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From States' Rights Blues to Blue States' Rights: Federalism After the Rehnquist Court

Cover Page Footnote

Stanley Morrison Professor of Law and former Dean, Stanford Law School.

FROM STATES' RIGHTS BLUES TO BLUE STATES' RIGHTS: FEDERALISM AFTER THE REHNQUIST COURT

*Kathleen M. Sullivan**

INTRODUCTION

The Rehnquist Court dramatically revived the structural principles of federalism as grounds for judicial invalidation of statutes. For most of the twentieth century, the federal and state governments had been left to bargain or fight over their relationship in the realm of politics. The Rehnquist Court, by contrast, increasingly held that this relationship was a matter to be refereed in the courts. The Court grounded this approach in the history of the Founding: "Dual sovereignty is a defining feature of our Nation's constitutional blueprint. States, upon ratification of the Constitution, did not consent to become mere appendages of the Federal Government. Rather, they entered the Union with their sovereignty intact."¹ In addition, the Court suggested that this relationship required judicial protection, not mere political self-help: "Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other."²

For the most part, the Rehnquist Court's federalist revival restrained the federal government from incursion upon the states.³ In some lines of decision, the Court held that Congress had exceeded the scope of its powers.⁴ In others, it held that a federal law had wrongly intruded upon the sovereign autonomy of the states.⁵ Whether enforcing such internal or external limits on federal power, the Rehnquist Court took significant steps to rebalance power between the state and federal governments. The Court revived normative arguments for self-rule at more local levels of government and found textual and structural bases for vindicating such

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1. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (internal quotations omitted).

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

3. *Term Limits* was the rare exception, restraining the states from incursion upon the federal government by invalidating state-imposed limits upon congressional terms.

4. For a discussion of these lines of cases, see *infra* notes 10-25 and accompanying text.

5. For a discussion of these cases, see *infra* notes 26-36 and accompanying text.

arguments against assertions of federal power that had gone unchallenged for decades.

Did these decisions establish a new constitutional order for federalism? Did they roll back the increasing centralization of social and economic policy that has characterized American government since the New Deal? The responses of some critics might suggest so. The Rehnquist Court's federalism decisions sharply divided the Court, typically eliciting 5-4 divisions among the Justices and vigorous dissents. Some observers denounced the Court for asserting such aggressive judicial supremacy over Congress. Others expressed concern that revitalized protection of states' rights would allow the nation to backslide into a patchwork of local prejudice and tyranny, undermining the federal government's ability to extend and entrench egalitarian norms.⁶

Any such extreme picture, however, is overstated. The Rehnquist Court surely revived the structural principles of federalism. But it maintained certain striking limits that kept these principles from bringing about a greater sea change in constitutional law. The Court did more to change the constitutional jurisprudence of federalism than it did to realign actual constitutional power. The question for the future is how much generative power this jurisprudence will have, for blue states and red states alike.

This essay sets forth this argument as follows. Part I shows how the Rehnquist Court's federalism decisions had more bark than bite: Each line of decision was significantly qualified by decisions upholding federal laws and marking limits to the bold principles earlier asserted. Part II demonstrates how the Rehnquist Court conspicuously failed to extend the federalism revival to its logical limits, leaving intact a number of important lines of cases affording significant scope to federal power over state governments and state officials. To be sure, the Rehnquist Court enhanced state power through a number of sub-constitutional lines of cases, issuing procedural holdings that reduced federal intervention into state government. But the practical effect of the Rehnquist Court's federalism decisions has been overstated by its critics; rumors of the death of the New Deal have been greatly exaggerated.

Even if the Rehnquist Court's federalism decisions did not shift power from the federal government to the states as dramatically as some have suggested, those decisions articulated a powerful set of constitutional ideals and principles supporting checks on federal incursions into state self-rule. Part III discusses the underpinnings of this new jurisprudence, and suggests how it has the capacity to transcend traditional political alignments. States' rights have been associated historically with conservative causes, while federal power has been associated with increasing egalitarianism and

6. For a review of some of these criticisms, see, e.g., David J. Barron, *A Localist Critique of the New Federalism*, 51 *Duke L.J.* 377 (2001); Sylvia A. Law, *In the Name of Federalism: The Supreme Court's Assault on Democracy and Civil Rights*, 70 *U. Cin. L. Rev.* 367 (2002).

protection of minorities from Reconstruction through the New Deal and the Civil Rights Acts of the 1960s. But now that federal power in all three branches has been consolidated in Republican hands to the greatest extent since 1954, champions of liberal causes might need to rethink any reflexive recoil from federalism. Gay weddings in San Francisco and Massachusetts, like popular initiatives authorizing physician-assisted suicide in Oregon and medicinal use of marijuana in California, exemplify recent progressive experimentation at the local level through policies that could not command a national majority. Under such political circumstances, liberals should hesitate before rejecting the Rehnquist Court's new federalism. It might well contain seeds of a constitutional concept of social fluidity that can help to realize progressive as well as conservative ideals.

