

WHOSE FEDERALISM?

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"It should never be forgotten that this slogan, 'Our Federalism,' born in the early struggling days of our Union of States, occupies a highly important place in our Nation's history and its future."¹ When Justice Black invokes the voices of the constitutional Elders as he did in *Younger v. Harris*, perhaps the safest instinct is not to second-guess the attribution. But was there ever such a slogan? Obviously, the fears of excessive centralization of governmental power and the tensions between national and local decisionmaking have had a "highly important place in our Nation's history and its future," whether or not any such label or shorthand was ever used to identify those concerns. But at the purely rhetorical level, the all-purpose slogan "Our Federalism" probably does not have as ancient a pedigree as Justice Black would have liked.

As a constitutional sound-bite, the phrase "our federalism" seems to have been slipped into Supreme Court discourse by none other than Justice Black's nemesis, Felix Frankfurter. Indeed, the phrase was introduced almost contemporaneously with Justice Frankfurter's arrival on the Court. Frankfurter was sworn in as an Associate Justice on January 30, 1939, and scarcely a month later the first opinion under his name was announced. There, on page 378 of the justly forgotten decision in *Hale v. Bimco Trading*,² was the phrase in the first of many appearances. In referring to the American scheme of government, Justice Frankfurter tagged it "our complicated federalism."³ Luckily for the slogan's future, the qualifying adjective did not long survive. The more familiar (and less complicated) "our federalism" arrived in a Frankfurter dissent issued about two weeks after *Bimco*, in *Texas v. Florida*.⁴ In a discus-

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1. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

2. 306 U.S. 375 (1939).

3. 306 U.S. at 378. The opinion included a discussion of the Anti-Injunction Act (28 U.S.C. § 2283), which Justice Frankfurter referred to as "an historical mechanism for achieving harmony in one phase of our complicated federalism by avoiding needless friction between two systems of courts having potential jurisdiction over the same subject matter." *Id.* He concluded that the Act did not apply to the case.

4. 306 U.S. 398 (1939).

sion of the high court's original jurisdiction, Frankfurter wrote: "The authority which the Constitution has committed to this court over 'Controversies between two or more States,' serves important ends in the working of our federalism."⁵ A slogan was born.

"Our federalism" was invoked two more times by Frankfurter in 1939: once in concurrence⁶ just two weeks after *Texas v. Florida*, and once for the Court later that year.⁷ Clearly, Frankfurter was taken with the phrase. But at first, no one else seems to have been. Over the next three decades—and indeed until his departure from the bench in 1962—few of the Justices other than Frankfurter invoked the "our federalism" phrase. Through the 1930s and 1940s, Frankfurter had a virtual monopoly on its use.⁸ The only mention of "our federalism" by another member of the Court during this time occurred when Justice Roberts borrowed the phrase in his dissent in *Screws v. United States*⁹—a dissent in which Justice Frankfurter joined.¹⁰ It was not until the late 1950s that others made even sporadic use of the slogan, and even then it was chiefly the property of Justice Frankfurter.¹¹ And in the early 1960s, while Frankfurter remained on the Court, he alone employed the phrase.¹² It was only after his departure that others picked up

5. 306 U.S. at 428 (dissenting opinion).

6. See *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 490 (1939). That part of Frankfurter's opinion containing the "our federalism" language was later quoted by Justice Butler in a footnote in *O'Malley v. Woodrough*, 307 U.S. 277, 294 n.15 (1939).

7. See *Palmer v. Massachusetts*, 308 U.S. 79, 84 (1939).

8. During this period, Frankfurter invoked it more often in dissent (five times—see *Brown v. Western Railway of Alabama*, 338 U.S. 294, 299 (1949); *Williams v. Austrian*, 331 U.S. 642, 663 (1947); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 241 (1947); *Morris v. Jones*, 329 U.S. 545, 564 (1947); *Hill v. Florida*, 325 U.S. 538, 552 (1945)) than in opinions for the Court (four times—*Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653, 660 (1948); *Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945); *Williams v. North Carolina*, 325 U.S. 226, 233 (1945); *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 141 (1941)). See also *State Tax Comm'n of Utah v. Aldrich*, 316 U.S. 174, 184 (1942) (concurring opinion).

9. 325 U.S. 91, 142 (1945).

