THE ASSUMPTIONS OF FEDERALISM

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INTRODUCTION

When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism. Over the past decade, the Supreme Court has limited the scope of Congress's powers and has greatly expanded the protection of state sovereign immunity. In 1995, for the first time in sixty years, the Supreme Court declared a federal law unconstitutional as exceeding the scope of Congress's Commerce Clause power.[1] For only the second and third times in sixty years—and the first time, the case was expressly overruled—the Court invalidated a federal law for violating the Tenth Amendment.[2] At the same time, the Court has used federalism to enlarge the states' sovereign immunity in federal court for violations of federal statutes.[3] These decisions have spawned hundreds of lower

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1. United States v. Lopez, 514 U.S. 549 (1995); *see also* United States v. Morrison, 529 U.S. 598 (2000).

2. Printz v. United States, 521 U.S. 898 (1997); New York v. United States, 505 U.S. 144 (1992). The earlier decision was *National League of Cities v. Usery*, 426 U.S. 833 (1976), which was overruled in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

3. *See, e.g.*, Fed. Mar. Comm'n v. S.C. Ports Auth., 535 U.S. 743 (2002) (finding that state governments cannot be sued in federal agency adjudicatory proceedings); Alden v. Maine, 527 U.S. 706 (1999) (holding that state governments cannot be sued in state court, even on federal claims, without their consent).

court decisions concerning federalism and have ensured that federalism will be a constant issue before the Supreme Court for years to come.

Virtually all of the decisions protecting federalism were by a 5-4 margin, with the majority comprised of Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas. In the last few years of the Rehnquist Court, however, the federalism revolution waned as the Court consistently ruled in favor of federal power.[4] While the Court did not overrule or undercut its earlier decisions, the pendulum did not swing any further in the direction of the federalism revolution. Strikingly, some of its decisions in favor of federal power—such as *Tennessee v. Lane*[5] and *Central Virginia Community College v. Katz*[6]—were 5-4 decisions with Justice O'Connor in the majority. *Nevada Department of Human Resources v. Hibbs*[7] was a 6-3 decision, with both Chief Justice Rehnquist and Justice O'Connor in the majority.

In this Article, I conclude that the Rehnquist Court's federalism decisions rested on unsupported assumptions. However, it must be recognized that the federalism decisions they replaced had rested on contrary, but equally unsupported, assumptions. Constructing a meaningful and desirable theory of federalism requires reasoning from the underlying values of federalism and not relying on unwarranted assumptions.

Part I of the Article argues that, throughout American history, the Supreme Court has shifted between two models of federalism: (1) federalism as empowerment and (2) federalism as limits. The former seeks to empower government at all levels to deal with society's problems. A core feature of federalism as empowerment is that it broadly defines the scope of federal power to equip the federal government with authority to take socially desirable actions. Initially articulated by John Marshall,[8] this was the vision of federalism during the nineteenth century and from 1937 until the 1990s. The alternative vision sees federalism as a means of limiting federal power, especially to protect the authority of state governments. This was the vision of

4. *See, e.g.*, Gonzales v. Raich, 125 S. Ct. 2195 (2005) (finding that the federal Controlled Substances Act does not exceed the scope of Congress's authority under the Commerce Clause when it is applied to marijuana grown within a state for personal medicinal use or distribution without charge); Sabri v. United States, 541 U.S. 600 (2004) (holding that Congress may prohibit bribes to government officials who work for entities receiving federal funds).

5. 541 U.S. 509 (2004) (holding that state governments can be sued for violating Title II of the Americans with Disabilities Act when the fundamental right of access to the courts is implicated).

6. 126 S. Ct. 990 (2006) (stating that sovereign immunity does not apply in Bankruptcy Court proceedings and that Congress may constitutionally authorize suits against state governments in Bankruptcy Court proceedings).

7. 538 U.S. 721 (2003) (finding that state governments may be sued for violating the family leave provisions of the Family and Medical Leave Act).

8. *See, e.g.*, Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).

federalism from the late nineteenth century until 1937.

Part II argues that, until its last few years, the Rehnquist Court followed the latter vision of federalism as limits. This was manifest in three sets of doctrines. First, the Court limited Congress's powers under the Commerce Clause and under Section 5 of the Fourteenth Amendment. Second, the Court revived the Tenth Amendment as a limit on federal power by holding that Congress may not compel state legislative or regulatory activity. Third, the Court greatly expanded state sovereign immunity by limiting Congress's power to authorize suits against state governments and by holding that states may not be sued in state courts or federal agency proceedings.

Part III argues that the Rehnquist Court's federalism decisions rest on a series of unsupported assumptions. In particular, I identify seven assumptions:

1. It is for the judiciary to impose limits on Congress in the name of protecting federalism and the authority of state governments; the political process, with minimal judicial review, is not adequate for this purpose.
2. There is a meaningful and desirable distinction between economic and noneconomic activities in terms of Congress's authority to regulate commerce among the states.
3. Federal laws that compel state and local governments to comply with federal mandates undermine accountability by confusing voters as to whom to hold responsible.
4. Congressional expansion of rights is not "enforcement" of rights within the meaning of Section 5 of the Fourteenth Amendment.
5. Sovereign immunity is a constitutional principle beyond the scope of the Eleventh Amendment, and it outweighs in importance government accountability as a constitutional principle.
6. The desire to protect the authority of state governments does not require a narrow preemption doctrine.
7. The social desirability of federal legislation does not matter in evaluating whether laws violate principles of federalism.

These assumptions have many striking characteristics. All are reasonable, but the opposite assumptions are equally reasonable. In fact, the prior era of Supreme Court decisionmaking largely rested on the opposite assumptions. Moreover, none of these assumptions provides a sound basis upon which to rest federalism decisions. Some are empirical in nature, yet they lack an empirical foundation. Some are based on definitions. Others are based on value judgments that are not justified.

Part IV argues that getting past these assumptions requires a different approach to federalism, one that reasons from the underlying goals of federalism. Part of the reason for the heavy reliance on assumptions is that the traditional values asserted for federalism—preventing tyranny and protecting states as laboratories for experimentation—are not useful and have nothing to

do with the actual decisions. Two values should be key: advancing liberty and enhancing effective government. Other values include: efficiency, as sometimes it is more efficient to have action at the national level and sometimes at the local; participation, as sometimes national action better engages involvement and other times localism does so; community empowerment, which is sometimes a benefit of decentralization; and economic gains, as sometimes national action is needed to deal with externalities. Constructing a meaningful theory of federalism must be based on these values and not on unsupported assumptions. My goal in this Article is not to construct such a theory, but rather to point to what its foundation must be.

I. THE MODELS OF FEDERALISM

It is, of course, familiar to note that over the course of American history, the Supreme Court has shifted between two models of federalism. For the first century of American history, the Court expansively defined federal power and did not once declare a federal law unconstitutional as exceeding the scope of Congress's powers or as violating the Tenth Amendment.[9] From the late nineteenth century through 1936, the Court shifted to a very different view of federalism, narrowly defining the scope of Congress's spending power and invalidating laws as violating a zone of activities reserved to the states by the Tenth Amendment.[10] From 1937 until the early 1990s, the Court shifted back to upholding federal power; not once during this time was any law struck down for exceeding the scope of Congress's commerce power, and only once was a law found to violate the Tenth Amendment, but that case was overruled nine years later.[11] Since the early 1990s, the Court again has used federalism to limit federal powers.

