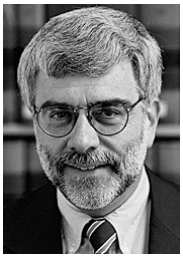
SINCE 1854

Chicago Daily Law Bulletin®

Volume 157, No. 157 Friday, August 12, 2011

What is an affront to the concept of federalism?



Criminal Procedure

By Timothy P. O'Neill

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If you occasionally have trouble determining when federal law trumps state law, you are not alone. Take a look at a 1991 Illinois Supreme Court case, *People v. Henderson.* 142 Ill.2d 258 (1991).

Demetrius Henderson claimed that he was unconstitutionally convicted of a crime for which he was not indicted. The Illinois Supreme Court emphasized that Henderson raised the claim "under federal constitutional law only." Consequently, the court proceeded to spend six paragraphs discussing a series of U.S. Supreme Court cases dealing with indictment issues. After this extensive analysis, the Illinois Supreme Court denied Henderson relief.

So what's the problem? The problem is this: Every single case the court discussed was a U.S. Supreme Court case dealing with the indictment clause of the Fifth Amendment to the U.S. Constitution ("No person shall be held to answer for a[n] … infamous crime, unless on a presentment or indictment of a grand jury. …). And the indictment clause of the Fifth Amendment has never, ever been incorporated to limit state criminal justice proceedings. Never. Ever. The Fifth Amendment indictment clause forbids felony preliminary hearings in federal courts, but it has never prevented states from having felony preliminary hearings, if they wish. This hot tidbit of constitutional criminal procedure came out in the advance sheets during the presidency of Chester A. Arthur. *Hurtado v. California,* 110 U.S. 516 (1884).

Once the Illinois Supreme Court noticed that Henderson was basing his argument solely on the Fifth Amendment indictment clause, it could have simply cited *Hurtado,* denied the claim and saved itself from engaging in six paragraphs of irrelevant constitutional analysis. But the court simply assumed that the U.S. Supreme Court is the final authority on all aspects of state and federal criminal procedure. And this tendency to simply assume that the U.S. Supreme Court completely controls every aspect of criminal procedure in Illinois is an astonishing affront to the whole concept of federalism.

So what is this thing called "federalism"? If you need a reminder, take a look at Alison LaCroix's new book "The Ideological Origins of American Federalism" (Harvard, 2010). LaCroix is a law professor at the University of Chicago Law School and her book is definitely not without controversy. In fact, it has already produced spirited criticism from the eminent American historian Gordon S. Wood as well as an equally spirited response from professor LaCroix. Regardless, the book reminds us not only about the complex structure of the federal system, but also how it impacts on the criminal justice system.

LaCroix defines the federal idea as "a belief that multiple independent levels of government could legitimately exist within a single polity and that such an arrangement was not a defect to be lamented but a virtue to be celebrated." (6) She argues that federalism was a response to traditional British claims "that only one supreme law-giving authority could exist within the empire (and the corollary claim that this authority resided in Parliament)." (8) But LaCroix contends that the nature of sovereignty was very much a contested issue in the 18th century. On the one hand, William Blackstone expressed the British concept of the indivisibility of sovereignty. The idea that "separate and equal authorities could exist within the same juridical boundaries offended contemporary understandings of the very nature of government power." (14) Yet some continental observers believed that there could be "divisible sovereignty." They drew on the classical concept of foedera, i.e., treaties or positive agreements among political entities that created governmental structures such as leagues, compacts and confederations. These thinkers contended that political authority could validly be shared among multiple states tied together in a single system.

LaCroix argues that this conflict concerning the nature of sovereignty was brought home to the colonies through actions such as Parliament's passage of the Stamp Act in 1765. She cites a report from the Massachusetts House of Representatives in 1765 which complained about the royal governor's willingness to simply cede all power of taxation to Parliament in London: "[W]e beg leave to observe that the [Massachusetts] charter invests [us] with the power of making laws for its internal government and taxation; and that this charter has never yet been forfeited." (58)

Thus, for LaCroix, "American federalism's central ideas — multilayered authority, a substantive … approach to jurisdiction, a central government with a brief and identity distinct from the combined wills of the component states — had begun to coalesce in the 1760s and 1770s" when colonial legislatures were parrying claims of total parliamentary supremacy. (133) And this is what made the U.S. Constitution so unique. It created "a new species of government, embracing multiplicity." (173-4) It also allowed state judges to interpret both state and federal law, while at the same time setting limits below which they could not go.

I cannot imagine what a Founding Father would have made of the *Henderson* decision. The idea that a state court would so cavalierly assume that federal law trumped state law in an area such as criminal law would be literally inconceivable to Madison or Hamilton. Yet *Henderson* is certainly reflective of a trend in Illinois courts to defer as much as possible to U.S. Supreme Court precedent, even when it is not binding.

What U.S. Supreme Court precedent is not binding? Quite a lot. Take "double jeopardy," a provision of the Fifth Amendment

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of the Bill of Rights that —- unlike the indictment clause — actually does apply in Illinois state courts. Whenever the U.S. Supreme Court decides a double jeopardy case in favor of a defendant, it is creating binding precedent for both state and federal courts. It is a "constitutional floor" below which no court may go.

Yet when the U.S. Supreme Court rejects a defendant's claim of double jeopardy, the results are quite different. True, the decision is absolutely binding on all federal courts because the U.S. Supreme Court is the top federal court in the nation. But the result is much different regarding its effect on state courts. That is because a state court is always free to rely on its own state law to hold for a defendant in a future case. In our federal system of shared powers, the U.S. Supreme Court sets a "floor" below which no state or federal court may go. But a state court is always able to use its own state law to provide an independent and adequate means of granting relief to a criminal defendant within its own state system. The U.S. Supreme Court sets the "floor" for rights, but a state court is always free to make the "ceiling" as high as it wishes to provide more rights to its own criminal defendants. This, of course, is what Justice Louis Brandeis was referring to when he called the states "laboratories of democracy." *New State Ice Co. v Liebmann.* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

So what does the Illinois Supreme Court do when faced with a double jeopardy issue? It has announced — in advance — that whatever the U.S. Supreme Court holds in the area of double jeopardy will be applied lockstep in Illinois. *People v Levin.* 623 N.E.2d 317 (Ill. 1993). It is the same with equal protection. *In re Jonathon C.B.*, Ill. Sup. Ct., No. 107750, decided June 30, 2011. And it is practically the same for search and seizure. *People v Caballes.* 221 Ill.2d 282 (2006) (explaining concept of "limited lockstep"). So it's not surprising that in Henderson the Illinois Supreme Court wanted to even follow U.S. Supreme Court precedent on a constitutional provision that does not even apply to Illinois.

Is there any hope? Absolutely. Recently Justice Anne M. Burke wrote a dissent in *In re Jonathon C.B.* explaining why Illinois should reject a 40-year-old U.S. Supreme Court case which had held that it was not a federal constitutional violation to deny a jury trial in a juvenile proceeding. Burke carefully examines why changing circumstances have now made juvenile proceedings in Illinois much more like criminal proceedings than they were 40 years ago. She then argues why such a right should now be found in the Illinois Constitution. Her dissent is a textbook example of how to write about a state constitutional law issue. It — along with the LaCroix book — should be required reading for all Illinois judges.