

Federalism and the Processes of Governance in Hurst's Legal History

HARRY N. SCHEIBER

"The more important any legal theme is in United States history," Willard Hurst once wrote, "the more likely it is that it has been significantly affected by the coexistence and interplay of the national and the state governments."¹ That federalism and its impact on legal development should have been of central importance to Hurst's interpretations of American history is by no means surprising, yet the subject seldom finds a place in the growing literature on Hurst's seminal research contributions. His estimate of federalism's importance may no doubt be explained in part by the close relationship that he had with Felix Frankfurter as the research assistant in 1935–36 for Frankfurter's book of lectures on the Commerce Clause in the nineteenth century. This was a study animated, one can be certain, by Frankfurter's interest in finding ample room within the constitutional order for giving the states adequate space to pursue their varied individual policy preferences in response to the challenges posed by economic and social change.² Indeed, Frankfurter had long been struggling with the issue of what authority was left, by a proper interpretation of constitutional federalism, to the state legislatures and courts; and he must have been pleased when Hurst wrote to him in 1938 that he was thinking about undertaking a historical study of diversity jurisdiction as a way of getting "a slant on the business of making federalism work."³

1. Hurst, *The Legitimacy of the Business Corporation* (Charlottesville: University of Virginia Press, 1970), 139.

2. Daniel R. Ernst, "Willard Hurst and the Administrative State: From Williams to Wisconsin," *Law and History Review* 18 (2000): 17.

3. Hurst to Frankfurter, 27 Feb. 1938, quoted in Ernst, "Willard Hurst," 6, n. 12. On the evolution of Frankfurter's views of federalism, see also the discussion in Harry N.

Harry N. Scheiber is the Stefan Riesenfeld Professor of Law and History at Boalt Hall School of Law, University of California, Berkeley.

As a Brandeis clerk, Hurst played a part in the day-to-day development of the justice's constitutional jurisprudence—one in which the states were prized as “laboratories” for policy experiment and in which decentralized power was seen as a highly positive good in the society as a whole and an objective to be given high value in constitutional interpretation.⁴ Hurst later collaborated closely at the Wisconsin Law School with William Lloyd Garrison. The subjects of their joint scholarly concerns, especially as to social legislation and administration, embraced a number of policy issues in which federalism and its formal constraints were of central importance. Garrison was one of the leading proponents in the 1930s of an extreme centralist view that advocated the necessity of a plenary national police power. He must have provided Hurst with a fascinating challenge to Brandeis's premises on federalism. Garrison's view was much closer to that of the hard-line realists who regarded federalism doctrine as a shibboleth and federalism in practice as “inane” at best, and a policy disaster at worst.⁵

These older mentors of Hurst, and Garrison as his faculty associate, all subscribed to one variant or another of realism; they all believed that the intractable facts on the ground, the realities of society and economy, needed to be assessed and given due respect in constitutional interpretation if the law were to grow and adapt to the changing demands of modern industrialization. But each of them came to the problem of federalism on his own terms—Frankfurter, with a strong element of doctrinal attachment to federalism, even if adherence to its constitutional imperative required sacrifice of other important interests; Brandeis, with a strong romantic strain in his vision of the states as progressive centers; Garrison, with a rough-hewn pragmatism interlaced with scorn for judges' mythification of constitutional principles, with such disastrous policy results.

What I propose to set forth here is an analysis of the terms upon which Hurst, as a historian and more generally as a student of legal process and social change, came to the problem of federalism. I also seek to examine the relationship of his views on federalism to several key elements of

Scheiber, “Redesigning the Architecture of Federalism—An American Tradition,” *Yale Law and Policy Review/Yale Journal on Regulation*, Symposium Issue (1996): 253–56.

4. For new material from archival and personal sources on Hurst's relationship to and views of Brandeis, see Ernst, “Willard Hurst,” and Alfred S. Konefsky, “The Voice of Willard Hurst,” *Law and History Review* 18 (2000): 147–65.

5. I am indebted with regard to Garrison's views (which included his advocacy of a proposal to amend the Constitution to give Congress explicit plenary regulatory power) to Professor Kjell Åke Modéer (Lund University, Sweden), who has in progress a biography of Garrison. For Llewellyn's comment (that “the actual lines of distribution [of power] are inane”) and the more general Legal Realist position, see Harry N. Scheiber, “Federalism and Legal Process: Historical and Contemporary Analysis of the American System,” *Law and Society Review* 14 (1980): 663, 665.

