Module 6: Current Issues

**Jonathan Turley**: There is a fascinating debate about the role of the Supreme Court on federalism. In fairness to the critics of federalism we have had changes in the constitutional system. In 1913 you had the ratification of the sixteenth and seventeenth amendments. They had a profound impact upon states rights. One was a direct election of senators and the other one was the creation of federal income tax. What's fascinating about those two amendments is that there was very little discussion at the time of the impact on federalism. They were being ratified for compelling reasons of their own, but their impact was devastating for the states. Because, not only would they no longer effectively control the makeup of the US Senate, the federal government would have its own source of revenue that it could manipulate and increase. Those two changes had this profound impact. So the question then becomes, in light of those changes, how active should the Supreme Court be in protecting federalism some justices, like Justice Ginsburg, have said it's really all political. You made the changes to the Constitution as the American public. You can essentially throw the bums out if you think they are eroding states rights but it's not the job of the Supreme Court to preserve this balance that was changed so significantly. I take a different view. Federalism still remains a defining principle the US Constitution. Those amendments were not ratified as rejection of federalism. I think what it demands is for the Supreme Court to be more active in preserving the powers of the state. I think it is a healthy system to allow states to experiment. It's a healthy system to allow states to look very different. You know, we live in a time when uniformity is valued. We go to Starbucks and McDonald's because we know what we'll find there. We love predictability because our lives are so fast moving but stability and uniformity are not good things, necessarily, in government. Because, in government it means that we speak with a single voice even when we have many different voices that want to be heard.

**Michael Greve**: I think that the legal challenges now play out against of two broad trends in American politics. One of them at the federal level and one of them at the state level. At the federal level the overwhelming tendency which is now becoming troublesome to many people's minds, including my own mind, is the migration of federal power from the Congress to the executive. For all sorts of reasons from political polarization to a lot of different factors Congress has been immobilized. It either legislates not at all or it enacts these hyper complicated statutes and either way it will have to give or has given the executive enormous discretion in pursuing these programs as it sees fit. So all the migration of power has been from the Congress to the executive as a result of that, federalism is now shaped more by the executive than by anything Congress does. At the state level, development is the emergence or reemergence, I should say, of sectional politics big difference among, differences among states, those used to be cultural and break out over things like homosexual marriage or abortion things like that. That's still very vibrant in many areas but it's also economically too, so that we have a lot of states that want to be really left alone and do their own thing and want to compete with other states and attract productive citizens. Texas, Oklahoma, Utah, the Dakotas. Those are the most productive and fastest-growing states in the country. And you have other states, a block of other states, that pursue a very different model. If you want to put a label on it, it's much more akin to a European welfare state, big transfer payments, very, very expensive public programs, and those states, New York, California, Illinois, and so forth, are we locked into these programs. The cases that come up and reach the Supreme Court and the District of Columbia Circuit really reflect that. Many of them now concern sort of very, very arcane points of administrative law. They're not big constitutional cases, for the most part, how far does your power reach, but did you have to give us notice about this program? Is it within the executive power to undertake these programs or do you really need a statute to govern you? Can you do this under the existing statutory authority or do you need a new statute? Those kinds of questions crop up in a vast range of fields from health insurance and healthcare, to energy policy, the environment, education, welfare, that's where all the action is and that's what I expect more of that in years ahead. The cases are very hard to explain to people who don't study this for a living but they are, none the less, hugely important.
Ernest A. Young: The state bureaucracy is a terribly important site of conflict over federalism issues. Think about the no child left behind act, for instance, where you know there's a lot of pretty extensive federal requirements imposed on state and local policymakers in education, and this is an area where the states had taken a primary role, still take a primary role, for hundreds of years. And so there was a lot of pushback against some of these requirements. Both I think from a sense that you're telling us to put to do too much, and also from just a practical standpoint that these are unworkable requirements. We can't run the test this way. And because the national government was dependent on the states to cooperate and implement these mandates, they had to listen to those state bureaucrats when they said you know this sort of testing isn't going to work. And in fact the Department of Education had to revisit a lot of the rules that they had formulated and roll them back a little bit. I think you see that in a lot of different areas. So I think people don't pay near enough attention to what happens after a federal law gets passed. You can pass a federal law, you can challenge it, maybe succeed maybe you don't but but even if the federal law purports to regulate some important area of policy they're still going to be a lot of contestation about exactly what shape it takes and so I think we need to be aware that federalism is going to come into play in those areas.

Robert Nagel: People wonder whether the Rehnquist court's federalism revival is going to continue or what's happened to it or what will happen to it in the future. The revival itself was set of cases where the Court sought to readjust the relative levels of power and to restrain the national government to a greater extent that it had been at least since 1937. There are many people who expect that this revival, while it's been fairly quiet in the last 10 years or so, is just lying there waiting to re-emerge. I, myself, think that the courts record over centuries is that it only episodically and partially protects the state authority under our federal system. Its disinclined to do so for a number of reasons. At least disinclined to do so consistently and in really operationally important ways. It is, after all, an arm of the national government itself.

Jonathan Turley: Part of the danger that we have today is that people are becoming increasingly detached from their local governments. They feel increasingly set adrift in the political system. You know, this generation is a generation that believes they really have very little influence over politics. That's an exceedingly dangerous thing. This whole concept of power resting with the citizens means nothing if citizens don't exercise it.