Less obvious, though, is that these varying approaches to federalism reflect two very different underlying views about the structure of American government. One, which I will call federalism as empowerment, sees the genius in having multiple levels of government and in having multiple actors to deal with social problems. If one level of government fails to require cleanup of nuclear wastes or to protect women from violence, another can step in. The benefit of having many levels of government is that there are multiple power

9. *See, e.g.*, *id.* (broadly defining the scope of Congress's commerce power and rejecting the Tenth Amendment as a limit on it).

10. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (narrowly interpreting the Commerce Clause); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating a federal law prohibiting shipment in interstate commerce of goods made by child labor as violating the Tenth Amendment); United States v. E.C. Knight Co., 156 U.S. 1 (1895) (narrowly interpreting the Commerce Clause).

11. Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating application of the Federal Fair Labor Standards Act to state and local governments), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

centers capable of acting. Federal and state courts, from this view, both should be available to protect constitutional rights. Federal, state, and local legislatures should have the authority to deal with social problems, such as unsafe nuclear wastes, guns near schools, and criminals owning firearms.

Seeing federalism as empowerment means a broad conception of Congressional power unconstrained by the concerns of federalism. Congress's power under provisions such as the Commerce Clause and Section 5 of the Fourteenth Amendment are expansively interpreted, limited primarily by the political process and the judicial protection of other parts of the Constitution, such as separation of powers and individual rights. The Tenth Amendment is not interpreted as an independent basis for invalidating federal laws.

Seeing federalism as empowerment also means maximizing the availability of both federal and state courts to hear constitutional claims. Rather than using federalism to limit federal court authority, the empowerment view uses federalism to open the doors of both federal and state courts to those asserting federal, and especially constitutional, claims.

Finally, viewing federalism as empowerment, rather than as limits, leads to an enhancement in state and local power. The doctrine of preemption is repeatedly used to limit actions by these levels of government in the name of federalism. Removing the shackles of federalism would produce a much more limited preemption doctrine, with courts finding preemption only when it is based on an express congressional declaration of a need to serve an important governing interest.

In contrast, the second model views federalism as primarily about limits on government power. From this perspective, the Constitution is preeminently about restraining government authority. The federal government is meant to be one of limited powers, and it is the role of the federal courts to enforce significant restrictions. Also, under this view, states are sovereign entities; as Justice Kennedy expressed it, "[t]he Framers split the atom of sovereignty."[12] The federal courts must protect the sovereignty of states from intrusion by the federal government.

Seeing federalism as limits, rather than empowerment, has radically different implications. For example, under a view of federalism as limits, it is the role of the Court to narrowly define the scope of Congress's powers under key provisions such as the Commerce Clause and Section 5 of the Fourteenth Amendment and to leave governance to the states. Indeed, the failure of the Court to do so is seen as a threat to the entire American system of government. In the early-twentieth-century federalism decisions, the Court declared that enforcing limits was "essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power, and for all practical purposes we should have a completely centralized

12. U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

government."[13]

Under this view of federalism, the Tenth Amendment is seen as reserving a zone of activities for the states upon which Congress cannot encroach. This, too, is seen as essential to the maintenance of the constitutional system. For example, in declaring unconstitutional a federal law prohibiting the shipment in interstate commerce of goods made by child labor, the Supreme Court declared:

> The far reaching result of upholding the act cannot be more plainly indicated than by pointing out that if Congress can thus regulate matters entrusted to local authority by prohibition of the movement of commodities in interstate commerce, all freedom of commerce will be at an end, and the power of the states over local matters may be eliminated, and thus our system of government be practically destroyed.[14]

This view of federalism as limits also sees a need to significantly restrict the authority of federal courts to protect the domain of state judiciaries. Typical of this approach are cases like *Younger v. Harris* that proclaim the importance of "Our Federalism" as a major limit on federal judicial authority.[15] Also, this approach provides state governments with sovereign immunity so as to protect their dignity and finances.

Those who defend this view of federalism see enforcement of limits as crucial to prevent government tyranny that can occur with centralization of power.[16] There is also the sense that state and local governments are closer to the people and are thus more likely to be responsive to their needs.[17] Additionally, states are seen as laboratories for experimentation, which ultimately benefits all of society.[18]

It is tempting to look for a middle ground between these two views, but they really are competing conceptions of federalism. One seeks to broadly define federal power; the other wants to narrow it to protect the prerogatives of state governments. One sees the protection of state sovereignty as largely left to the political process;[19] the other sees a crucial judicial role in safeguarding state governments. One sees the Tenth Amendment as "but a truism"[20]—a reminder that Congress must point to express or implied authority in order to act; the

13. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 548 (1936).

14. *Hammer*, 247 U.S. at 276.

15. 401 U.S. 37, 44 (1971) (stating that federal courts may not enjoin pending state court criminal proceedings because of concerns of comity and federalism).

16. Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After* Garcia, 1985 SUP. CT. REV. 341, 380-95.

17. *See* DAVID SHAPIRO, FEDERALISM: A DIALOGUE 91-92 (1995).

18. The phrase "laboratories for experimentation" seems to originate with Justice Brandeis in *New State Ice Co. v. Leibmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting).

19. *See, e.g.*, Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

20. United States v. Darby, 312 U.S. 100, 124 (1941).

other views the Tenth Amendment as an independent limit on federal power to be enforced by the courts. One sees sovereign immunity as antithetical to a Constitution based on accountability and providing remedies for wrongs inflicted by government; the other views sovereign immunity as essential to safeguard the dignity and finances of state governments. One seeks to expand the availability of the federal courts to remedy constitutional violations; the other wants to limit federal court jurisdiction to protect the power of state courts.

For the first century of American history and again from 1937 until the early 1990s, the Supreme Court embraced federalism as empowerment. In contrast, from the late nineteenth century through 1936 and again since the 1990s, the Court embraced federalism as limits.

II. THE REHNQUIST COURT AND FEDERALISM AS LIMITS

To be more specific, the Rehnquist Court's federalism decisions, particularly those in the decade between 1992 and 2002, embraced federalism as limits in several ways. Although the decisions are familiar, I want to briefly review them in this Part for two reasons: (1) to establish the proposition asserted above that the Rehnquist Court has taken a view of federalism as limits; and (2) to facilitate the discussion in the next Part about the underlying assumptions of the Rehnquist Court's federalism decisions.

A. *Limiting the Scope of Congress's Powers*

From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress's Commerce Clause authority. Countless criminal and civil laws were enacted under this constitutional power; it was by far the most frequent source of authority for federal legislation. But this changed with the Rehnquist Court.

In *United States v. Lopez*,[21] the Supreme Court declared unconstitutional the Federal Gun-Free School Zones Act, a federal law that made it a crime to have a firearm within 1000 feet of a school. Alphonso Lopez, an 11th grader at a San Antonio high school, was caught with a gun at school. He was convicted under the law, but the Supreme Court reversed the conviction and held that the Gun-Free School Zones Act exceeded the scope of Congress's Commerce Clause authority.