10. *Screws*, 325 U.S. at 138. See also above at note 6 (noting Justice Butler's quotation of Frankfurter's language that included the "our federalism" phrase).

11. "Our federalism" shows up in fifteen cases in the 1950s including six times in the spring of 1959 alone (Westlaw search June 15, 1991, "our federalism," data base S.Ct.)—see *Louisiana Power & Light v. City of Thibodaux*, 360 U.S. 25, 28 (1959); *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 279 (1959); *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 247 (1959); *Bartkus v. Illinois*, 359 U.S. 121, 129 n.9 (1959); *New York v. O'Neill*, 359 U.S. 1, 11 (1959); *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 374 (1959). Frankfurter was responsible for all but four of the fifteen appearances in the 1950s and he was responsible for each of the six appearances in the bountiful spring of '59. The only four non-Frankfurter uses in the 1950-1959 period were by Justice Jackson in *Public Serv. Comm'n v. Wycoff Co.*, 344 U.S. 237, 247 (1952); Justice Harlan in *Hoag v. New Jersey*, 356 U.S. 464, 468 (1958); Justice Harlan again in *Cicenia v. La Gay*, 357 U.S. 504, 510 (1958); and Justice Brennan in *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 533 (1959) (concurring opinion).

12. The Frankfurter "our federalism" opinions of the 1960s are *Kesler v. Dept. of Public*

where he had left off, the phrase appearing a dozen more times before the decision in *Younger v. Harris*.¹³ Interestingly, Justice Black, who had been on the Court for well over thirty years when he wrote the opinion in *Younger*, and whose arrival preceded Frankfurter's by fifteen months, had never made use of the phrase in any of his opinions prior to *Younger* itself.¹⁴

It may be hard to imagine that the phrase "our federalism" was not used by the Court before Frankfurter first used it in 1939, but if the technology of Lexis and Westlaw may be believed, not even the term "federalism"—positively ubiquitous by today's standards—had appeared in any Supreme Court opinion before the 1939 decision in *Bimco*. Rightly called "the most eloquent exponent of the value of federalism in the past fifty years"¹⁵ it is fitting that Frankfurter was the initial and most frequent user of the "federalism" word while he was on the Court. Indeed, in the first two decades during which Frankfurter was on the bench hardly anyone else ever used the term.¹⁶ Usage by other Justices picked up a little in the 1950s,¹⁷ but it nearly tripled over that in the 1960s,¹⁸ and then it doubled yet again in the next decade¹⁹—the "new federal-

Safety, 369 U.S. 153, 172 (1962); *Rogers v. Richmond*, 365 U.S. 534, 546 (1961); *Monroe v. Pape*, 365 U.S. 167, 237, 242 (1961) (dissenting opinion); and *Elkins v. United States*, 364 U.S. 206, 233 (1960) (dissenting opinion).

13. Westlaw search June 15, 1991, "federalism," data base S.Ct.

14. Well, hardly ever. In his dissent in *Kesler v. Dept. of Public Safety*, 369 U.S. 153, 184 (1962), Justice Black quoted from Frankfurter's majority opinion in that same case in which Frankfurter had referred to the "complicated demands of our federalism." Black, however, quoted the language in dissent only to argue that the case could not be decided by reference to any such considerations. If *Kesler* counts as the first instance of Black's use of the phrase in an opinion, it was, interestingly, Frankfurter's last.

15. Robert C. Post, *Justice Brennan and Federalism*, 7 Const. Comm. 227, 233 (1990).

16. Other than Frankfurter, only Justices Rutledge and Reed ever employed the word "federalism" in the decades of the 1930s and 40s (apart, of course, from Justice Roberts's solo use of "our federalism" in *Screws*, (cited in note 9)). Reed used it in *Adamson v. California*, 332 U.S. 46, 53 (1947), where he referred to the "constitutional doctrine of federalism." Rutledge used the word "federalism" three times in the 1940s. See *United States v. Scophony Corp.*, 333 U.S. 795, 803 n.12 (1948); *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 418 (1946); *Screws v. United States*, 325 U.S. 91, 116 (1945) (concurring opinion). In *Screws*, Justice Rutledge made what was apparently the Court's first reference to "dual federalism"—an almost-as-famous constitutional sound bite as "our federalism." See Edward S. Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1 (1950). Actually, among article III users of the federalism word in judicial opinions, Frankfurter was beaten to the punch by Judge William Clark. See *United States v. Parker*, 19 F. Supp. 450, 454 (D.N.J. 1937) ("our hobby of comparative federalism"); *United States v. Flegenheimer*, 14 F. Supp. 584, 586 (D.N.J. 1935).

