

LEVERAGING FEDERALISM: THE REAL MEANING OF
THE REHNQUIST COURT'S FEDERALISM
JURISPRUDENCE FOR STATES

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The Rehnquist Court has been credited with, or accused of—depending upon one’s perspective—creating a “federalism revolution.” Undoubtedly, the Rehnquist Court has dusted off seemingly long-forgotten federalism provisions in the Constitution and used them as the basis for invalidating numerous federal laws. This court has found limits to congressional power under the Interstate Commerce Clause of Article I (e.g., *United States v. Lopez*¹ and *United States v. Morrison*²), prohibited the federal government from commandeering states and reinvigorated the idea of state sovereignty under Tenth Amendment (e.g., *New York v. United States*,³ *Printz v. United States*,⁴ *Mack v. United States*,⁵ and *Alden v. Maine*⁶), limited Congress’s “remedial” authority under Section 5 of the Fourteenth Amendment (e.g., *City of Boerne v. Flores*,⁷ *Kimel v. Florida Board of Regents*,⁸ and *Board of Trustees of the University of Alabama v. Garrett*⁹), and advanced a broad theory of state immunity from civil lawsuits under the Eleventh Amendment (e.g., *Seminole Tribe of Florida v. Florida*,¹⁰ *Alden v. Maine*,¹¹ *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,¹² *Kimel v. Florida Board of Regents*,¹³ and

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¹ 514 U.S. 549, 552 (1995).

² 529 U.S. 598, 602 (2000).

³ 505 U.S. 144, 149 (1992).

⁴ 521 U.S. 898, 935 (1997).

⁵ *Id.*

⁶ 527 U.S. 706, 759–60 (1999).

⁷ 521 U.S. 507, 536 (1997).

⁸ 528 U.S. 62, 91–92 (2000).

⁹ 531 U.S. 356, 374 (2001).

¹⁰ 517 U.S. 44, 53 (1996).

¹¹ 527 U.S. 706, 754 (1999).

¹² 527 U.S. 666, 691 (1999).

*Board of Trustees of the University of Alabama v. Garrett*¹⁴).

These lines of cases have provoked a good deal of commentary on and off the Court. As Linda Greenhouse observed in the *New York Times*, “[n]ot since the Supreme Court’s resistance to the New Deal crumpled in the late 1930’s has the court been so hostile to the exercise of federal power.”¹⁵ Of course, the federalism coin is two-sided. On the one side, a bust of federal power protrudes, while on the other, the contours of state power are etched. Nonetheless, the two sides are not independent of one another, and in order to understand the meaning of the Court’s federalism jurisprudence for states, it is essential to get a grasp on the impact of the Court’s decisions on the national government—especially in Congress. Thus, understanding the meaning of the Court’s federalism decisions for states requires a proper understanding of the relationship and interconnections among the Court’s constitutional interpretations, congressional decision-making, and the role of states in the national lawmaking process.

The first section of this essay briefly explores the target of the Rehnquist Court’s federalism jurisprudence and argues that the main thrust of the Court’s federalism doctrine has been to limit federal legislative powers, as opposed to building up state powers. However, the effectiveness of the Court’s attempts to limit federal powers remains uncertain. The second section then explores the meaning of the Court’s actions for states and contends that the Court’s decisions are not unilaterally bolstering state powers, but that the Court’s jurisprudence may provide state and local governments leverage against the federal government if they assert themselves appropriately. The final section examines the limitations of the leading theoretical explanations of the Rehnquist Court’s federalism decisions, most prominently manifested in the legal academy by the political safeguards versus judicial safeguards debate.

I. FEDERALISM, THE REHNQUIST COURT, AND CONGRESS

Although many commentators have discussed both sides of the federalism coin, for the most part, the Rehnquist Court appears to be more focused on limiting congressional powers than on bolstering

¹³ 528 U.S. at 91–92.