I. THE REHNQUIST COURT'S NEW FEDERALISM

The Rehnquist Court developed four lines of cases reviving the principles of the anti-Federalists at the nation's Founding—principles commonly referred to in current parlance, somewhat paradoxically, as “federalism.”⁷ Each line closely divided the Court and each elicited strong criticism from advocates of federal power. But the practical impact of each of these lines of cases was limited by decisions setting forth their outer boundary and leaving significant realms of federal power intact.

The first line of cases reintroduced, for the first time since the New Deal, judicial enforcement of the limits of power granted to Congress by the Commerce Clause.⁸ In *United States v. Lopez*,⁹ the Court invalidated a federal criminal prohibition on gun possession within the vicinity of a school, reasoning that gun possession, standing alone, does not have a substantial effect on interstate commerce. In *United States v. Morrison*,¹⁰ the Court invalidated the civil damages provisions of the federal Violence Against Women Act, reasoning that acts such as date rape or domestic battery are not economic activities with a substantial effect on interstate commerce. Both decisions declined to defer to congressional conclusions—in *Morrison*, conclusions based on quite extensive congressional factual findings—that a regulated activity has a substantial effect on interstate commerce.¹¹

7. Compare Timothy Zick, *Are the States Sovereign?*, 83 Wash. U. L.Q. 229, 245 (2005) (noting “the Court’s recent, and much commented upon, Anti-Federalist ‘revival’”), and Kathleen M. Sullivan, *Dueling Sovereignties: U.S. Term Limits, Inc. v. Thornton*, 109 Harv. L. Rev. 78, 80 (1995) (noting the Court’s “dramatic antifederalist revival”), with Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 Harv. L. Rev. 2180, 2213 (1998) (employing the term “Federalist Revival”).

8. U.S. Const. art. I, § 8.

9. 514 U.S. 549 (1995).

10. 529 U.S. 598 (2000).

11. See *Lopez*, 514 U.S. at 557 n.2 (“[S]imply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” (quoting *Hodel v. Va. Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 311 (1981))).

These decisions signaled the end to an anything-goes approach to congressional commerce power, reviving the theory that enumeration of powers in Article I is a structural principle warranting judicial intervention to constrain federal overreaching. These striking new constraints on the federal commerce power, however, reached their outer limit in *Gonzalez v. Raich*,¹² which upheld the application of federal controlled substance laws to the consumption of home-grown marijuana, despite California's efforts by popular initiative to allow such consumption for medicinal purposes. The majority reasoned that the principles of federalism did not compel an exemption from federal law, even for wholly intrastate activities expressly sanctioned by a state's government, so long as a product grown and consumed locally is fungible with products sold on interstate markets and the overall congressional scheme aims at activity that might be thought to have a substantial effect on interstate commerce.¹³ Only three Justices from the *Lopez* and *Morrison* majorities stuck to their federalist guns, arguing in dissent that the Court's capacious conception of federal power over economic activities might well swallow up such wholly local activities as quilting bees.¹⁴

In a second line of cases, the Rehnquist Court introduced new limits on Congress's power to enact remedial legislation under the Enforcement Clause of the Fourteenth Amendment.¹⁵ In *City of Boerne v. Flores*,¹⁶ the Court invalidated the Religious Freedom Restoration Act insofar as it demanded compelling justification from state officials for declining to grant religious exemptions from generally applicable laws. The majority reasoned that Congress exceeds its civil rights enforcement power if it enacts remedial legislation that is not congruent with and proportional to a pattern or potential pattern of constitutional violations by the states.¹⁷ By identical 5-4 majorities, the Court extended this principle from religious restrictions to sex discrimination,¹⁸ age discrimination,¹⁹ disability discrimination,²⁰ and patent discrimination.²¹

12. 125 S. Ct. 2195 (2005).

13. *See id.* at 2197 (reiterating that "the Court need not determine whether respondents' activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding").

14. *See id.* at 2226 (O'Connor, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) ("There is simply no evidence that homegrown medicinal marijuana users constitute, in the aggregate, a sizable enough class to have a discernable, let alone substantial, impact on the national illicit drug market . . ."); *id.* at 2236 (Thomas, J., dissenting) ("If the majority is to be taken seriously, the Federal Government may now regulate quilting bees, clothes drives, and potluck suppers throughout the 50 States.").

15. U.S. Const. amend. XIV, § 5.

16. 521 U.S. 507 (1997).

17. *Id.* at 530 ("While preventive rules are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved.").