17. "Federalism" (including its incorporation in "our federalism") appeared in twenty-four cases in the 1950s. Westlaw search June 15, 1991, "federalism," data base S.Ct.

18. "Federalism" (including its incorporation in "our federalism") appeared in sixty-two cases in the 1960s. *Id.*

19. "Federalism" (including its incorporation in "our federalism") appeared in 122 cases in the 1970s. *Id.*

ism”²⁰ decade of *Younger v. Harris*. And “federalism,” like “our federalism,” has since shown no signs of disappearing from the Court’s vocabulary.²¹

More interesting, perhaps, is the politically neutral use that Frankfurter often made of the terms “federalism” and “our federalism.” Today, federalism is pretty much a household word among constitutional insiders—a conceptual shorthand for the assumptions underlying the proper relationship or balance of power between the states and the national government. As Richard Stewart has put it: “Federalism seeks to maintain political decentralization and social diversity while simultaneously promoting national measures to meet national needs and prevent localized oppression.”²² Commentators speak of “federalism” as one would speak of other political “-isms,” and they write about the “values” of federalism,²³ the “policy” of federalism,²⁴ or the “doctrine” of federalism.²⁵ And while it represents a normative concept, the precise contours of “federalism” are the subject of continuing and contentious debate.²⁶ “Our Federalism” as it is currently used is just another way of referring to “our notions of federalism”²⁷ or (as Justice Douglas chose to call it in his *Younger* dissent): “American federalism.”²⁸ And for Justice Black, that concept meant:

[A] proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate

20. See Louise Weinberg, *The New Judicial Federalism*, 29 *Stan. L. Rev.* 1191 (1977).

21. “Federalism” (including its incorporation in “our federalism”) appeared in 142 cases in the 1980s. Westlaw search June 15, 1991, “federalism,” data base S.Ct. Opinions from the Court’s 1990-91 Term were virtually awash in the rhetoric of federalism. See, e.g., *Coleman v. Thompson*, 111 S.Ct. 2546 (1991) (in a decision that appropriately began “This is a case about federalism,” the word “federalism” appears a total of eighteen times in the various opinions of the Justices); *City of Columbia v. OMNI Outdoor Advertising, Inc.*, 111 S.Ct. 1344 (1991) (eight times); *Harmelin v. Michigan*, 111 S.Ct. 2680 (1991) (five times).

22. Richard B. Stewart, *Federalism and Rights*, 19 *Ga. L. Rev.* 917, 917 (1985).

23. A.E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 *Ga. L. Rev.* 789, 789 (1985).

24. Mark Tushnet, *General Principles of the Revision of Federal Jurisdiction: A Political Analysis*, 22 *Conn. L. Rev.* 621, 623-24 (1990) (“the policy that national interests ought not be advanced at an excessive cost to the commitment of substantial policymaking power to the states, a policy Justice Black labelled ‘Our Federalism.’”)

25. Charles Alan Wright, *The Law of Federal Courts* 320 (West, 4th ed. 1983).

26. See, e.g., *Coleman v. Thompson*, 111 S.Ct. 2546, 2569 (Blackmun, J., dissenting) (arguing that federalism has “no inherent normative value”); cf. Post, 7 *Const. Comm.* at 227 (cited in note 15) (discussing Justice Brennan’s rights-reinforcing view of federalism).

27. *Community Communications Co. v. Boulder*, 455 U.S. 40, 69 (1982) (Rehnquist, J., dissenting).