¹⁴ 531 U.S. at 374 (2001).

¹⁵ Linda Greenhouse, *Will the Court Reassert National Authority?*, N.Y. TIMES, Sept. 30, 2001, Section 4, at 14.

state powers, suggesting to some that the Court is really engaged in a separation-of-powers battle. In the *Washington Post*, for example, Suzanna Sherry asserted that “not since the New Deal has the Supreme Court so consistently set itself, and the Constitution, against Congress.”¹⁶ After the Court handed down its decision in *Board of Trustees of the University of Alabama v. Garrett*,¹⁷ Linda Greenhouse wrote an article in the *New York Times* entitled simply: *The High Court’s Target: Congress*.¹⁸ In their assessment of the Court’s commerce power and Section 5 cases in the *Michigan Law Review*, law professors Ruth Colker and James J. Brudney have argued that the Court is “[d]issing Congress.”¹⁹

A simple count of the legislation struck down by the Court supports these claims. For instance, from 1952 through the end of the 1993 term, the Supreme Court struck down forty-four federal laws and 355 state and local laws, or about one federal law and seven state and local laws per term. On the other hand, from the 1994 term through the 2000 term, the Court struck twenty-four federal laws and twenty-five state and local laws—more than three federal statutes and three state and local laws per term.²⁰ Thus, while the Court has substantially increased its constitutional scrutiny of federal legislation, it remains fairly vigilant over state and local laws.

In addition to the raw number of federal statutes being struck down, the qualitative nature of the Court’s federalism jurisprudence also suggests a stronger focus on Congress than the states. The commerce power and Section 5 decisions draw judicially imposed lines around explicit grants of power to Congress. Even the Tenth Amendment decisions strike a stern tone regarding Congress’s attempts to commandeer states by making them implement federal power, while also paying homage to state sovereignty. Eleventh Amendment jurisprudence, while seeking to protect state immunity from civil lawsuits, is coupled with strong judicial scrutiny over the scope of Congress’s power to pass the statutes that provide the

¹⁶ Suzanna Sherry, *Some Targets Were Larger Than Others*, WASH. POST, July 4, 1999, at B4.

¹⁷ 531 U.S. 356 (2001).

¹⁸ Linda Greenhouse, *The High Court’s Target: Congress*, N.Y. TIMES, Feb. 25, 2001, Section 4, at 3.

¹⁹ Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80 (2001).

²⁰ These statistics were reported by Jeffrey Segal on the American Political Science Association’s Law and Courts email listserve, March 1, 2002, and were based on analysis from the *United States Supreme Court Database*. See Posting of Jeffrey Segal, JSegal@notes.cc.sunysb.edu, to lawcourts-l@usc.edu (Mar. 1, 2002) (on file with author).

bases for those suits.

Although the Supreme Court's main target appears to be the limitation of congressional powers, it is not clear how effective the Court's decisions have been at achieving that goal. First, Congress might have alternative constitutional authority, such as its so-called spending power, for enacting legislation similar to much of that invalidated by the Court. Second, the legislation struck down has not been of such a nature as to capture the imagination of the public or the Republican majority in Congress, and as a result, members of Congress have not confronted the Court because most do not sense a serious threat to their own policy goals.²¹ In fact, even conservative Republicans have continued to introduce legislation such as various tort reform bills that would intrude on traditionally state-reserved powers. In the wake of Trent Lott's removal as Senate Majority Leader, there has also been discussion that the Hate Crime Bill²² will be reconsidered—a statute that is clearly suspect under the Court's commerce power jurisprudence established in *United State v. Lopez*²³ and in *United States v. Morrison*.²⁴ This would suggest that while the Court's decisions have targeted Congress, members of Congress do not necessarily perceive their own powers to have diminished. This in turn indicates that, *standing alone*, the Court's decisions have not, will not, and perhaps cannot reduce national powers and augment state authority.