18. *United States v. Morrison*, 529 U.S. 598 (2000) (striking down the civil damages provisions of the Violence Against Women Act for lack of congressional power under the Fourteenth Amendment, and finding that the Act did not counteract a demonstrated pattern of gender bias by state officials).

These decisions limited federal litigation against state entities even where the commerce power otherwise authorized federal remedies against private employers or other parties engaged in similar activities; previous decisions had held that Congress may not abrogate state sovereign immunity by exercise of its authority under the Commerce Clause even where that authority would suffice to regulate private conduct.²² This escalation of judicially enforceable limits on federal civil rights remedies against state entities was qualified, however, by *Nevada Department of Human Resources v. Hibbs*²³ and *Tennessee v. Lane*.²⁴ Each of these cases upheld the application of federal antidiscrimination laws to the states as justified to remedy or prevent state civil rights violations—in *Hibbs*, against working women, and in *Lane*, against paraplegics or other disabled people seeking entrance to state facilities.

A third line of Rehnquist Court cases advanced federalism by limiting the federal government's ability to commandeer state officers and legislatures to serve federal ends. In *New York v. United States*,²⁵ the Court invalidated provisions of a federal law requiring states that failed to adopt federally prescribed measures governing disposal of low-level radioactive waste to take title to such waste, and with title, to acquire any associated liability. The Court reasoned that the federal government may not coerce state legislatures to enact federal policy, including by offering them a Hobson's choice between having to parrot federal regulations or to enact a tax to pay for waste disposal. In *Printz v. United States*,²⁶ the Court extended this holding to limit federal intrusion into state enforcement as well as enactment of law, invalidating portions of the Brady Handgun Violence Prevention Act that had required sheriffs and other local law enforcement

19. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (invalidating the application to state officials of provisions of the Age Discrimination in Employment Act of 1967 as exceeding congressional enforcement power under the Fourteenth Amendment because Congress lacked evidence of widespread unconstitutional age discrimination by the states).

20. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (invalidating the application to state officials of provisions of the Americans with Disabilities Act of 1990 as exceeding congressional enforcement power under the Fourteenth Amendment because Congress had not found a pattern of discrimination against the disabled by states or state officials).

21. *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999) (invalidating the application to a state university of patent infringement actions under the Patent and Plant Variety Protection Remedy Clarification Act as exceeding congressional enforcement power under the Fourteenth Amendment, because Congress had found no pattern of state deprivation of property without due process of law or other deficiency in available state-law remedies).

22. See *infra* notes 29-31 and accompanying text.

23. 538 U.S. 721 (2003) (upholding provisions of the Family Medical Leave Act as within the civil rights enforcement powers of Congress because it was deemed to be an appropriate prophylactic measure against unconstitutional gender discrimination).

24. 541 U.S. 509 (2004) (upholding provisions of Title II of the Americans with Disabilities Act of 1990 as responsive to demonstrated unequal treatment of persons with disabilities in access to state facilities).

25. 505 U.S. 144 (1992).

26. 521 U.S. 898 (1997).

officials to carry out federally mandated background checks on handgun purchasers.

While the commandeering line of cases limited the ability of Congress to conscript state officials—either legislative or executive—directly into federal policy enforcement, it left them subject to a considerable range of federal power. The Court's little-noticed decision in *Reno v. Condon*,²⁷ which upheld federal restrictions in the Driver's Privacy Protection Act on the release or sale of drivers' license information by states, made clear the limits of *New York* and *Printz*. *Condon* explained that the federal government may not tell the states how to regulate their own citizens, but is free to regulate the states themselves in the same way it regulates private entities. Thus, for example, if Congress regulates data providers ranging from telephone companies to video rental stores, it may also regulate data provision by state motor vehicle bureaus.²⁸

In a fourth novel line of federalism cases, the Rehnquist Court established the principle that state sovereign immunity limits the power of Congress, when acting under its Article I powers, to authorize citizen suits against state governments. Exemplary cases include *Seminole Tribe of Florida v. Florida*,²⁹ *Alden v. Maine*,³⁰ and *Federal Maritime Commission v. South Carolina State Ports Authority*.³¹ These sovereign immunity decisions, like the commandeering decisions, derive principally from the tacit structural postulates of the Constitution, not from the literal text of the Eleventh Amendment.³² While the Eleventh Amendment prohibits only the use of federal courts to entertain lawsuits against a state by citizens of another state, the Court has extended state sovereign immunity also to federal actions before state courts and federal administrative proceedings.³³ These decisions thus ultimately rely on the proposition that the federal

27. 528 U.S. 141 (2000).

28. *See id.* at 151 ("The [Driver's Privacy Protection Act (DPPA)] regulates the States as the owners of data bases. It does not require the South Carolina Legislature to enact any laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in *New York* and *Printz*.").