Hurst's larger interpretations of socio-legal development in American history. In this, as in any analysis of his writings, it is important to keep firmly in mind that Hurst had little patience for oversimplification. He commented privately in 1985, for example, on the imperative need for legal historians to take account of "the daunting diversity of the whole legal-social record in this country—in terms of sections, interests, institutions, and doctrinal variations."⁶ An adequate understanding of federalism, given that imperative, required taking account of it as both an institutional and a doctrinal influence; but it also required viewing the "federal element," as he sometimes termed it, as part of a larger matrix or framework in which it not only interacted with state law but also embodied the real-life, day-to-day operations and interrelationships of working governmental institutions. "The business of making federalism work" (the phrase that he used in writing to Frankfurter) thus became subsumed into the larger subject matter of how the governmental *system* worked. And for Hurst, as has been shown in earlier studies and reaffirmed in this symposium, the "legal system" and "the law" were much the same, for analytical purposes, as the overall system of governance and its dynamics.

Explaining those dynamics involved recourse not only to study of formal institutions and doctrine but also to research upon the influence of popular attitudes, shared values, and dissenting or deviant forces. To include such elements prominently in the analysis, and by consequence to give an important place to mindlessness, drift, and default, makes isolation of the "federal element" difficult for the analyst of Hurst's schema. But it seems to me a task well worth undertaking, given its fascination for him, if we can plausibly explain how his conception of federalism in American history was significantly related to the leading themes in his interpretations of law and socio-economic change.

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If there is any single perspective on federalism and its role in American history that runs continuously through Hurst's work, it is the concept of the federal Union—and, as a concomitant, the varying degrees of autonomy over policy exercised over time by state courts and legislatures and other agencies—as having a basic "framework" function for the policy process, especially in the areas of economic and social policy. (Politics is another matter, especially "high politics," or what he termed conflict over narrowly "political" questions, and will be considered as a separate issue later in this essay.)⁷ Lawmaking and policy process at the state and local level were front and center in nearly all Hurst's most important writing; but he ana-

6. Hurst to the author, 17 April 1985, in author's files.

7. See text at notes 26–28, below.

lyzed these phenomena without losing sight of how even vibrant localism of spirit, and the self-identification of community and especially “public interest” (or the “commonwealth” ideal), were both given opportunity for expression and also constrained in important ways by the facts and the law of federalism. Thus in his great lumber industry history, as well as in his more general interpretive studies, Hurst singled out federalism as a “framework” element alongside the doctrines (and also the “symbols”) of property, of contract, and of police power as fashioned in the federal courts—together with the actions, or in most cases inaction, of Congress with respect to vital matters of economy and social ordering. Hurst often referred, in particular, to the special difficulties of government in dealing with problems of size and scale in so large a country, and to the use of federalism and its division of authority as the instrument for meeting this challenge: “[T]he relation of political authority at the center to political authority in constituent units provided one of the organizing themes of the country’s legal development.”⁸

The Supreme Court, even more than Congress in the early nineteenth century, was the key agency of the national government in defining the terms of the federal arrangement in functional areas, especially where Congress abdicated altogether from an interventionist role. Thus, in what is his most extended systematic analysis of the federalism element, *The Legitimacy of the Business Corporation*, Hurst dealt in detail with both framework functions and the specifics of the ongoing federal-state relationship in corporations policy and supervision. Running through the conventional analysis of formal doctrinal expressions was a reiteration of the idea that “from 1790 to the 1930s the federal role was limited, not by formal bounds of the Constitution, but by a working tradition of the federal system.”⁹ This tradition constrained Congress, reinforcing the effects of other social and political realities, especially the unwillingness of Congress “to thwart local selfishness” and its inability to “[muster] a broad range of interests” behind a single national policy.¹⁰

Hurst used the term “tradition,” in thus referring to a “working tradition,” not only as an expression of the reality of continuing governmental practice, but also as a description of persistent popular attitudes and of dominant, deeply held values. In this distinctive respect, the federalism element was interwoven with other leading strands in Hurst’s heroic effort to provide an overarching interpretation of the complex multivariate relationships

8. Hurst, *Law and Social Process in United States History* (Ann Arbor: University of Michigan Press, 1960), 24. On size and scale as challenges, and the relationship to federalism, see, e.g., *ibid.*, 61 and following, 247–48.