That the Court's decisions have not automatically resulted in an immediate rollback of federal power or a constitutional showdown is not all that surprising when one considers the impact of Supreme Court decisions and the nature of congressional behavior more generally. In order for the Rehnquist Court's federalism decisions to have teeth and to be implemented, other governmental institutions must choose to follow them—after all, the Court's decisions are not self-executing and usually require the cooperation

²¹ See Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L.J. 435, 436 (2001); Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L.J. 479 (2001).

²² See Hate Crimes Prevention Act of 2001, H.R. 74, 107th Cong. § 4 (2001) (prohibiting acts of violence that are motivated by the victim's race, religion, or national origin).

²³ 514 U.S. 549, 567 (1995) (holding that Congress did not have authority under the Commerce Clause to make it a federal offense to knowingly possess a firearm within a school zone because the possession of a gun cannot be said to affect interstate commerce).

²⁴ 529 U.S. 598, 617 (2000) (finding that, in passing legislation which provided for civil recovery for victims of violent crimes that were motivated by gender, Congress exceeded its power under the Commerce Clause because these crimes are not economic activities and therefore cannot substantially affect interstate commerce).

of the other branches of government.²⁵

Members of Congress may not easily accept externally imposed limitations to congressional power. Moreover, constitutional arguments over the distribution of governmental powers are not on every lawmaker's checklist during the legislative process. Rather, congressional decision-making and agendas are most heavily influenced by electoral concerns, individual conceptions of representation, party leadership, personal ideology, and the desire to make good public policy.²⁶ Members of Congress want to be on the "right side" of issues in the eyes of their constituents and voters, and therefore, engage in "position taking" calculated to achieve that goal.²⁷ Constitutional issues are not likely to figure into that calculation, as they are usually seen as somewhat esoteric, and in any event, they are often viewed as legal issues appropriately addressed in the judiciary.²⁸ Consequently, the Rehnquist Court's federalism jurisprudence is not a slam dunk for state autonomy or for state and local power vis-à-vis the federal lawmaking process. Somehow then, the Court's decisions must resonate in Congress.

Members of Congress do sometimes engage in constitutional debates and consider constitutional limitations on their own powers. While some in Congress are eager to deliberate over constitutional issues, often times there must be pressure from external sources to make constitutional issues compete with those factors that usually influence congressional behavior.²⁹ One such external source is a realistic threat that the Court will use judicial review to invalidate legislation once it is enacted into law. Often times, opponents of legislation in Congress use the threat that the Court will strike down legislation to force constitutional debate, to influence the

²⁵ See generally CHARLES A. JOHNSON & BRADLEY C. CANON, *JUDICIAL POLICIES: IMPLEMENTATION AND IMPACT* (2d ed. 1999); GERALD N. ROSENBERG *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

²⁶ See generally R. DOUGLAS ARNOLD, *THE LOGIC OF CONGRESSIONAL ACTION* (1990); RICHARD F. FENNO, JR., *CONGRESSMEN IN COMMITTEES* (1995); RICHARD F. FENNO, JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS* (1978); JOHN W. KINGDON, *AGENDAS, ALTERNATIVES AND PUBLIC POLICIES* (2d. ed. 1997); JOHN W. KINGDON, *CONGRESSMEN'S VOTING DECISIONS* (3d. ed. 1989); DAVID R. MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* (1974).

²⁷ See Whittington, *supra* note 21, at 512.

²⁸ See generally Donald G. Morgan, *CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY* (1966); Bruce Peabody, *Congressional Attitudes Toward Constitutional Interpretation*, in *CONGRESS AND THE CONSTITUTION* (Neal Devins & Keith Whittington eds., forthcoming).