Chief Justice Rehnquist wrote for the Court in a 5-4 decision and began by emphasizing that Congress's powers must be interpreted in a limited manner. The Court held that, under the Commerce Clause, Congress may regulate only: (1) "the channels of interstate commerce"; (2) "the instrumentalities of

21. 514 U.S. 549 (1995).

interstate commerce" and "persons or things in interstate commerce"; and (3) activities that have a substantial effect on interstate commerce.[22] The Court found that the federal law prohibiting guns near schools did not constitute any of these types of regulation and thus was unconstitutional.

In *United States v. Morrison*,[23] the Court followed *Lopez* and declared unconstitutional the civil damages provision of the Violence Against Women Act. The provision created a federal cause of action for victims of gender-motivated violence.[24] The case involved a woman, Christy Brzonkala, who allegedly was raped by football players at Virginia Tech University. The football players were not criminally prosecuted and ultimately avoided even university discipline. Brzonkala sued under the Violence Against Women Act. The United States government intervened and defended the law on the ground that violence against women has a substantial effect on the national economy. In enacting the Violence Against Women Act, Congress had held lengthy hearings and found that gender-motivated violence costs the American economy billions of dollars a year.

The Supreme Court expressly rejected these findings as insufficient to sustain the law. Chief Justice Rehnquist emphasized that Congress was regulating noneconomic activity that has traditionally been dealt with by state laws. Moreover, the Court stressed that there was no jurisdictional requirement in the statute necessitating proof of an effect on interstate commerce. The Court said that Congress cannot justify regulation in this area by finding that the cumulative impact of an activity has a substantial effect on interstate commerce. The Court thus concluded: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[25]

Another area where the Court has dramatically limited the scope of Congress's powers concerns authority to legislate under Section 5 of the Fourteenth Amendment. This provision empowers Congress to enact laws to enforce the Fourteenth Amendment.[26] In 1997, in *City of Boerne v. Flores*,[27] the Court significantly restricted this power by holding that Congress may not use its Section 5 powers to expand the scope of rights or to create new rights.

In *City of Boerne v. Flores*, the Court, in a 6-3 decision, declared the Religious Freedom Restoration Act (RFRA) unconstitutional as exceeding the scope of Congress's Section 5 powers. The Act was adopted in 1993 to

22. *Id.* at 558-59.

23. 529 U.S. 598 (2000).

24. 42 U.S.C. § 13981 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

25. *Morrison*, 529 U.S. at 617-18.

26. U.S. CONST. amend. XIV, § 5.

27. 521 U.S. 507 (1997).

overturn the Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*, which significantly lessened the protections of the Free Exercise Clause of the First Amendment.[28] *Smith* involved an Oregon law that prohibited the consumption of peyote, a hallucinogenic substance. Native Americans challenged this law, claiming that it infringed free exercise of religion because their religious rituals required the use of peyote. Under prior Supreme Court precedents, government actions burdening religion were upheld only if they were necessary to achieve a compelling government purpose.[29] The Supreme Court, in *Smith*, changed the law and held that the Free Exercise Clause cannot be used to challenge neutral laws of general applicability. The Oregon law prohibiting consumption of peyote was deemed neutral because it was not motivated by a desire to interfere with religion, and it was a law of general applicability because it applied to everyone.

In response to this decision, in 1993, Congress overwhelmingly adopted RFRA, which was signed into law by President Clinton. RFRA was express in stating that its goal was to overturn *Smith* and to restore the test that had been followed before that decision. The Act required courts considering free exercise challenges, including to neutral laws of general applicability, to uphold the government's actions only if they were necessary to achieve a compelling purpose. Specifically, RFRA prohibited the "[g]overnment" from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability" unless the government can demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[30]

City of Boerne v. Flores involved a church in Texas that was prevented from constructing a new facility because its building was classified as a historic landmark. The church sued under RFRA, and the city challenged the constitutionality of the law. The Court, with Justice Kennedy writing for the majority, held that the Act was unconstitutional. The Court held that under Section 5 of the Fourteenth Amendment, Congress may not create new rights or expand the scope of rights; rather, Congress is limited to laws that prevent or remedy violations of rights recognized by the Supreme Court, and these must be narrowly tailored—"proportionate" and "congruent"—to the constitutional violation.[31]

Justice Kennedy explained that Section 5 gives Congress the power to enact laws "to enforce" the provisions of the Fourteenth Amendment. He

28. 494 U.S. 872 (1990).

29. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963).

30. 42 U.S.C. § 2000bb-1 (1993), *invalidated by* City of Boerne v. Flores, 521 U.S. 507 (1997).

31. *See City of Boerne*, 521 U.S. at 508.

stated:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[32]

Congress thus is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court. Moreover, the Court said that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[33] Justice Kennedy's majority opinion then declared RFRA unconstitutional on the grounds that it impermissibly expanded the scope of rights and that it was not proportionate or congruent as a preventative or remedial measure.

This was a radical change in the law; no prior case had hinted at such a limit on Congress's powers under Section 5 of the Fourteenth Amendment. The decision opened the door to challenges to many federal laws. In three cases since *City of Boerne v. Flores*—*Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,[34] *Kimel v. Florida Board of Regents*,[35] and *Board of Trustees of the University of Alabama v. Garrett*[36]—the Supreme Court has reaffirmed that Congress under Section 5 cannot expand the scope of rights and that any federal law must be a "proportionate" and "congruent" measure to prevent and remedy constitutional violations. All three cases involved the issue of whether a federal law was a valid exercise of Congress's Section 5 powers and thus constituted a permissible basis for suing state governments, in light of the Court's holding that Congress may authorize suits against states when acting under Section 5 of the Fourteenth Amendment. In all three cases, the Court found that the federal laws at issue did not fit within the scope of Section 5 under *City of Boerne v. Flores*.

It is important to note one other aspect of the Court's Section 5 decisions: the Court has ruled that Congress cannot use this provision to regulate private conduct. In the *Civil Rights Cases* in 1883, the Supreme Court greatly limited Congress's ability to use its power under the Reconstruction Amendments to regulate private conduct.[37]

Over eighty years later, however, in *United States v. Guest*, five Justices, although not in a single opinion, concluded that Congress may outlaw private

32. *Id.* at 519.

33. *Id.* at 520; *see also* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 365 (2001).

34. 527 U.S. 627 (1999).

35. 528 U.S. 62 (2000).

36. 531 U.S. 356 (2001).

37. 109 U.S. 3 (1883).

discrimination pursuant to Section 5 of the Fourteenth Amendment.[38] *Guest* involved a 1964 version of the federal law that makes it a crime for two or more persons to "go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege . . . ."[39] The Court held that interference with the use of facilities in interstate commerce violated the law, whether or not such interference was motivated by a racial animus.

The majority opinion did not reach the question of whether Congress could regulate private conduct under Section 5 of the Fourteenth Amendment. However, six of the Justices—three in a concurring opinion and three in a dissenting opinion—expressed the view that Congress could prohibit private discrimination under its Section 5 powers. Justice Tom Clark, in a concurring opinion joined by Justices Hugo Black and Abe Fortas, said that "the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."[40] Likewise, Justice William Brennan—in an opinion that concurred in part and dissented in part and was joined by Chief Justice Earl Warren and Justice William Douglas—concluded that Congress may prohibit private discrimination pursuant to Section 5.[41]

But in *United States v. Morrison*,[42] the Supreme Court expressly reaffirmed the *Civil Rights Cases* and disavowed the opinions to the contrary in *United States v. Guest.* In *Morrison*, the Court held that the civil damages provision of the Violence Against Women Act was not constitutional as an exercise of Congress's Section 5 power. Chief Justice Rehnquist, writing for the Court, said that Congress under this authority may regulate only state and local governments, not private conduct. Chief Justice Rehnquist relied on "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[43] He said that the opinions in *United States v. Guest* indicating congressional power to regulate private conduct were only dicta.[44] Thus, the civil damages provision of the Violence Against Women Act was deemed to exceed the scope of Congress's Section 5 powers because it "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias."[45]

38. 383 U.S. 745 (1966).