28. *Younger v. Harris*, 401 U.S. 37, 60 (1971) (Douglas, J., dissenting).

ways.²⁹

But Frankfurter's uses of the terms "federalism" and "our federalism" were perceptibly different from, and much more modest than, these more familiar uses. When Frankfurter used them, he often spoke of "federalism" not as a concept or in the abstract. Instead (and perhaps oddly from our current perspective) he spoke of our system of government as "a federalism"—a term that he used to describe any system of government in which power was divided between a central government and regional or state governments. "[W]e are a federalism,"³⁰ said Frankfurter in 1939, which was to say only that our government was a "federal" one. Even more interestingly, he also regularly spoke of "federalisms" in the plural, by which again he appears to have meant no more than to stick a generic label on the class of governments in which power was diffused between central and local sovereignties. The other federalisms that Frankfurter offered up as examples were the governments of Canada and Australia, which he referred to as "the two other great English federalisms."³¹ In these contexts, federalism was not so much a doctrine; rather it was a kind of government.³² This descriptive use of the term seemed to be an accepted one in academic circles at the time, as Frankfurter's citation to the work of Professor Jane Clark (who used the term in a similar manner) bears out.³³

This is not to say that Frankfurter (or his brethren) did not use the word in the more normative or conceptual sense in which it is customarily used today; it appears that they did.³⁴ It is just that

29. *Id.* at 44.

30. *Graves v. New York ex rel. O'Keefe*, 306 U.S. 466, 488 (1939) (concurring opinion); see also *Irwin v. Dowd*, 359 U.S. 394, 407 (1959) (dissenting opinion) (referring to our government as "a constitutional federalism").

31. *Graves*, 306 U.S. at 490; see also *Knapp v. Schweitzer*, 357 U.S. 371, 375 (1958) (discussing some of the differences "between federalisms").

32. See *Staub v. City of Baxley*, 355 U.S. 313, 325-26 (1958) (Frankfurter, J., dissenting). Of course, at some level, governmental arrangements (e.g., a federalism or a democracy) and the ideas that inform them (i.e., "federalism," or "democracy") are inseparable. Nevertheless, for purposes of this discussion, the two uses of the terms can fairly be distinguished from one another.

33. See Jane Perry Clark, *The Rise of a New Federalism* 294 (Columbia U. Press, 1938). Professor Clark, in a book on state-federal relations nearly contemporaneous with Frankfurter's own elevation to the Court, observed that the "devices of [state-federal] cooperation, like the federalism of which they are a part, are frequently complex, cumbersome, and unwieldy." *Id.* Clark thanks Frankfurter in the Preface to her book. See *id.* at xiii; see also below at note 66.

34. See, e.g., *Farmers Educational & Coop. Union v. WDAY, Inc.*, 360 U.S. 525, 536 (1959) (Frankfurter, J., dissenting) (referring to "the binding principle of federalism"); *United States v. Oregon*, 366 U.S. 643, 654 (1961) (Douglas, J., dissenting) (discussing "our conception of federalism"); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 532 (1959) (Brennan, J., concurring) (referring to the Constitution as "an instrument of federalism"); see also *Adamson v. California*, 332 U.S. 46, 53 (1946) (Reed, J.); *Screws v. United States*, 325

Frankfurter had a particular predilection for using it in this now somewhat more unusual and less well-remembered manner. When Frankfurter used “federalism” in combination with “our” (or with the definite or indefinite article), it was invariably used in a nonabstract, descriptive manner. In these contexts, Frankfurter rarely suggested that there was anything peculiar or unique—as among federal governments—about “a federalism like ours”³⁵ (as he once called it in a variation of his theme). Rather, the point to be made was that “ours” was like “the two other great English federalisms”³⁶ and that similar problems befell all such governments. Thus, the reference to “our federalism” was used, initially at least, as a way for Frankfurter to show our kinship to their federalisms. “The very federalism of our structure”³⁷ made us like them. In this respect, the phrase was not much of a slogan at all; nor was it invoked to identify a doctrine or a principle, or even to suggest the desirability of diffused governmental power. Rather, Frankfurter’s version of “our federalism” seems to have been no more than a substitute way of saying “our federation”³⁸ or “our federal system” (which was, in its basic outlines, like other federal systems).³⁹ The more politically charged use of the phrase would come later, in opinions by other Justices, when Frankfurter was off the bench.

While it seems clear that Frankfurter coined the particular combination of words for the Court, it was not the first time that he had used it in print. For example, he had employed the phrase as a professor at Harvard Law School in his book on the Commerce Clause, which came out only two years before his arrival on the Court.⁴⁰ In it, he observed that if Chief Justices Taney’s and Marshall’s opinions “hung together” in some measure, “it is because the work of both men was infused with a philosophy regarding our fed-

U.S. 91, 116 (Rutledge, J., concurring). I have discovered no opinion of Justice Black’s (with perhaps one exception—see above at note 14), that used the federalism word in either of its possible senses prior to *Younger v. Harris* (and its incorporation in “Our Federalism”).