9. Hurst, *Legitimacy*, 140.

10. *Ibid.*, 145.

in legal process. Hurst held consistently to the view that the main focus of policy and law—a largely pragmatic, instrumentalist law—in the early nineteenth century was the advancement of material growth and the nurturing of economic individualism in a market economy.¹¹ (This did not, of course, mean laissez-faire government. For in fact intervention took place in a way that left vast scope to the states and in which the national government abstained from acting in many vital areas of policy that would be progressively centralized from the Civil War era to the post-1945 period.) The “federal element” was related to what he regarded as this central preoccupation of the legal system in that era because federalism was one expression of the more comprehensive commitment to dispersion of power. The popular faith in dispersion of power expressed a belief that it provided a protection for liberty; it was also seen as a desideratum for advancing the cause of individualism and “release of energy.” But faith in dispersion referred not only to the private sector—that is, to private centers of power—but also involved wariness of centralization in government. Hurst argued that the diffusion of formal authority and real power reflected in the law of federalism, and reflected also in the actual structure and governance of the federal Union, was consistent with (and given impetus by) this generalized faith that was part of “our cultural inheritance.”¹²

Another relationship between the federal element and the general legal culture was explored by Hurst in terms first set out by James Madison in *The Federalist* essays and came to a focus on the operation of interest-group pluralism in legal process. We learn from Ernst’s study that Hurst embraced (but in the end also qualified, in important ways) the concept of pluralism as an explanation of how the larger political process in America (subsuming “legal process” as more conventionally defined) affected the direction and content of law and public policy. His discovery of Pendleton Herring’s

11. See Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956), 29 (“[I]n most affairs one senses that men turned to non-economic issues grudgingly or as a form of diversion and excitement or in spurts of bad conscience over neglected problems”). On Hurst’s larger interpretation of the quest for material growth and its place in the scheme of popular values that he regarded as being accurately expressed, on the whole, in law, see Harry N. Scheiber, “At the Borderland of Law and Economic History: The Contributions of Willard Hurst,” *American Historical Review* 75 (1970): 744–56 (also analyzing the problematic issues that are involved in Hurst’s equating of popular will with legal outcomes). See also the essays in this symposium by Novak and Landauer. For an insightful commentary by Hurst on the evidentiary problem, in this regard, see his essay, “Legal Elements in United States History,” in *Perspectives in American History* 5 (1971): 26–27 and following.

12. Hurst, “Legal Elements” (“Our cultural inheritance valued individuality and a broad scope for innovative will and venturing energy”); see also Hurst, *Law and the Conditions of Freedom*, 8 and passim.

classic work on pluralism was a turning point, it seems, for Hurst as he moved away from the Beardian-Progressive interpretation of conflict and its resolution in American history. This shift led logically to Hurst's construction of a powerful model of policy process that took account of interest groups as part of a "complex reality."¹³

Hurst wrote often of the "balance of power" as expressive of outcomes in struggles over law and policy. At times, his view seemed to veer close to the extreme expression of a pluralistic conflict model advanced by scholars such as Earl Latham—that is, the idea that "what may be called public policy is the equilibrium reached in this struggle [among interest groups] at any given moment, and it represents a balance which the contending factions of groups constantly strive to weight in their favor."¹⁴

Federalism was relevant to all this because Hurst's embracing of pluralist theory also led to an emphasis upon how both patterns of interest-group conflict and actual substantive policy outcomes varied greatly among the states of the Union. And when he probed in profound detail the realities of pluralism at the local level and in the framework of state law, the "daunting diversity" and complexity that he found there reinforced the view that federalism's diffusion of power had far-reaching consequences in giving play to regional, local, and functional interest group differences.¹⁵ He thus was insistent that legal historians must undertake "fact-based work" that would reconstruct the actual social and economic situations within which debate occurred and decisions were hammered out—that is to say, give their attention to the "particularly and functionally defined subject matter" of policy, based upon a serious scholarly effort to learn the background in economic, social, and political history.¹⁶ This focus on the social realities in diverse local situations proved to be a salutary corrective to the simplistic Manichaean versions of legal and political process that had dominated

13. See Hurst, *Law and Social Order in the United States* (Ithaca: Cornell University Press, 1977), 25.

14. See Earl Latham, *The Group Basis of Politics: A Study in Basing-Point Legislation* (Ithaca: Cornell University Press, 1952) 36; see also the discussion of Hurst's leadership in the move away from Progressive historiography to pluralist analysis, in Harry N. Scheiber, "Public Economic Policy and the American Legal System: Historical Perspectives," *Wisconsin Law Review* 1980: 1159. Compare Hurst's use of the term "balance of power" in *Law and the Conditions of Freedom*, especially in the third chapter (by that title), and also his discussion of how "creation of a balance of power [in Madisonian terms] is a fundamental way in which we may use law to fashion the social framework" (*ibid.*, 42).