39. 18 U.S.C. § 241 (1996). The language of the original 1964 statute can be found in *Guest*, 383 U.S. at 747.

40. *Guest*, 383 U.S. at 762 (Clark, J., concurring).

41. *Id.* at 777 (Brennan, J., concurring in part and dissenting in part).

42. 529 U.S. 598 (2000).

43. *Id.* at 621.

44. *Id*. at 622-24.

45. *Id.* at 626.

B. *The Expansion of Sovereign Immunity*

Another key change in the law from the Rehnquist Court has been the Supreme Court's significant expansion in the scope of state sovereign immunity. In *Alden v. Maine*,[46] the Court held that, because of state sovereign immunity, a state government may not be sued in state court, even on a federal claim, without its consent. *Alden* involved a claim by Maine probation officers that they were owed overtime pay under the Federal Fair Labor Standards Act. They sued in federal court, but their suit was dismissed because of the Eleventh Amendment. They then sued in state court. However, the Supreme Court, in a 5-4 decision, held that sovereign immunity broadly protects state governments and precludes suits against nonconsenting states in state courts.

Additionally, in a series of recent cases, the Court has greatly limited the ability of Congress to authorize suits against state governments in federal courts. In 1996, in *Seminole Tribe of Florida v. Florida*,[47] the conservative majority of the Court held that Congress may authorize suits against states only pursuant to laws enacted under Section 5 of the Fourteenth Amendment, which empowers Congress to adopt statutes to enforce that Amendment. As described above, in *City of Boerne v. Flores*,[48] the Court limited Congress's Section 5 powers to preventing or remedying violations of rights recognized by the Supreme Court; Congress cannot expand the scope of rights or create new rights.

The combination of *Seminole Tribe* and *City of Boerne* precluded many types of claims from being heard. The Court's 1999 decision in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*[49] held that state governments cannot be sued for patent infringement. In *Kimel v. Florida Board of Regents*,[50] the Court decided that state governments may not be sued for violating the Age Discrimination in Employment Act. In *Board of Trustees of the University of Alabama v. Garrett*,[51] the Court ruled that state governments may not be sued for employment discrimination in violation of section one of the Americans with Disabilities Act. In each case, the Court, in a 5-4 decision, concluded that Congress was expanding the scope of rights and that the laws could not be justified as narrowly tailored to preventing or remedying constitutional violations.[52]

46. 527 U.S. 706 (1999).
47. 517 U.S. 44 (1996).
48. 521 U.S. 507 (1997).
49. 527 U.S. 627 (1999).
50. 528 U.S. 62 (2000).
51. 531 U.S. 356 (2001).
52. However, in its most recent decisions in this area, the Court has held that state governments may be sued in some situations: for violating the provision of the Family and Medical Leave Act that requires that employees be given leave from work to care for sick family members, Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003); for

C. *Revival of the Tenth Amendment*

Another aspect of the Rehnquist Court's federalism revival has been its use of the Tenth Amendment as a limit on federal power. In the first third of the twentieth century, the Supreme Court held that the Tenth Amendment reserves a zone of activities for exclusive state control. In *Hammer v. Dagenhart*,[53] for example, the Court struck down a federal law prohibiting child labor on the ground that it violated the Tenth Amendment. After 1937, however, the Court rejected this view, and the Tenth Amendment was no longer seen as a limit on federal power; rather, it was just a reminder that Congress could not act unless there was express or implied constitutional authority.

Professor Laurence Tribe remarks that "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general—and the rights of states in particular—provided no judicially-enforceable limits on congressional power."[54] In 1976, the Court appeared to revive federalism as a limit on Congressional powers in *National League of Cities v. Usery*,[55] in which the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage. The Court, in an opinion by then-Justice Rehnquist, held that Congress could not regulate states in areas of "traditional" or "integral" state responsibility. But just nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[56] the Court expressly overruled *National League of Cities*. Justice Rehnquist, in a short dissent, wrote that he believed that his view would again triumph on the Court.

And indeed it did. In two decisions, the Rehnquist Court revived the Tenth Amendment as a constraint on Congress's authority. In *New York v. United States*,[57] the Court—for only the second time in fifty-five years and the first since the overruled *National League of Cities* decision—invalidated a federal law as violating the Tenth Amendment. The federal law at issue, the 1985 Low-Level Radioactive Waste Policy Amendments Act,[58] created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders. The Act provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive wastes received from other states. Additionally, and most controversially, to ensure effective state government action, the law provided that states would "take title" to any wastes within their borders that were not properly disposed of by January 1,

discriminating against people with disabilities with regard to the fundamental right of access to the courts, Tennessee v. Lane, 541 U.S. 509 (2004); and for violations of constitutional rights, United States v. Georgia, 126 S. Ct. 877 (2006).

53. 247 U.S. 251 (1918).

54. LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 378 (2d ed. 1988).

55. 426 U.S. 833 (1976).

56. 469 U.S. 528 (1985).

57. 505 U.S. 144 (1992).

58. 42 U.S.C. §§ 2021b-2021j (1988).

1996, and then would "be liable for all damages directly or indirectly incurred."[59]

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes. However, by a 6-3 margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."[60] Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states. Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly impose on states a requirement to implement federal legislation.[61] The Court concluded that it was "clear" that, because of the Tenth Amendment, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[62]

A few years later, in *Printz v. United States*,[63] the Court applied and extended *New York v. United States*. *Printz* involved a challenge to the federal Brady Handgun Violence Prevention Act,[64] which required the "chief law enforcement officer" of each local jurisdiction to conduct background checks before issuing permits for firearms.[65] The Court, in a 5-4 decision, found that the law violated the Tenth Amendment. Justice Scalia wrote for the majority and revived the phrase "dual sovereignty" to explain the structure of American government.[66] The Court concluded that Congress violated the Tenth Amendment in compelling states to implement federal mandates.

These, of course, are not the only federalism decisions of the Rehnquist Court. But they are the primary ones embodying the view of federalism as limits on government power. They provide a basis for Part III's examination of the assumptions underlying the Rehnquist Court's federalism decisions.

III. THE ASSUMPTIONS OF FEDERALISM AS LIMITS

In examining the Rehnquist Court's federalism decisions, it is striking that they rest on fundamental assumptions that the Court never justified. In identifying these assumptions, it is apparent that each is crucial, and none can

59. § 2021e(d)(2)(C)(i), *invalidated by* New York v. United States, 505 U.S. 144 (1992).

60. *New York*, 505 U.S. at 175.

61. *Id.*

62. *Id.* at 188.

63. 521 U.S. 898 (1997).

64. 18 U.S.C. § 922 (1993).

65. § 922(s)(2), *invalidated by* Printz v. United States, 521 U.S. 898 (1997).