35. *Uveges v. Pennsylvania*, 335 U.S. 437, 449 (1948) (dissenting opinion).

36. See footnote 31.

37. *United States v. Scophony Corp. of America*, 333 U.S. 795, 803 n.12 (1948) (Rutledge, J.).

38. See, e.g., *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 571 (1949) (Jackson, J.) (referring to the “long settled principles of our Federation”).

39. The phrase “our federal system” has a modestly longer pedigree dating from the nineteenth century. See, e.g., *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 491 (1856) (Opinion of Daniel, J.) (referring to James Madison as the “artifex maximus of our federal system”); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 564 (1851); *Wheaton v. Grigg*, 33 U.S. (8 Pet.) 591, 658 (1834); see also Felix Frankfurter, *Distribution of Judicial Power Between United States and State Courts*, 13 *Corn. L.Q.* 499, 503 (1928) (referring to “our federal scheme”).

40. Felix Frankfurter, *The Commerce Clause Under Marshall, Taney, and Waite* 66 (U. N.C. Press, 1937).

eralism as a means to an ordered social life—and the Court as a means of regulating the federalism.”⁴¹ Similarly, Frankfurter’s 1938 book on Justice Holmes veritably bristles with references to “our federalism”⁴² and to the problems of our and the other “English speaking federalisms”⁴³ (this time including India). Even as early as 1929, in an article for the *New Republic*, Frankfurter had referred to the Supreme Court as “the ultimate tribunal in our federalism.”⁴⁴

In addition, in Frankfurter’s many uses of “our federalism,” even the intonation of the words seems different from Justice Black’s later use of them. When Frankfurter talks of “the constitutional law of our federalism”⁴⁵ or “the dual judicial system in our federalism,”⁴⁶ or “the complexities (or “actual workings”)⁴⁷ of our federalism,”⁴⁸ their use seems almost casual. Compare this with Justice Black in *Younger v. Harris*: Not only does Black capitalize “Our Federalism,” but he embalms the words in quotation marks and calls them (for the first time) a “slogan.” On reading “this slogan, ‘Our Federalism,’ ” the phrase takes on a kind of entity status. It becomes a concept that can be talked about as a separate thing-in-itself—a concept that has legitimacy and that can therefore be invoked to justify particular legal results. The very next Term, it was easy for the Court to affirm that *Younger* had been decided on “the ‘policy’ ground of ‘Our Federalism.’ ”⁴⁹ As a consequence, it is almost hard to read those earlier, more innocent uses of the same words by Justice Frankfurter without superimposing the echo of Justice Black’s own articulation of them (and without mentally capitalizing the “O” and the “F”). But to do so in most cases seems inappropriate and noticeably awkward.⁵⁰

By contrast to Frankfurter’s usage, the slogan “Our Federalism,” as used in a case like *Younger v. Harris*, suggests a particular

41. *Id.*

42. See Felix Frankfurter, *Mr. Justice Holmes and the Supreme Court* ch. 3 (Harv. U. Press, 1938).

43. *Id.* at 90. See also Philip Kurland, ed., *Of Law and Life & Other Things that Matter: Papers and Addresses of Felix Frankfurter 1956-1963*, 126 (Harv. U. Press, 1967) (referring to “other federalisms”); *id.* at 124 (“ours is a federalism”).

44. *The Federal Courts*, 58 *New Republic* 273, 274 (April 24, 1929).

45. *Bartkus v. Illinois*, 359 U.S. 121, 129 (1959).

46. *Rogers v. Richmond*, 365 U.S. 534, 546 (1961).

47. *Graves v. New York ex rel. O’Keefe*, 306 U.S. 466, 490 (1939).

48. *Brown v. Allen*, 344 U.S. 443, 498 (1953) (separate opinion). See also Felix Frankfurter & James Landis, *The Business of the Supreme Court of the United States—A Study in the Federal Judicial System*, 40 *Harv. L. Rev.* 1110, 1129 (1927) (“these political problems will persist as long as our federalism endures”).

49. *Mitchum v. Foster*, 407 U.S. 225, 231 (1972).

