1994 & Supp. II 1996).

62. Compare IND. R.P.P.C. 1-2, with 28 U.S.C. § 2254 (1994 & Supp. II 1996) (rules governing *habeas corpus* cases in federal district court).

law has slowed accordingly. In recent years, the Indiana Supreme Court has purposefully encouraged a reinvigoration of state constitutional analysis.⁶³

Interestingly, however, even after independent state constitutional analysis, Indiana courts largely follow federal constitutional analysis concerning the rights of the accused. This does not signal a lack of commitment by the Indiana Supreme Court in examining the Indiana Constitution's bill of rights. Rather, it is an unsurprising result considering that the state and federal constitutions codify rights that serve the same goals and values⁶⁴ and that the drafters of the 1851 Indiana Constitution convened to reform the legislative and financial processes of state government and did not focus on the rights of the accused.⁶⁵

In search-and-seizure cases, Indiana courts apply an independent reasonableness standard in evaluating the legality of police conduct.⁶⁶ Despite this separate state reasonableness test, Indiana decisions are consistent with United States Supreme Court search-and-seizure decisions in:

- *Terry v. Ohio* for stop and frisks;⁶⁷
- *Minnesota v. Dickerson* in plain-feel cases;⁶⁸
- *Whren v. United States* for pretext stops;⁶⁹
- *Rakas v. Illinois* for standing;⁷⁰
- *Nix v. Williams* on inevitable discovery;⁷¹
- *New York v. Belton* on search of a car incident;⁷²
- *Pennsylvania v. Mimms* on removal of a driver from a car after a traffic stop;⁷³
- *Maryland v. Wilson* on removal of a passenger from a car after a traffic stop;⁷⁴

63. See Randall T. Shepard, *Second Wind for the Indiana Bill of Rights*, 22 IND. L. REV. 575 (1989).

64. See Randall T. Shepard, *The Maturing Nature of State Constitutional Jurisprudence*, 30 VAL. U.L. REV. 421, 441 (1996).

65. See *Indiana Gaming Commission v. Moseley*, 643 N.E.2d 296, 299-300 (Ind. 1994); *Ajabu v. State*, 693 N.E.2d 921, 930 n.10 (Ind. 1998).

66. See, e.g., *Ben-Yisrayl v. Indiana*, 690 N.E.2d 1141, 1152 (Ind. 1997); *Haley v. Indiana*, 696 N.E.2d 98, 102-03 (Ind. Ct. App. 1998).

67. 392 U.S. 1 (1968); *Wilson v. State*, 670 N.E.2d 27 (Ind. Ct. App. 1996); *State v. Joe*, 693 N.E.2d 573 (Ind. Ct. App. 1998).

68. 508 U.S. 366 (1993); *Burkett v. State*, 691 N.E.2d 1241 (Ind. Ct. App. 1998).

69. 517 U.S. 806 (1996); *State v. Voit*, 679 N.E.2d 1360 (Ind. Ct. App. 1997).

70. 439 U.S. 128 (1978); *Cox v. State*, 392 N.E.2d 496 (Ind. Ct. App. 1979); *Porter v. State*, 570 N.E.2d 1324 (Ind. Ct. App. 1991).

71. 467 U.S. 431 (1984); *Banks v. State*, 681 N.E.2d 235 (Ind. Ct. App. 1997).

72. 453 U.S. 454 (1981); *Mitchell v. State*, 690 N.E.2d 1200 (Ind. Ct. App. 1998); *State v. Lamar*, 680 N.E.2d 540 (Ind. Ct. App. 1992).

73. 434 U.S. 106 (1977); *Young v. State*, 564 N.E.2d 968 (Ind. Ct. App. 1991); *Warr v. State*, 580 N.E.2d 265 (Ind. Ct. App. 1991).

74. 117 S. Ct. 882 (1997); *Banks v. State*, 681 N.E.2d 235 (Ind. Ct. App. 1997).

- *California v. Greenwood* on searches of curbside trash;⁷⁵
- *Florida v. Rodriguez* on consensual encounters;⁷⁶ and
- *Hodari v. California* on seizure.⁷⁷

Even though the Indiana Supreme Court extensively analyzed the state Constitution on the privilege of self-incrimination, the court upheld the legality of a confession following the result and logic of the 1986 United States Supreme Court decision in *Moran v. Burbine*.⁷⁸ The Indiana Supreme Court also decided recently that Indiana should continue to follow the federal standard for retroactivity of new rules of constitutional law.⁷⁹

In sum, states do the Yoeman work in law enforcement, but find themselves looking to the federal government for policy guidance and money. And while the Indiana Supreme Court is aggressive about interpreting the state Constitution, it most often parallels the analysis of the federal Constitution. Therefore, neither the expanded federal power over crime nor the independent state constitutional analysis, practically speaking, have produced significant change in the state law-enforcement arena. Thus, the trend toward the new federalism has not altered the balance of federal-state power in this area.