²⁹ See J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS* (forthcoming).

drafting of legislation, or to justify their opposition to a bill.³⁰

One such example involves attempts to pass campaign finance reform in the 1990s. There, Senator Mitch McConnell (R-KY), among others, noted that the campaign finance bill created constitutional problems.³¹ His arguments had support in large part because of the Court's decisions in *Buckley v. Valeo*³² and its progeny. While the McCain-Feingold bill eventually passed, it did so only after long delays and much deliberation, in addition to careful draftsmanship with an eye toward satisfying *Buckley* and the Court's free speech jurisprudence.³³

It is possible that the renewed threat posed by the Supreme Court's federalism decisions may be used to encourage more federalism debate in Congress. This was certainly the case with the hate crimes legislation introduced and considered in every United States Congress since the mid 1990s.³⁴ Both the House and Senate Judiciary Committees have held hearings over that legislation,³⁵ and much of the debate in those hearings has centered around the constitutionality of the legislation under the Commerce Clause after the Court's *Lopez* decision. Federalism issues have also been raised during the consideration of other legislation—such as the Religious Liberty Protection Act³⁶ and tort reform legislation,³⁷—to a much greater extent than those issues were debated prior to the Rehnquist Court's renewed federalism threat. In fact, debate over constitutional federalism principles was virtually nonexistent prior

³⁰ *Id.*

³¹ See 146 CONG. REC. S7647 (daily ed. July 26, 2000) (statement of Sen. McConnell).

³² 424 U.S. 1 (1976) (holding that the most of the provisions of the Federal Election Campaign Act of 1971 regarding contributions were constitutional, but that some of the expenditure provisions violated the First Amendment).

³³ See, e.g., *Constitutional Issues Raised by Recent Campaign Finance Legislation Restricting Freedom of Speech Before the House Subcommittee on the Constitution of the Comm. on the Judiciary*, 107th Cong. (2001).

³⁴ See, e.g., Hate Crimes Prevention Act of 1997, H.R. 3081, 105th Cong. (1997), available at <http://thomas.loc.gov>; Hate Crimes Prevention Act of 1998, S. 1529, 105th Cong. (1998), available at <http://thomas.loc.gov>.

³⁵ See *Hearing on H.R. 3081 Before the House Comm. on the Judiciary*, 105th Cong. (1998) (statement of John C. Harrison, Associate Professor of Law, University of Virginia), available at <http://thomas.loc.gov>.

³⁶ See Religious Liberty Protection Act of 1999, H.R. 1691, 106th Cong. (1999), available at <http://thomas.loc.gov>; *Testimony of Douglas Laycock Before the Senate Judiciary Committee*, available at 1999 WL 699733 (Sept. 9, 1999) (asserting that the Religious Liberty Protection Act of 1999 does not violate federalism principles).

³⁷ See *Statement of the National Conference of State Legislatures Before the House Committee on the Judiciary of the U.S. House of Representatives*, available at 1997 WL 179449 (Apr. 10, 1997) (arguing that national tort reform would interfere with the work that state legislatures had been doing).

to the Rehnquist Court's federalism decisions.³⁸

In addition to the lawmakers within Congress who might use recent doctrine to debate constitutional issues, interest groups are often significant external actors who bring constitutional issues to Congress. Importantly, interest groups often use Court decisions as a basis for pursuing agendas and framing issues in Congress. For instance, in the area of religious liberties, a broad coalition of religious and civil liberties groups have participated in Supreme Court litigation and lobbied Congress to pass legislation in response to Supreme Court decisions. The passage of the Religious Freedom Restoration Act³⁹ (involving Section 5 of the Fourteenth Amendment) in response to *Smith v. Fair Employment and Housing Commission*,⁴⁰ and the consideration of the Religious Liberty Protection Act of 1999,⁴¹ (involving the commerce power), proposed in response to *City of Boerne v. Flores* were both heavily influenced by an almost identical cast of organized groups.⁴² While the Rehnquist Court may not single-handedly limit congressional power or prevent federal infringement on state authority, its decisions may provide some context for constitutional federalism debates in Congress. As the next section will examine in more detail, the current federalism jurisprudence may provide some leverage for state and local interests in Congress.