50. Consider: “[T]he dual judicial system in ‘*Our Federalism*;’ ” “the ultimate tribunal in ‘*Our Federalism*;’ ” or “the Constitutional law of ‘*Our Federalism*;’ ” and so on.

spin on the proper adjustment of state-federal power. By invoking the Framers of 1787, Justice Black directs the reader's attention to a point prior to the ratification of the fourteenth amendment, and away from a second group of Reconstruction era Framers who permanently altered the antebellum notions of federalism to which Justice Black paid homage. By attributing the "slogan" to the time of (original) constitutional creation, Black endows "Our Federalism" with a close-to-textual status which—for a literalist like Justice Black, at least—one might suppose to have an immediate and obvious meaning. The reader of the opinion in *Younger* is therefore led to believe that the contours of state-federal relations evoked by the phrase "Our Federalism" are ones that were set in place long ago in some Golden Age of more modest national powers. One therefore readily lumps the words, as Justice Black did in *Younger*, with other words suggestive of deference to state judicial functioning—despite his disclaimer that he was not endorsing "blind deference" to "States' Rights."⁵¹ And if decisions from the Court's 1990-91 Term are any indication, "federalism" and "our federalism" have grown to become rhetorically and emotionally charged words that invoke the (political) correctness of deferring to state action in many areas of constitutional law, often at the expense of enforcement of national laws and ultimately at the expense of individual rights.⁵² They are now words that offer a substitute for analysis—words that can be called upon to justify convenient results.⁵³

It may not be possible fully to account for the shift in emphasis and the different use of the words "our federalism" in *Younger*. But what seems to have happened is that Justice Black—who was using the words on his own for the first time—conflated two verbal events. On the one hand, "federalism" as a normative or conceptual term had become an accepted part of high court discourse through the 1950s and 1960s. And, on the other hand, there were those many Frankfurter opinions that—while using the federalism

51. *Younger*, 401 U.S. at 44. See *Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (referring to *Younger's* principles of "equity, comity and federalism"); see also Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1425-26, 1520 (1987) (noting that "federalism" and "Our Federalism" now serve as code words for states' rights).

52. See cases cited above at note 21; see also *Coleman v. Thompson*, 111 S. Ct. 2546, 2569-71 (1991) (Blackmun, J., dissenting) (arguing that the majority had adopted a wooden reading of federalism that would endorse deference to state decisionmaking in virtually every state-federal conflict).

53. It is ironic that the (supposedly) historical grounded rhetoric of "Our Federalism" has enabled the Court to justify conservative judicial activism even where "history" itself would appear to argue for a different result. See e.g., *Riverside County v. McLaughlin*, 111 S.Ct. 1661, 1671-73 (1991) (forty-eight hour illegal detention upheld in part because of "demands of federalism" and despite a compelling historical argument to the contrary (see *id.* at 1671-73) (Scalia, J., dissenting)).

word in a descriptive sense—had stuck on the possessive “our” simply to remind the reader whose federal system (or whose federation) was being discussed. What Black did was to take the old unexceptionable word combination—our + federalism—in which federalism was used in its descriptive sense, and to use it now with federalism in its more conceptual or normative sense. In so doing, Black created a phrase the likes of which had not been seen before in the Court’s opinions.⁵⁴ At the rhetorical level, the feat was remarkably successful. Since *Younger*, “Our Federalism” has seldom been used except in the sense in which Black had newly christened it—as a way of referring to our concerns for harmonious state-federal relations, and with more than a hint of special solicitude for states’ rights.⁵⁵

That Justice Black had manipulated (or simply confused) some of the Court’s earlier language seems apparent. But more curious is his insistence that “Our Federalism” was a slogan with a pedigree. Not even the bare combination of words had materialized in any opinion on the Court prior to 1939, and Black’s own version was innovation well beyond that. Even if he misunderstood (or played a little fast and loose with) the Frankfurter version, it is dumbfounding that he should have made such an assumption about its ancestry. A good constitutional fundamentalist like Justice Black might have thought to provide some historical or textual support to prove the slogan’s antiquity if he had had any—although his willingness to place his faith in the existence and antiquity of the phrase may itself bear witness to his basic fundamentalism and “transcendent constitutional piety.”⁵⁶