15. Hurst, *Law and Economic Growth: The Legal History of the Lumber Industry in Wisconsin, 1836–1915* (Cambridge, Mass.: Belknap Press, 1964), 54 and following. For Hurst's realism in relation to classical common-law analysis, see Robert W. Gordon, "Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography," *Law and Society Review* 10, no. 1 (1975): 9–55.

16. Hurst to the author, 17 April 1985, in author's files.

Progressive historiography, and Hurst's view has withstood and robustly survived the criticisms levied by the Critical Legal Studies school.¹⁷

Federalism was thus important as a framework and in channeling and constraining the pluralist conflicts that dominated politics as Hurst viewed them. But Hurst also attributed to federalism specific functions that influenced both process and substantive legal outcomes. In his lumber industry study, with its magisterial scope, Hurst gave his fullest attention to the various functional aspects of a working federalism, citing how the competition among states for labor, capital, and market power in production effectively placed constraints on how seriously they might consider strong regulation of entrepreneurial interests (the "competition in laxity" phenomenon); how federal policy and administration, the most prominent example being in management of the public domain and the federal land distribution system, served both as a model for state law (and also management) and as a limiting factor on state options in regard to terms of disposition; and how the diffusion of power and effective strength of the states as centers of decision making in so many fields (often in nearly an entire absence of national policy, as in mining and in utilization of the rivers for industrial purposes in the lumber region) kept the focus of interest conflict, intensely felt, upon the state capitals and courts.¹⁸ Withal, "the separate existence of the states as policy makers"¹⁹ became a subject, in his hands, to be dealt with functionally—as to framework, as to its relation to pluralism, and as to the outcomes of political conflict in substantive law.²⁰

But the question remains whether federalism, in the foregoing relationships, had a bearing also upon "drift and default," the element of irresponsibility and/or shortsightedness and/or mindlessness that Hurst made a main theme in his generalized model of nineteenth-century legal process. He addressed this issue directly in his analysis of business corporation law, contending that federalism often worked against rationality in destructive or at least mindless ways:

17. On the historiographic controversies, see Harry N. Scheiber, "Private Rights and Public Power: American Law, Capitalism, and the Republican Polity in Nineteenth-Century America," *Yale Law Journal* 107 (1997): 823–61; William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1996); cf. Tony Freyer, *Producers versus Capitalists: Constitutional Conflict in Antebellum America* (Charlottesville: University Press of Virginia, 1994), passim.

18. Hurst, *Law and Economic Growth*, passim.

19. Hurst, *Legitimacy of the Business Corporation*, 139.

20. For efforts to merge formal constitutional doctrinal development with a functional analysis of federalism on the lines Hurst marked out, see Harry N. Scheiber, "Federalism and the American Economic Order, 1789–1910," *Law and Society Review* 10, no. 1 (1975): 57–118; on the twentieth-century history, see Scheiber, "Redesigning the Architecture of Federalism," 227–96.

The federal ingredient has not always been a product of deliberation. National and state legal agencies have generated their own institutional inertia and vested interests; the separate, yet interwoven, existence of nation and states has mandated or fostered situations and trends of action and result beyond what men perceived or planned or chose. But whether we see more of deliberation or of drift in any given areas of public concern, we must still count the federal factor as a large part of much of the growth of public policy.²¹

On the positive side, he reverted to Madisonian rhetoric and premises: “[W]e sought through Union to establish a broad base and diverse sources of national authority. Thus we would enlarge private liberty by reducing the likelihood that any narrow interest could capture government to the oppression of others.”²² In this sense, the ideal of federalism—its affirmative values, as contended for by those who wanted the states to have an assured range of functions for which they were the locus of decision making and, to one degree or another, the constitutionally protected arena of power—became part of what I have elsewhere termed Hurst’s “normative model” of rational, efficient government operating accountably on democratic principles.²³ His interpretive model of how the legal system actually functioned on the ground, for example in the case of both state and national law for the Wisconsin lumber industry, invoked that normative standard to indicate where the record of actual governance fell short. Thus he wrote of the national government’s role that, given the normative arguments for division of powers in a federal system,

one might hope that the central government, out of its greater interests and resources and its relative insulation from urgent parochialism, would form policy by a broader calculus than that which might move lesser sovereigns. But this hope was unfulfilled. The United States paid no significant attention to the timber resources of its lands east of the Mississippi so long as it held them.²⁴