IV. A PROMISE OF ORIGINAL FEDERALISM REALIZED (OR THE REVERSE ECHO EFFECT)

One of the promises of federalism is the value of states as laboratories of experimentation.⁸⁰ In short, subject to the federal Supremacy Clause, each state may exert its sovereign power as it chooses. States may choose different means to regulate common ends, or they may regulate different ends altogether. Varied demographic, cultural, philosophical, geographic, or experiential influences will produce varying regulation. Over time, a state will be able to look to its sister states' regulatory approaches and results when implementing or evaluating its own systems.

As discussed above, the federal government has often led states in legislating criminal law, while states do the bulk of the law-enforcement work. Sometimes, I have observed, states “echo” federal criminal legislation by enacting an offense or set of criminal laws first developed or implemented by the federal government. This influence of the federal government over matters traditionally within state

75. 486 U.S. 35 (1988); *Moran v. State*, 644 N.E.2d 536 (Ind. 1994).

76. 467 U.S. 1 (1984); *Molino v. State*, 546 N.E.2d 1216 (Ind. 1989).

77. 497 U.S. 621 (1991); *Wilson v. State*, 670 N.E.2d 27 (Ind. Ct. App. 1996).

78. 475 U.S. 412 (1986); *Ajabu v. State*, 693 N.E.2d 921 (Ind. 1998).

79. *State v. Mohler*, 694 N.E.2d 1129 (Ind. 1998) (following *Teague v. Lane*, 489 U.S. 288 (1989), and its federal progeny).

80. “Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.” *New State Ice Co. v. Liebmann*, 285 U.S. 282, 311 (1932) (Brandeis, J., dissenting).

purview has marked the post-New Deal era. In addition to the criminal law, for example, states have adopted their own versions of federal statutes in areas such as labor relations,⁸¹ civil rights,⁸² and environmental law.⁸³

As we conclude the twentieth century, however, the opposite dynamic is at work. States are taking the initiative to analyze and attempt to solve problems that the federal government has declined to address. For example, as discussed above, welfare reform as a concrete plan of action—as opposed to a vague attack on liberalism—finds its antecedents in several state experiments, the most well-known being the “Wisconsin Works” or “W2” workfare program developed by Wisconsin Governor Tommy Thompson.⁸⁴

More recently, it is the state tobacco litigation that provides the best example of state-initiated reform achieving national results or, to put it another way, the best example of the “echo effect” in reverse. Mike Moore, the attorney general of Mississippi, filed the first state tobacco lawsuit in May 1994.⁸⁵ The suit was brought by a state attorney general, in state court, based solely on state-law theories.⁸⁶ Soon, other states filed their own similar suits.⁸⁷ Early in the Mississippi litigation, General Moore and others asked the U.S. Department of Justice to join the tobacco litigation by becoming a party in the existing cases, by filing suit separately in the name of the United States, or—at the very least—by assisting the states in their suits. The Justice Department declined and elected instead to sit on the sidelines; therefore, the states went it alone.⁸⁸ Eventually, forty-one states and Puerto Rico filed lawsuits against the tobacco industry.⁸⁹ All but two were filed in state court and, overwhelmingly, the suits are proceeding under state-law causes of action.⁹⁰

81. See, e.g., IND. CODE ANN. § 22-7-1-2 (1991) (providing workers the right to select a bargaining representative; stating expressly to construe in conjunction with the National Labor Relations Act, 29 U.S.C. §§ 151-169 (1994)).

82. See, e.g., *id.* §§ 22-9-2-1 (Supp. 1998) (age discrimination); 22-9-5-1 (Supp. 1998) (disability discrimination).

83. See, e.g., *id.* § 13-25-4-8 (Supp. 1998) (imposing liability under state law for violations of federal environmental statute, Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (1994 & Supp. II 1996)).

84. See Brian Louis, *Wisconsin: Welfare Reform, Abortion Restrictions Top Legislative Session*, WEST'S LEGAL NEWS, May 30, 1996, available in 1996 WL 28173, at *1.