66. *Printz*, 521 U.S. at 918.

be taken for granted. None, for example, can be derived from the text or the intent behind the text (even assuming the appropriateness of an originalist method of constitutional interpretation). Although this list is not exhaustive, it certainly indicates some of the major assumptions made by the Rehnquist Court that were never justified.

1. *It is for the judiciary to impose limits on Congress in the name of protecting federalism and the authority of state governments; the political process, with minimal judicial review, is not adequate for this purpose.*

In 1954, Professor Herbert Wechsler wrote a famous article suggesting that judicial protection of states and of federalism is unnecessary because the political process adequately safeguards the interests of state governments.[67] Later, Professor Jesse Choper advanced a similar thesis, arguing against judicial enforcement of federalism principles.[68]

In *Garcia v. San Antonio Metropolitan Transit Authority*, the Supreme Court expressly invoked and cited Wechsler and Choper in concluding that it was not for the federal judiciary to enforce limits on Congress based on federalism.[69] In overruling *National League of Cities v. Usery*,[70] the Court said that the political process adequately protected the interests of state governments. Justice Blackmun, writing for the majority, stated:

> Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself. It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government . . . . In short, the Framers chose to rely on a federal system in which special restraints on federal power over the States inhered principally in the workings of the National Government itself, rather than in discrete limitations on the objects of federal authority. *State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.* The effectiveness of the federal political process in preserving the States' interests is apparent even today in the course of federal legislation.[71]

The Rehnquist Court's federalism decisions obviously reject this view that the political safeguards of federalism are adequate. For example, its use of the

67. *See generally* Wechsler, *supra* note 19.

68. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS (1980).

69. 469 U.S. 528, 551 & n.11 (1985).

70. 426 U.S. 833 (1976) (holding that it violates the Tenth Amendment to apply the Fair Labor Standards Act to state and local governments).

71. 469 U.S. at 550-52 (emphasis added and internal citations omitted).

Tenth Amendment as a limit on congressional power, such as in *New York v. United States*[72] and *Printz v. United States*,[73] is based on the assumption that the political process is inadequate to safeguard state governments and that the courts must do so instead. Similarly, limiting the ability of Congress to authorize suits against state governments is also based on this assumption.[74]

But never did the Rehnquist Court justify this crucial premise that the political process is insufficient to protect the states and that it is the judiciary's role to do so. Indeed, never did the Rehnquist Court even acknowledge that it was rejecting the Court's express conclusion in *Garcia.*

Certainly, the assumption that states' interests are adequately represented in the national political process could be challenged.[75] At the time the Constitution was written, states chose senators and thus were directly represented in Congress. But now, with popular election of senators, why believe that the states' interests as states are adequately protected in Congress?[76] The assumption must be that the voters, in choosing representatives and senators, weigh heavily the extent to which the individual legislator votes in a manner that serves the interests of the state as an entity. Yet, simple observation of congressional elections shows that the issues at stake are usually basic ones about the economy, health care, and the personalities of the candidates. The focus of the attention is on the interests of the voters, not on the institutional interests of state and local governments. Indeed, it may well be that "the primary constituencies of the national representatives may . . . be precisely those that advocate an extension of the federal power to the disadvantage of the states."[77]

But what is crucial is that the Rehnquist Court never made any of these arguments challenging the view that the political process would adequately protect the states. Instead, it simply assumed the inadequacy of the political process, even though the Court had stated just the opposite in 1985 in *Garcia.*

72. 505 U.S. 144 (1992) (declaring unconstitutional, as impermissible commandeering of state governments, a federal statute requiring states to clean up nuclear wastes).

73. 521 U.S. 898 (1997) (declaring unconstitutional, as impermissible commandeering, a federal statute requiring state and local governments to do background checks before issuing permits for firearms).

74. *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that Congress may authorize suits against state governments only when acting pursuant to Section 5 of the Fourteenth Amendment).

75. *See* Larry Kramer, *Putting the Politics into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215 (2000); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459 (2001).

76. *See* Andrzej Rapaczynski, *supra* note 16, at 393.

77. *Id.*

2. *There is a meaningful and desirable distinction between economic and noneconomic activities in terms of Congress's authority to regulate commerce among the states.*

In *United States v. Morrison*,[78] the Supreme Court held that the civil damages provision of the Violence Against Women Act was unconstitutional, even though Congress had made detailed findings about the national economic consequences of violence against women. Chief Justice Rehnquist's majority opinion concluded that Congress could not regulate noneconomic activity, such as sexual assaults, based on its cumulative impact on commerce. The Court said that, "[i]f accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit or consumption."[79] By this reasoning, the Court explained, Congress could regulate all violent crimes in the United States. The Court thus concluded: "We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregated effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local."[80]

The Court returned to this distinction more recently in *Gonzales v. Raich*.[81] There, the Court held that Congress constitutionally may use its power to regulate commerce among the states to prohibit the cultivation and possession of small amounts of marijuana for medicinal purposes. Although California has created an exemption to its state marijuana laws for medical uses, no such exemption exists to the federal law. In a 6-3 decision, with the majority opinion written by Justice Stevens, the Court upheld the federal law. Justices Kennedy, Souter, Ginsburg, and Breyer joined the majority opinion, and Justice Scalia concurred in the judgment. Justice Stevens explained that, for almost seventy years, Congress has had the authority to regulate activities that have a substantial effect on interstate commerce. The Court concluded that marijuana, when looked at cumulatively and including those amounts grown for medical purposes, has a substantial effect on interstate commerce. Justice Stevens's opinion relied on a precedent from over sixty years ago, *Wickard v. Filburn*,[82] which held that Congress may regulate the amount of wheat that farmers grow for their own home consumption.

How does *Gonzales v. Raich* fit into the Court's recent Commerce Clause jurisprudence? The Court did not change the test for the Commerce Clause that it has followed since *Lopez* in 1995: Congress, under the Commerce Clause,

78. 529 U.S. 598 (2000).
79. *Id.* at 615.
80. *Id.* at 617-18.
81. 125 S. Ct. 2195 (2005).
82. 317 U.S. 111 (1942).

may regulate the channels of interstate commerce, the instrumentalities of interstate commerce and persons or things in interstate commerce, and activities that have a substantial effect on interstate commerce.[83] Nor did the Court revisit its holding in *Morrison* that in regulating noneconomic activities, substantial effect cannot be based on cumulative impact. Instead, *Gonzales v. Raich* stands for the proposition that intrastate production of a commodity sold in interstate commerce is economic activity, and therefore substantial effect can be based on cumulative impact.

Thus, the distinction between economic and noneconomic activities is crucial to the Rehnquist Court's Commerce Clause jurisprudence. But never was it justified by the Court. Certainly, the distinction can be questioned. For example, it is unclear what makes something economic as opposed to noneconomic. Almost every activity has some economic consequence, so this inevitably seems to require an arbitrary line, perhaps between activities that have direct effects and those that have indirect effects. Yet, such a distinction between direct and indirect effects had already been tried by the Court and was expressly rejected.[84] Again, the key point is that the Rehnquist Court assumed, but did not justify, the distinction between economic and noneconomic effects that was crucial to its Commerce Clause jurisprudence.