And of course the record of state government was worse than merely that of a passive agency abdicating responsibility: “excessive localism and particularity” in legislative assessment of issues, “reliance upon delegating to private actors the initiative in defining values, opportunities, costs, and hazards,” and the force of private pressures overwhelming public sector autonomy all undermined any hope of a resilient legal process in which some kind of plausible long-range concept of “public interest” might prevail.²⁵

21. Hurst, *Legitimacy of the Business Corporation*, 139.

22. Hurst, *Law and the Conditions of Freedom*, 42.

23. Scheiber, “At the Borderland.”

24. Hurst, *Law and Economic Growth*, 14–15. See also *ibid.*, 240–41.

25. *Ibid.*, 253, 251, 261–63.

Generally absent from Hurst's reflections on federalism, however, was any extended attention to its function in perpetuating slavery in the federal Union for seventy years after the Founding and then maintaining racial segregation for another century. A partial explanation is his faithfulness to the mission of explaining the relationships of law and society in the context of capitalism and the business order viewed in terms of the "pre-history" of the modern administrative and regulatory state. In addition, the focus of so much of the monographic research in which he worked out his larger themes was solidly upon Wisconsin. Systematic consideration of the darker side of American social and political history did not have the prominence in Hurst's work that the record warrants, as I have argued in earlier studies of his interpretations.²⁶ Extremely puzzling to me, in this regard, is the argument that Hurst advanced in one instance, that federalism was a unique element in American legal process because "the problems of federalism were primarily political—problems of the organization of power. Federalism is the one area of early nineteenth-century concerns in which one can confidently say the focus was on political objectives."²⁷ This seems a curious contention in light of how questions of race, class, and gender became prominent in state-level constitutional conflict and ramified in national debates; and the puzzlement is confounded in light of Hurst's argument, in a passage shortly following the last quoted, that "Generally, [Americans] felt, we had finished fashioning our principles of power organization by about 1800; now we could attend to the more urgent and interesting business of opening up the continent."²⁸ (None of this diminishes significantly, however, the fact that Hurst did more than any other legal historian in the present century—only Richard Morris and Hurst's own colleague Lawrence Friedman can compare—in setting out the terms of argument on most of the basic questions that are widely taken as the central issues in American legal history.)

In sum, as Hurst viewed the "federal ingredient," it had not only a framework role but also the potential to function in opposition to the political tendency toward policies that were harmful to long-term social interests and that were formed under irresistible pressure from special interests exploiting the weakness of administratively underdeveloped government. This

26. Scheiber, "At the Borderland," and "Public Economic Policy," 1170–71. Racism in California, for example, was prominent in popular constitutional debate and injected explicitly into the 1879 state constitution itself. See Harry N. Scheiber, "Race, Radicalism, and Reform: Historical Perspective on the 1879 California Constitution," *Hastings Constitutional Law Quarterly* 17 (1989): 35–80; Paul S. Taylor, "Foundations of California Rural Society," *California Historical Society Quarterly* 24 (1945): 193–228.

27. Hurst, *Law and the Conditions of Freedom*, 41.

28. *Ibid.*, 43.

was so to the extent that Congress was ready to accept responsibility for national problems transcending state competence—a development that occurred in an activist mode, as he argued, only after the Civil War. It also depended on the extent to which national constitutional doctrines for due process (itself an expression of respect for individualism) and for basic liberties, at least for male white citizens, at least held out an ideal juridical standard for advancing rule-of-law ideals. Hurst explicitly professed the noble objective, in his work, of seeking to mobilize historical knowledge to understand better how—in specific historical contexts—legal process could achieve success in imposing on the often chaotic and irrational processes of legislation an effective adjustment of interests “by rational criteria, under fair and humane procedures, to the ultimate end of serving to enrich public life.”²⁹ There is no doubt that Hurst sought in that fundamental sense to construct a usable past. His analyses of the historic functions and values of federalism were an essential part of that enterprise.

29. Hurst, *Law and Economic Growth*, 263.