II. WHAT DOES THIS MEAN FOR STATES?

The previous section argued that the Court's federalism decisions seem largely targeted at limiting the scope of federal power, but the impact of those decisions is far from a foregone conclusion. The Court's decisions and doctrines, however, have the potential of being used in Congress to generate federalism debate and influence the drafting of legislation. Thus, the Court's jurisprudence may not guarantee state autonomy, dramatic increases in state powers, or insulation from federal intrusion into policy areas traditionally reserved for states, but it does create an opportunity to increase the presence of state and local governments in the national political and

³⁸ See PICKERILL, *supra* note 29.

³⁹ Pub. L. No. 103-41, 107 Stat. 1488 (codified as amended in scattered sections of 42 U.S.C.).

⁴⁰ 30 Cal. Rptr.2d 395 (1996).

⁴¹ H.R. 1691, 106th Cong. (1999), *available at* <http://thomas.loc.gov>.

⁴² For a detailed analysis of the role of interest groups in bridging the Court and Congress in the area of religious liberty, see KEVIN R. DEN DULK & J. MITCHELL PICKERILL, *BRIDGING THE LAWMAKING PROCESS* (2003).

lawmaking process. The Court's federalism decisions provide potential and substantial leverage for state and local governments in the national policymaking process. However, that potential is most likely to be translated into reality if and when states assert themselves by leveraging federalism in Congress. There are several ways in which state and local interests might exploit this leverage.

First, of course, opposition to the expansion of federal power or the intrusion into state policy areas can come from within Congress. Until the Rehnquist Court's federalism renaissance, neo-federalists in Congress had to rely mostly upon philosophical arguments when opposing legislation or the expansion of federal policy, and they were largely unsuccessful in their attempts. Now, however, they have a more instrumental, and politically pressing, basis for those arguments—the Court is likely to strike expansive legislation down on federalism grounds. This instrumental argument is more likely to be viewed as politically pressing to most other members of Congress than more esoteric, philosophically-oriented diatribes on federalism.

Other important sources for bringing constitutional federalism concerns to Congress are interest groups that represent state and local interests. Through various governmental interest groups, such as the National Governor's Association, the National Association of Attorneys General, the National League of Cities and the National Conference of State Legislatures, among many others, state and local concerns are well represented in Congress.⁴³ These groups gained prominence and influence in the 1970s and successfully lobbied Congress to cooperate with state and local governments in the implementation of federal social policies. During that period of time, particularly in light of President Nixon's "New Federalism," these groups sought to protect state and local interests through the increase of bloc grants and fewer federal mandates over the implementation of government programs at the state and local levels.

In the current political and constitutional context, the Court's federalism decisions may provide new bargaining power for those who advocate state and local interests. However, the Court's decisions alone will not amount to the "federalism revolution" advocated by some and feared by others. Attention now must turn

⁴³ For in depth studies of governmental interest groups in Congress, see ANNE MARIE CAMMISSA, *GOVERNMENTS AS INTEREST GROUPS* (1995); DONALD H. HAIDER, *WHEN GOVERNMENTS COME TO WASHINGTON* (1974).

to how those decisions are implemented in Congress and by state and local governments. Neo-federalists in Congress and in pressure groups that represent state and local interests must seize the moment if the Court's decisions are to contribute to real cutbacks in federal power to the benefit of state and local concerns. Additionally, the connection between the Court's federalism jurisprudence and federal legislation must also be made in the context of Republican-sponsored legislation that intrudes on traditional state powers. These will include, without limitation, the numerous tort reform bills (involving personal injury, product liability, medical malpractice etc.), the Religious Liberty Protection Act and related bills, new unfunded mandates, new federal criminal laws, and federal regulation of education. Thus, proponents of states' rights and limited federal government will still have to wage their federalism battles in the political and policymaking processes, but the Court's jurisprudence provides an important additional weapon in that fight.