54. In fairness to Justice Black, some of the usages of “our + federalism” in the period following Frankfurter’s departure from the Court in 1962 and before *Younger* (in 1971) seem to endow the phrase with the kind of entity-like status that Justice Black would later give it. But for the most part, the words still seem to have been used in the Frankfurter fashion, even though it is possible to see (in retrospect at least) how Justice Black may have been led astray. See, e.g., *Nat’l Bank of Berkshire County v. State Tax Comm’n*, 392 U.S. 339, 349 (1968) (Marshall, J., dissenting) (referring to Chief Justice John Marshall as “a principal architect of our federalism”); *Hanna v. Plumer*, 380 U.S. 460, 474 (1965) (Harlan, J., concurring) (referring to the decision in *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), as “one of the modern cornerstones of our federalism”); *Ker v. State of California*, 374 U.S. 23, 31 (1963) (Clark, J.) (observing that the decision in “*Mapp v. Ohio*, 367 U.S. 643 (1961) sounded no death knell for our federalism”).

55. See, e.g., *Deakins v. Monaghan*, 484 U.S. 193, 209 (1988) (White, J., concurring) (“for purposes of comity or ‘Our Federalism’ ”); *California v. Grace Brethren Church*, 457 U.S. 393, 412 n.29 (1982) (“comity . . . is essential to ‘Our Federalism’ ”); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 71 (1982) (Rehnquist, J., dissenting) (“the Court holds that . . . our federalism is not implicated”); *Mitchum v. Foster*, 407 U.S. 225, 231 (1972) (“the ‘policy’ ground of ‘Our Federalism’ ”).

56. Eugene Rostow, *Book Review*, 5 Const. Comm. 193, 193-94 (1988) (reviewing Charles A. Lofgren, “*Government From Reflection and Choice*”: *Constitutional Essays on War, Foreign Relations, and Federalism* (1986)).

Notably, the primary materials don't seem to help out Justice Black very much. An unsystematic search through the ratification debates,⁵⁷ Madison's Notes of the convention⁵⁸ and the standard edition of antifederalist pamphlets⁵⁹ turns up nothing remotely approximating such a slogan. Nor do the standard works on the Federalist era hint at its existence.⁶⁰ Even in *The Federalist* itself, any word resembling "federalism" is missing.⁶¹ What is more, it is no secret that the ancient and related terms "federal" and "Federalist" were ones of debated meaning in those "early struggling days of our Union."⁶² In fact, by the time anyone got around to using the word "federalism" in the Supreme Court, counsel raised it in brief and used it synonymously with "consolidation,"⁶³ the pejorative buzzword for over-centralization. Given this background, it seems unlikely that such a phrase—even assuming some hypothetical Framers ever uttered it—would have once flourished in the sense in

57. See generally Jonathan Elliot, *The Debates in the Several State Conventions* vols. I-V (2d ed. 1836).

58. See generally *Notes of Debates in the Federal Convention of 1787*, Reported by James Madison (Norton, Bicentennial ed. 1987).

59. See generally Herbert J. Storing, *The Complete Anti-Federalist* (U. Chi. Press, 1981).

60. See, e.g., John Chester Miller, *The Federalist Era 1789-1801* (Harper, 1960); Leonard D. White, *The Federalists* (Macmillan, 1948); see also Gordon S. Wood, *The Creation of the American Republic, 1776-1787* (U. N.C. Press, 1969).

61. See Thomas S. Engeman, Edward J. Erler & Thomas B. Hofeller, eds., *The Federalist Concordance 196-97* (Wesleyan U. Press, 1988).

62. Historians have observed that the terms were something of a political football, with a hotly disputed meaning during the era of ratification. The appropriation of the "Federalist" label by those who supported the Constitution was apparently quite a coup insofar as "federal" was initially associated with a political arrangement resembling confederation. See Jackson Turner Main, *The Anti-Federalists: Critics of the Constitution 1781-88* xi (U. N.C. Press, 1961). The defenders of the old Articles of Confederation were forced, says Main, to assume the "unpleasant connotation" of the negative name "Antifederalists" when the Constitution's supporters grabbed the mantle "Federalist" first. But the Constitution's opponents were not, as he noted, "antifederal" at all:

It was a nice piece of misdirection by the Federalists. Originally the word "federal" meant anyone who supported the Confederation. Several years before the Constitution was promulgated, the men who wanted a strong national government, who might more properly be called "nationalists," began to appropriate the term "federal" for themselves.