85. *Moore v. American Tobacco Co.*, No. 94-1429 (Jackson Cty. Ch. Ct. May 1994).

86. *Id.*

87. Minnesota was the second state to file its suit on August 17, 1994. See *Minnesota v. Philip Morris, Inc.*, C1-94-8565 (2d Jud. Dist. 1994), *aff'd in part, rev'd in part*, 551 N.W.2d 490 (Minn. 1995). On August 22, 1998, Nebraska became the forty-second jurisdiction (including Puerto Rico) to file suit. See *Sternberg v. R.J. Reynolds*, District Court Lancaster County Docket 573 (1998), at 277.

88. See *Maryland Asks Federal Court to Remand Medicaid Reimbursement Action*, MEALEY'S LITIG. REP.: TOBACCO, July 3, 1996, at 12.

89. See *id.*

90. Indiana's lawsuit, for example, was filed in state court and pleads all state-law claims.

On June 20, 1997, the state attorneys general completed the historic tobacco settlement and forwarded it to Congress for consideration. Each participating state, while not necessarily agreeing with all the details of the settlement, willingly found itself in a consortium of sister states constituted to produce a common result. Together, state attorneys general proposed terms of settlement, consulted with public-health groups, advised their governors and state legislators, devised a system for allocating settlement proceeds, and tried to provide Congress and the White House the incentive to pass the deal. Moreover, states have provided valuable assistance to each other in the litigation as it continues to move forward in each state while the proposed settlement has been pending in Congress.⁹¹

Congress has balked at enacting the tobacco settlement into law. Although politics has played a major role, many of the stumbling blocks to the legislation involve compensation for the federal government and the nuances of federal regulatory regimes.⁹² Mississippi, on the other hand, with a trial date imminent and not having the luxury to wait for congressional action, entered into its own settlement with the industry in July 1997.⁹³ Florida and Texas followed with their own settlements as trial dates approached in their cases.⁹⁴ The State of Minnesota became the first state to actually go to trial, settling the case just as the decision was put in the jurors' hands.⁹⁵

And what was the federal reaction to the individual settlements? The Department of Health and Human Services effectively placed a Medicaid lien on states' settlement proceeds before the ink was dry on the tobacco industry's checks.⁹⁶ For perhaps the first time, the federal government has its hands out for a piece of a pie cooked up by the states.

The state tobacco litigation shows state initiative at work. It is initiative that might or might not be caused or furthered by the new federalism. But regardless, in the coming years, it will likely not be a singular instance of state-initiated

See Modisett v. Philip Morris, Inc., No. 49D07-9702-CT-236 (Marion Super. Ct. Oct. 28, 1997) (second amended complaint).

91. *See Separate Miss. Settlement Possible, But Parties Still Ready for Trial*, MEALEY'S LITIG. REP.: TOBACCO, July 3, 1997, at 23.

92. Reports abound about the tobacco industry's media campaign against the leading tobacco reform legislation—the McCain Bill—and the industry's continuing influence over Congress. *See, e.g.*, David E. Rosenbaum, *Tobacco Bill Killed on Procedural Votes in Senate*, N.Y. TIMES, June 18, 1998, at A1. This underscores the influence that interest groups like the tobacco industry may exert at the state level.

93. *See Just Days Before Trial, Mike Moore, Tobacco Firms Reach \$3 Billion Deal*, MEALEY'S LITIG. REP.: TOBACCO, July 17, 1997, at 3.

94. Richard L. Cupp, Jr., *A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation*, 46 U. KAN. L. REV. 465, 469 (1998).

95. *See Tobacco Companies to Pay Minnesota, Blue Cross \$6.6 Billion Plus Fees*, MEALEY'S LITIG. REP.: TOBACCO, May 21, 1998, at 3.

96. *See Robert Kruger, Paying a Medicaid Lien After Cricchio v. Pennisi*, N.Y. ST. B. J., Dec. 1997, at 58.

reform or litigation even for problems national in scope.⁹⁷

CONCLUSION

As a state policy-maker, I welcome the challenge of the “new federalism.” The devolution of power to states creates an opportunity for initiatives and innovations if states are prepared and assertive in meeting the responsibility of power. But bringing decisions closer to the voters could create problems if states are unprepared and passive in facing the new federalism challenge. With power comes the responsibility to act with resolve, intelligence, and care.

97. See Layton & Walton, *supra* note 30, at 46 (listing several “national” problems state attorneys general have tackled in the absence of federal enforcement).