3. *Federal laws that compel state and local governments to comply with federal mandates undermine accountability by confusing voters as to whom to hold responsible.*

In *New York v. United States*,[85] the Supreme Court held that Congress may not commandeer states and force them to enact laws or adopt regulations. Justice O'Connor's majority opinion expressly rested on the premise that such commandeering undermines the accountability of state governments. The Court concluded that it was "clear" that, because of the Tenth Amendment and limits on the scope of Congress's powers under Article I, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[86] The Court explained that allowing Congress to commandeer state governments would undermine government accountability, because the states would take the political heat and be held responsible for decisions made by Congress, not by the states themselves.[87]

83. United States v. Lopez, 514 U.S. 549, 558-59 (1995).

84. *See* Wickard v. Filburn, 317 U.S. 111, 124 (1942) (stating that "nor can consideration of . . . economic effects be foreclosed by calling them indirect"); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935) (drawing a distinction between direct and indirect effects).

85. 505 U.S. 144 (1992).

86. *Id.* at 188.

87. For an excellent analysis of the commandeering principle and its implications, see Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State*

But this assumption is highly questionable. It is unclear why voters would be confused by federal mandates. They could be informed when a state was acting because of a federal command. Everyone is used to doing things, like paying taxes, because they are required to do so by the federal government. The Court never justified why accountability could not be preserved by state and local officials simply by explaining to the voters when the state government was acting pursuant to a federal mandate.

4. *Congressional expansion of rights is not "enforcement" of rights within the meaning of Section 5 of the Fourteenth Amendment.*

In *City of Boerne v. Flores*,[88] the Supreme Court held that Congress under Section 5 of the Fourteenth Amendment cannot expand rights or create new rights; Congress may act only to remedy or enforce rights already recognized by the courts, and such laws must be "proportionate" and "congruent" to remedying proven constitutional violations. Justice Kennedy emphasized that Section 5 gives Congress the power to enact laws "to enforce" the provisions of the Fourteenth Amendment. He stated that legislation that "alters the meaning of the Free Exercise Clause" does not enforce the Fourteenth Amendment and that Congress is not enforcing the Fourteenth Amendment if it is changing its substantive content.[89]

The problem with this argument is that it rests on the assumption of a very narrow definition of the words "to enforce." One dictionary defines "enforce" as to "[u]rge, press home (argument, demand); impose (action, conduct *upon* person, etc.); compel observance of . . . ."[90] Another dictionary defines "enforce" as: "1. to give force to: STRENGTHEN; 2. to urge with energy; 3. CONSTRAIN, COMPEL; 4. to effect or gain by force; 5. to execute vigorously . . . ."[91] From the perspective of these definitions, Congress very much is "enforcing" the Fourteenth Amendment when it expands the scope of liberty under the Due Process Clause or increases the safeguards of equal protection. In this sense, congressional expansion of rights is enforcing by strengthening the Fourteenth Amendment.

Moreover, *City of Boerne*'s restrictive interpretation can be questioned for denying Congress the power to expand the scope of rights. The Constitution's protection of rights has long been understood as the floor, the minimum liberties possessed by all individuals. The Ninth Amendment provides clear textual support for this view in its declaration: "The enumeration in the

Officers to Implement Federal Laws?, 95 COLUM. L. REV. 1001 (1995), and Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle*, 111 HARV. L. REV. 2180 (1998).

88. 521 U.S. 507 (1997).

89. *Id.* at 519.

90. THE CONCISE OXFORD DICTIONARY OF CURRENT ENGLISH 401 (5th ed. 1964).

91. WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 275 (1965).

Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."[92] The Ninth Amendment is a clear and open invitation for government to provide more rights than the Constitution accords. If the Court reads the Constitution not to include a right, Congress or the states may act to create and protect that right. In other words, the Court's interpretive judgment that a particular right is not constitutionally protected is in no way incompatible with a legislature's *statutory* recognition and safeguarding of the liberty. Put another way, Justice Kennedy's assumption was that Congress was altering the meaning of the Fourteenth Amendment with RFRA. But the better view sees Congress creating a statutory right where the Court found no right under the Constitution.

5. *Sovereign immunity is a constitutional principle beyond the scope of the Eleventh Amendment, and it outweighs in importance government accountability as a constitutional principle.*

The Rehnquist Court has found that sovereign immunity, particularly for state governments, is a constitutional requirement. In *Alden v. Maine*, the Court declared, "We hold that the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[93] In *Federal Maritime Commission v. South Carolina State Ports Authority*,[94] the Supreme Court further enlarged sovereign immunity by holding that private actions may not be brought against state governments in federal administrative agency proceedings. Justice Clarence Thomas, writing for the Court, said, "The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities."[95] The Court ruled that it would impermissibly offend the "dignity" of state governments to allow them to be named as defendants in administrative agency proceedings. Justice Thomas explained:

> Given both this interest in protecting States' dignity and the strong similarities between [Federal Maritime Commission] proceedings and civil litigation, we hold that state sovereign immunity bars the [Federal Maritime Commission] from adjudicating complaints filed by a private party against a nonconsenting State. Simply put, if the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a State to do exactly the same thing before the administrative tribunal of an agency . . . .[96]

92. U.S. CONST. amend. IX.
93. 527 U.S. 706, 712 (1999).
94. 535 U.S. 743 (2002).
95. *Id*. at 760.
96. *Id*.

Sovereign immunity, as applied by the Rehnquist Court, is a right of governments to be free from suit without their consent. Yet, the assumption of such a right is highly questionable, because it is a right that cannot be found in the text or the Framers' intent. The text of the Constitution is silent about sovereign immunity. Not one clause of the first seven articles even remotely hints at the idea that the government has immunity from suits. Likewise, no constitutional amendment has bestowed sovereign immunity on the federal government.

A claim might be made that the Eleventh Amendment provides sovereign immunity to state governments. Yet, if this is a textual argument, a careful reading of the text does not support the claim. The Eleventh Amendment states, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign state."[97] Initially, it should be noted that the Eleventh Amendment applies only in *federal* court; it is a restriction solely on "the Judicial power of the United States." Indeed, in *Alden v. Maine*, the Court recognized this limitation and based its holding entirely on the broad principle of state sovereign immunity and not in any way on the text of the Eleventh Amendment. Justice Kennedy, writing for the majority, stated, "[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."[98]

Moreover, the text of the Eleventh Amendment only restricts suits against states that are based on diversity of citizenship; it says that the federal judicial power does not extend to a suit against a state by a citizen of another state or of a foreign country. Nothing within it bars a suit against a state by its own citizens. This was the holding of *Hans v. Louisiana* more than a century ago—a holding that certainly was not based on a textual argument regarding the Eleventh Amendment.[99]

Nor can sovereign immunity be justified from an originalist perspective based on the Framers' intent. It is important to remember that, where the text is silent, originalists believe that a right is protected under the Constitution *only if* the Framers' intent is clear in justifying protection.[100] If the intent is unclear, the right is not constitutionally protected. At the very least, the Framers' intent is completely ambiguous as to sovereign immunity.

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97. U.S. CONST. amend. XI.

98. *Alden*, 527 U.S. at 728.

99. 134 U.S. 1 (1890).

100. *See, e.g.*, Joseph D. Grano, *Judicial Review and a Written Constitution in a Democratic Society*, 28 WAYNE L. REV. 1, 7 (1981) (articulating the originalist philosophy); *see also* ROBERT H. BORK, THE TEMPTING OF AMERICA (1990) (defending originalist constitutional interpretation).