Id. at viii. See also Martin Diamond, *The Federalist on Federalism: "Neither a National Nor a Federal Constitution, but a Composition of Both"*, 86 Yale L.J. 1273, 1273-74, 1279-80 (1977) (noting that the "founding generation" went out of its way to avoid calling the government established by the Constitution "federal"—a term that was understood to be synonymous with "confederation"); Amar, 96 Yale L.J. at 1426 n.9, 1449, 1449 n.92 (cited in note 51) (marking on etymology of "federal" as referring to "treaty" or "covenant").

63. See the *Passenger Cases* (*Smith v. Turner*), 48 U.S. (7 How.) 283, 340 (1849) (argument of defendant Turner) (referring to a congressional statute from 1799 as having been passed in "the heyday of Federalism and consolidation"). Compare *W.B. v. Latimer*, 4 U.S. (4 Dall.) i, vi (Del. 1788) (state court opinion referring to "the spirit of federalism" that animated certain legislation during the era of Confederation).

which Justice Black apparently understood it, only to drop out of sight until he later rediscovered it.

It is tempting to conclude (if a conclusion is needed), that the antiquity of the word combination "our federalism" in Justice Black's mind was little more than a product of four decades worth of Frankfurter opinions. After all, no less a historian than Charles Beard found that one of Frankfurter's most enduring strengths lay in his "fancy phrase making."⁶⁴ The vocabulary of federalism that Frankfurter introduced to his Brethren provided a way to identify and bring out into the open the concerns that the New Deal Court and its successors believed ought to govern state/federal court relations. Frankfurter obviously did not invent the term "federalism" or its verbal permutations, or give them the shape that they have now assumed.⁶⁵ But he introduced them to the Court's discourse at a time when "Federalism [was] highly fashionable among . . . those who were on the look-out for new descriptions for rather old-fashioned political concepts."⁶⁶ Frankfurter thus provided a legitimating vocabulary that enabled the Court, among other things, to develop flexible and discretionary doctrines for federal courts to decline the exercise of jurisdiction and to restrict their intervention into certain areas of state functioning. In so doing, he helped the Court engineer a fundamental shift in the role of the federal courts, particularly with regard to constitutional challenges to "progressive" legislation and other regulatory measures.

Justice Black's curious response to this judge-made development, however, was to transform the new vocabulary and to treat it as an authentic piece of history that came from the Founders themselves. By invoking (and perhaps fabricating) golden-age rhetoric in *Younger*, Black made it appear that a hands-off role for the post-Civil War federal courts was the historically accurate one, when just the opposite may have been true.⁶⁷ The mini-revolution in judicial federalism brought about by the New Deal Court and its suc-

64. See John Braeman, *Thomas Reed Powell on the Roosevelt Court*, 5 Const. Comm. 143, 152 (1988) (quoting from a letter of Beard's to T.R. Powell).

65. The Oxford English Dictionary provides a smattering of nineteenth century uses of "federalism," mostly English. The earliest American entry in the O.E.D. listing is attributed to Henry Cabot Lodge in a book review of John T. Morse, *The Life of Alexander Hamilton* (Little, Brown, 1876), and to a chapter therein entitled *The Treasury and Federalism*. See 123 N. Amer. Rev. 113, 116 (1876).

66. Rudolf Schlesinger, *Federalism in Central and Eastern Europe* ix (Oxford U. Press, 1945). Schlesinger observed that the word "federalism" came to be in vogue among political scientists around the eve of the outbreak of World War II in Europe.

67. See, e.g., Douglas Laycock, *Federal Interference with State Prosecutions: The Cases Dombrowski Forgot*, 46 U. Chi. L. Rev. 636 (1979) (arguing that the equitable restraint doctrine of *Younger v. Harris* (and its progenitors) was a radical departure from prior federal court practice).

cessors, tended, like other successful revolutions, to shroud its innovation in the mantle of tradition. Justice Black's peculiar historical claims for the slogan "Our Federalism" thus not only bear witness to the phenomenon of "winner's history,"⁶⁸ but their ready acceptance suggests that the Court itself took some comfort in this improbable version of events.

68. See Morton J. Horwitz, *History and Theory*, 96 Yale L.J. 1825, 1827 (1987).