III. BROADER LESSONS?

There are broader lessons to take from this discussion. The leading theoretical debate in the legal academy over the Court's role in federalism matters pits proponents of political safeguards of federalism against those who advocate judicial safeguards of federalism. Both of these theories are complex and nuanced, but in short, the political safeguards approach, developed and advocated by Herbert Wechsler, Jesse Choper, Mark Tushnet and Larry Kramer, among others, argues that the Court is incapable of policing the boundaries of federal-state power and that federalism is a political construct that is best left to the political branches.⁴⁴ In this vein, states have adequate methods of protecting their interests without judicial aid, and the Court should save its limited political capital and remain a spectator in the federalism game. The judicial safeguards approach, advocated by John Yoo, Steven Calbresi and Marci Hamilton, among others, argues that national political institutions cannot be trusted to limit their own powers, that

⁴⁴ See JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (1999); Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); HERBERT WECHSLER, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, in *PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW* 49 (1961).

nothing in the Constitution suggests that the Court does not have a role in interpreting federalism provisions, and that the political protections available for state and local interests are vastly overstated by the political safeguards camp.⁴⁵

While influential within the legal academy and even within the Court itself, neither of these theoretical approaches is particularly satisfying when one considers the dynamic nature of lawmaking and constitutional debate in the United States' multi- and inter-institutional political system. While the two theories differ on the normative desirability of the Court's federalism decisions, they are both based on the same misguided empirical premise that the Court's exercise of judicial review over federalism will automatically deprive the majority in Congress of its will and enhance state sovereignty. This is unlikely.

Instead, the Court should be viewed as a single but unique institution in the national lawmaking and political process—a continuous and interactive process involving multiple institutions by design. The justices' motivations and incentives to consider constitutional issues—and their methods in so doing—are different from others in that process. As such, the Court offers a unique perspective and makes distinctive contributions to what Louis Fisher calls “[c]onstitutional dialogues” among governmental institutions.⁴⁶ In the past decade, numerous legal and political science scholars have shown how the Court and Congress both contribute to constitutional interpretations and constructions.⁴⁷ Consequently, the Court is neither the end-all-be-all denier of national democratic preferences as political safeguards advocates worry nor the savior of states as judicial safeguards proponents claim. While the boundaries of federalism will be debated, established, and re-established in the political process, the Court and states should both be important actors in that process. The

⁴⁵ See Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752 (1995); Steven G. Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 24 (2001); Marci A. Hamilton, *The Elusive Safeguards of Federalism*, 574 ANNALS OF THE AM. ACAD. OF POL. & SOC. SCI. 93 (2001); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

⁴⁶ LOUIS FISHER, CONSTITUTIONAL DIALOGUES (1988).

⁴⁷ See, e.g., SUSAN R. BURGESS, CONTEST FOR CONSTITUTIONAL AUTHORITY (1992); ROBERT A. BURT, THE CONSTITUTION IN CONFLICT (1992); NEAL DEVINS, SHAPING CONSTITUTIONAL VALUES (1996); LOUIS FISHER & NEAL DEVINS, POLITICAL DYNAMICS OF CONSTITUTIONAL LAW (1992); WAYNE D. MOORE, CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE (1996); TERRI JENNINGS PERETTI, IN DEFENSE OF A POLITICAL COURT (1999); KEITH E. WHITTINGTON, CONSTITUTIONAL CONSTRUCTION (1999).

2003]

Rehnquist Court and the States

833

Court is not at the center of the federalism universe, and scholars should not treat it as such. The Court's federalism jurisprudence will not be self executing; it does, however, provide new context and leverage for state and local interests in the national policymaking process if they choose to utilize and to not squander the opportunity. Nonetheless, the debate over the balance of federal-state power will continue in the national political and policymaking process wherein the Court and states have greater opportunity to be part of the debate.