There was no discussion of sovereign immunity at the Constitutional Convention in Philadelphia in 1787. The issue did arise in the state ratifying conventions. The dispute was over whether Article III authorized suits against nonconsenting states in federal court. One of the clauses of Article III, Section 2, specifically deals with suits against state governments. Its provisions permit suits "between a State and Citizens of another State" and "between a State . . . and foreign . . . Citizens . . . ."[101] The dispute was over whether the above-quoted language of Article III was meant to override the sovereign immunity that kept states from being sued in state courts. As Justice Souter observed,

> The 1787 draft in fact said nothing on the subject, and it was this very silence that occasioned some, though apparently not widespread, dispute among the Framers and others over whether ratification of the Constitution would preclude a State sued in federal court from asserting sovereign immunity as it could have done on any matter of nonfederal law litigated in its own courts.[102]

There is no record of any debate about this issue or these clauses at the Constitutional Convention.

Moreover, and perhaps even more important, the Rehnquist Court's sovereign immunity decisions assumed that the states would voluntarily comply with federal law. In *Alden v. Maine*, Justice Kennedy expressly defended sovereign immunity based on this assumption. He wrote:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land." U.S. Const., Art. VI.[103]

What, then, is the assurance that state governments will comply with federal law? The answer must be: trust in the good faith of state governments. Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement, the Supreme Court would have made such an assumption and issued such a statement that state governments simply could be trusted to voluntarily comply with federal law?

Put another way, the Rehnquist Court's sovereign immunity decisions assume that government immunity is more important than government accountability. Yet, this assumption is never justified or even acknowledged by the Court.

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101. U.S. CONST. art. III, § 2, cl. 1.

102. Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 104 (Souter, J., dissenting).

103. 527 U.S. at 754-55.

6. *The desire to protect the authority of state governments does not require a narrow preemption doctrine.*

One would expect that a Court concerned with federalism and states' rights would narrow the scope of federal preemption of state laws. Narrowing the circumstances of federal preemption leaves more room for state and local governments to act. Yet over the last several years, the Rehnquist Court repeatedly has found preemption of important state laws, even when federal law was silent about preemption or explicitly preserved state laws.[104]

For example, in *Geier v. American Honda Motor Co.*,[105] the Court found preemption of a state products liability lawsuit for an unsafe vehicle, notwithstanding a statutory provision which expressly provided that "[c]ompliance with" a federal safety standard "does not exempt any person from any liability under common law."[106] In *Lorillard Tobacco Co. v. Reilly*,[107] the Court found that federal law preempted state regulation of outdoor billboards and signs in stores advertising cigarettes. In *Crosby v. National Foreign Trade Council*,[108] the Court invalidated a Massachusetts law which restricted the ability of the state and its agency to purchase goods and services from companies that did business with Burma. Most recently, in *American Insurance Ass'n v. Garamendi*,[109] the Supreme Court found preemption of a California law requiring that insurance companies doing business in that state disclose Holocaust-era insurance policies. The Court invalidated the California statute, despite the absence of any federal law expressing an intent to preempt state law, based on the "dormant" foreign affairs power of the President.[110]

At the very least, these and other cases like them are inconsistent with the Supreme Court's oft-stated presumption against preemption. For example, the Court has declared:

> [B]ecause the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has "legislated . . . in a field which the States have traditionally occupied," we "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[111]

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104. I develop this argument more fully in Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOK. L. REV. 1313 (2004).

105. 529 U.S. 861 (2000).

106. *Id.* at 868 (citing 15 U.S.C. § 1397(k) (1988)).

107. 533 U.S. 525 (2001).

108. 530 U.S. 363 (2000).

109. 539 U.S. 396 (2003).

110. *Id.* at 429.

111. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1996) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), and Hillsborough County v. Automated Med.

Yet, the recent Supreme Court preemption cases clearly put the presumption in favor of preemption.[112]

More importantly, the decisions assume that principles of federalism and the desire to protect states from federal power do not apply with regard to preemption. Again, this assumption is never acknowledged or justified by the Court.

7. *The social desirability of federal legislation does not matter in evaluating whether laws violate principles of federalism.*

In *New York v. United States*, Justice O'Connor's majority opinion expressly rejected any consideration of whether the federal law requiring cleanup of nuclear wastes was desirable or even based on a compelling need. Justice O'Connor declared, "No matter how powerful the federal interest involved, the Constitution simply does not give Congress the authority to require the States to regulate."[113]

Yet, this assumption, that the strength of the justification for the federal action is irrelevant, was never justified by the Court. Indeed, throughout the Rehnquist Court's federalism decisions, there was an implicit assumption that the desirability or need for the federal action was irrelevant in evaluating it from a federalism perspective. To me, what is most striking about the Rehnquist Court's federalism decisions is that they invalidated laws that unquestionably were socially important and even essential. In *United States v. Lopez*, the Court struck down a federal law that prohibited guns within 1000 feet of schools. Would anyone want to have guns in or near schools? In *United States v. Morrison*, the Court invalidated a provision of the Violence Against Women Act that allowed victims of gender-motivated violence to sue in federal court. Shouldn't such victims have the ability to sue, especially in light of Congress's findings that state courts often are hostile to such claims? In *New York v. United States*, the Court struck down a federal law that required states to clean up their low-level nuclear wastes. Surely no one would argue that it is better to allow such wastes to remain a danger to the public. In *Printz v. United States*, the Court declared unconstitutional a federal law that required state and local law enforcement personnel to conduct background checks before issuing permits for firearms. Isn't it desirable to check out people before giving them gun permits?

My point is simply that the Rehnquist Court's federalism decisions consistently assumed that the desirability of legislation was irrelevant in evaluating whether it violated the Tenth or Eleventh Amendments or other

Labs., Inc., 471 U.S. 707, 715 (1985)) (internal citations omitted).

112. For an argument against the presumption against preemption, see Viet D. Dinh, *Reassessing the Law of Preemption*, 88 GEO. L.J. 2085 (2000).

113. 505 U.S. 144, 178 (1992).

principles of federalism. Yet, the more the rights of states are analogized to individual rights, the more questionable it becomes why they should not be treated in the same manner by allowing compelling government interests to trump rights.

IV. GETTING PAST THE ASSUMPTIONS OF FEDERALISM

In the preceding Part, I identified critical assumptions of the Rehnquist Court's federalism decisions. To be fair, the prior era of federalism decisions, from 1937 until the 1990s, rested on equally unjustified contrary assumptions. For example, the Court assumed that the political safeguards of federalism were adequate; that there was no need for judicial enforcement of limits on Congress's Commerce Clause power; and that there was no zone of activities reserved to the states by the Tenth Amendment.

It seems that a conservative Court, consistent with the traditional conservative commitment to states' rights, simply made one set of assumptions about federalism, while a more liberal Court in an earlier era came to opposite conclusions. The key question must be whether it is possible to get past federalism jurisprudence.

I suggest that such a change is possible if federalism decisions are based on the underlying values to be achieved. Many Supreme Court decisions protecting federalism say relatively little about the underlying values that are being served. Occasionally, the Court mentions the benefits of protecting states, but never does the Court explain how its decision advances these goals. When the Court does speak of the values of federalism, it usually speaks of benefits such as preventing tyranny, advancing individual liberty, and maintaining states as laboratories for experimentation.

For example, Professor Rapaczynski noted that "[p]erhaps the most frequently mentioned function of the federal system is the one it shares to a large extent with the separation of powers, namely, the protection of the citizen against governmental opposition—the 'tyranny' that the Framers were so concerned about."[114] Indeed, one of the most frequently advanced justifications for federalism is that the division of power between federal and state governments advances liberty. For example, Chief Justice Rehnquist wrote, "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'"[115] Similarly, Justice Scalia declared, "This separation of the two spheres is one of the Constitution's structural protections of liberty."[116] Likewise, Justice O'Connor wrote, "Just as the separation and independence of the coordinate branches of

114. Rapaczynski, *supra* note 16, at 380.

115. United States v. Lopez, 514 U.S. 549, 552 (1995) (quoting Gregory v. Ashcroft, 501 U.S. 452, 458 (1991)).

116. Printz v. United States, 521 U.S. 898, 921 (1997).

the Federal Government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."[117] Indeed, it is striking that so many of the Supreme Court's recent federalism decisions repeat the same language as a premise for judicial invalidation of federal laws.

Unfortunately, none of these cases explains how federalism enhances liberty. The idea expressed is the simple one that limiting federal power means restricting the ability of the federal government to enact laws inimical to individual freedom. The problem with this claim is that the federal government could use its authority to advance liberty or to restrict it. The Rehnquist Court's assumption is that the latter—federal action limiting liberty—is more likely than the former—federal legislation significantly enhancing individual rights. The Court has never justified this premise, nor have scholars even tried to demonstrate it.

Actually, proving the majority's claim with regard to individual freedom is more complicated than that. In all likelihood, over time, limiting the federal government's power probably will strike down some laws that advance liberty and some that restrict it. The majority needs to offer some reason to believe that, on balance, federal actions will be more harmful than beneficial to liberty. Nothing of this sort is found in any of the Supreme Court's federalism decisions.

Did the Rehnquist Court's federalism decisions advance liberty? Is there reason to believe that such decisions, over a long period of time, would enhance freedom? The majority in so many of these cases defends federalism in instrumental terms as a means to the end of increasing liberty. Yet, it is clear that the Rehnquist Court's federalism decisions did not enhance liberty. The Court struck down many federal laws, such as the Violence Against Women Act and the Religious Freedom Restoration Act, that expanded liberties. Moreover, the Court prevented suits to enforce statutes such as the Age Discrimination in Employment Act and the Americans with Disabilities Act. This regresses, not advances, liberty.

Another argument that is frequently made for protecting federalism is that states can serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

> To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.[118]

117. *Gregory*, 501 U.S. at 458.

118. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J.,

More recent federalism decisions, too, have invoked this notion. Justice Powell, dissenting in *Garcia v. San Antonio Metropolitan Transit Authority*, lamented that "[t]he Court does not explain how leaving the States virtually at the mercy of the Federal Government, without recourse to judicial review, will enhance their opportunities to experiment and serve as 'laboratories.'"[119] Likewise, Justice O'Connor, dissenting in *Federal Energy Regulatory Commission v. Mississippi*, stated that "the Court's decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas."[120]

However, any federal legislation preempting state or local laws limits experimentation. Indeed, the application of constitutional rights to the states limits their ability to experiment with providing fewer safeguards of individual liberties. The key questions are (1) when is it worth experimenting and (2) when is experimentation to be rejected because of a need to impose a national mandate? The value of states as laboratories provides no answer to this issue.

There also is a related process question: Who is in the best position to decide when further experimentation is warranted or when there is enough knowledge to justify federal actions? A strong argument can be made that the need for using states as laboratories is a policy argument to be made to Congress against federal legislation and not a judicial argument that should be used to invalidate particular federal laws on the grounds that they unduly limit experimentation. Additionally, Congress—and even federal agencies—can design experiments and try differing approaches in varying parts of the country.

Professors Rubin and Feeley take this argument even further. They argue that political realities mean that relatively few experiments will be done at the state and local levels. They write:

> To experiment with different approaches for achieving a single, agreed-upon goal, one sub-unit must be assigned an option that initially seems less desirable, either because that option requires changes in existing practices, or because it offers lower, although still-significant chances of success. . . . As a result, individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments.[121]

Most importantly, the Rehnquist Court's federalism decisions cannot be justified as desirable social experimentation. No one would realistically want to experiment with children having guns near schools, or with nuclear wastes not being cleaned up, or with firearms being issued without permits.

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dissenting).

119. 469 U.S. at 567 n.13 (Powell, J., dissenting).

120. Fed. Energy Regulatory Comm'n v. Mississippi, 456 U.S. 742, 787-88 (1982) (O'Connor, J., dissenting).

121. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 925 (1994).

My point is that the values invoked for the Rehnquist Court's federalism decisions do not explain them. What, then, are the values of federalism that should be the goal of the Supreme Court's federalism jurisprudence? The ultimate goals for government are enhancing liberty and effectively meeting society's needs. Federalism accomplishes both by providing multiple actors that can protect freedom and respond to social problems.

Moreover, federalism has other benefits: efficiency, as sometimes it is more efficient to have action at the national level and sometimes at the local; participation, as sometimes national action better engages involvement and other times localism does so; community empowerment, which is sometimes a benefit of decentralization; and economic gains, as sometimes national action is needed to deal with externalities.

My contention—and I do no more than state it here and leave it to be justified elsewhere—is that federalism decisions based on explicit consideration of these values will be preferable to those based on unjustified assumptions. For example, a focus on advancing liberty should make laws like the Violence Against Women Act or the Religious Freedom Restoration Act constitutional. A concern with ensuring effective government should allow Congress to require states to clean up nuclear wastes.

Here, I have only briefly sketched an alternative approach to federalism based on functional considerations rather than unjustified assumptions. But even such a sketch indicates how different such an approach would be to that followed by the Rehnquist Court.

CONCLUSION

Throughout American history, political ideology has dominated discussions of federalism. For the most part, conservatives have sought to oppose progressive federal actions—the elimination of slavery, Reconstruction, labor laws protecting workers, the New Deal, desegregation—by invoking federalism. At the same time, liberals have sought to empower the federal government to achieve what they see as desirable social goals. This is not inevitable. Yet although liberals could conceivably use federalism to oppose disfavored actions taken when conservatives controlled the federal government, this has not occurred so far.

Overall, the Rehnquist Court was much more conservative than liberal. There were five conservative Justices—Rehnquist, O'Connor, Scalia, Kennedy, and Thomas—who pursued the traditional conservative agenda of limiting federal power. Often this took the form of restricting the scope and application of federal civil rights statutes, such as the Violence Against Women Act, the Religious Freedom Restoration Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

If John Kerry had won the presidential election in November 2004 and had appointed the replacements for Rehnquist and O'Connor, these federalism

decisions likely would have been overruled. But with two Bush picks for the Supreme Court, the doctrine of limiting federal power will almost certainly remain and expand. The change in the composition of the Court makes it possible that even the Rehnquist Court's later decisions in favor of federal power could soon be reconsidered and reversed. Especially with Justice Alito replacing Justice O'Connor, there is now the prospect that the Court will more aggressively protect states' rights and limit federal power.

It is striking that the Rehnquist Court's federalism decisions rested on assumptions that were rarely acknowledged and never justified. In this Article, I sought to identify these assumptions and to argue that constructing a meaningful and desirable theory of federalism requires reasoning from the underlying values of federalism.