29. 517 U.S. 44 (1996) (holding that the Indian Commerce Clause does not grant Congress the power to abrogate state sovereignty by allowing Indian tribes to sue non-consenting states in federal court for breach of good-faith negotiation over gambling rights).

30. 527 U.S. 706 (1999) (holding that Congress could not subject a non-consenting state to suit in state court for violation of the Fair Labor Standards Act).

31. 535 U.S. 743 (2002) (holding that state sovereign immunity precluded the Federal Maritime Commission from hearing a claim that a port authority run by a non-consenting State violated the federal Shipping Act of 1984 by denying berth to a cruise ship).

32. U.S. Const. amend XI.

33. *See Fed. Mar. Comm'n*, 535 U.S. at 753 (conceding that the Eleventh Amendment does not extend by its terms to administrative proceedings but holding that "the Eleventh Amendment does not define the scope of the States' sovereign immunity; it is but one particular exemplification of that immunity").

government should not be permitted to bankrupt the states without their consent.³⁴

And yet here too, the Rehnquist Court drew limits to the principle, holding, for example, in *Central Virginia Community College v. Katz*³⁵ that Congress had authority under the Bankruptcy Clause³⁶ to subordinate state creditors to other creditors in bankruptcy proceedings. The Court circumvented earlier decisions by suggesting that the states had in effect consented to such abrogation of sovereign immunity by ratifying the Bankruptcy Clause at the Founding. The Court never wavered, moreover, from holding that Congress may subject states to citizen suits when exercising its power under the Fourteenth Amendment, which was enacted to constrain state power to discriminate.³⁷

II. THE FEDERALIST ROADS NOT TAKEN

These four lines of federalism cases might seem to have heralded the biggest comeback for states' rights since John C. Calhoun.³⁸ But the Rehnquist Court's federalist revival was not as sweeping as it might appear. As described above, the Court set forth limiting principles to each of these lines. Even more important, the Court declined to go down four roads that would have pushed its new federalism much further—despite having the apparent capacity to round up five votes to do so.

First, the Rehnquist Court never brought back the short-lived principle, set forth in 1976 in *National League of Cities v. Usery*,³⁹ that there are some areas of reserved state autonomy over traditional and integral governmental functions that are absolutely immunized from federal control. *National League* was explicitly overruled a decade later by *Garcia v. San Antonio Metropolitan Transit Authority*.⁴⁰ The bitter dissents in *Garcia* suggested that time and actuarial tables were on the side of the federalists.⁴¹ But Chief Justice William Rehnquist never cobbled a majority to bring back the federalist jurisprudence of *National League*, even though Presidents

34. See *Alden*, 527 U.S. at 750-51 (noting sovereign immunity's function of shielding state treasuries and thus preserving "the States' ability to govern in accordance with the will of their citizens").

35. 126 S. Ct. 990 (2006).

36. U.S. Const. art I, § 8.

37. See *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

38. See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 272 (1983) (Powell, J., dissenting) ("Thirty years later, Jefferson and Madison's views were expanded by John C. Calhoun in his nullification doctrine—the extreme view that eventually led to the War Between the States" by suggesting that a state could defect from a federal law it deemed unconstitutional.).

39. 426 U.S. 833 (1976) (holding unconstitutional, as an intrusion upon state autonomy reserved in the Tenth Amendment, a federal statute extending to state employers the wage and hour provisions of the Fair Labor Standards Act).

40. 469 U.S. 528 (1985).

41. See *id.* at 580 (Rehnquist, J., dissenting) (predicting that the principle of *National League* would "in time again command the support of a majority of this Court").

Ronald Reagan and George W. Bush added five new Justices to the Court, replacing most of the *Garcia* majority.

The failure to revive *National League* arguably renders the *Lopez* line of cases somewhat trivial. The majority opinion in *Lopez* spoke of criminal law, education, and family law as areas traditionally regulated by the states, suggesting a faint echo of *National League*'s notion of state islands in the stream of commerce. But if a traditional state activity does not enjoy affirmative immunity from congressional regulation, then the Rehnquist Court's internal limits on Congress's commerce power will provide thin constraint; it is a relatively small trick for Congress to make adequate findings that such an activity has a substantial effect on interstate commerce. If there is any doubt, Congress may simply employ an express jurisdictional nexus.⁴²

Second, the Rehnquist Court did not overrule *South Dakota v. Dole*,⁴³ which held that Congress could condition federal highway funding for the states on their raising their minimum drinking age to twenty-one. The *Dole* decision takes a broad view of Congress's ability to use its spending power as leverage to obtain state commitments to regulation that Congress could not impose directly. The Court assumed that the Twenty-First Amendment, which preserves some measure of state autonomy over alcohol traffic, precluded Congress from directly imposing such a federal regulation in this area. It also assumed that if the drinking-age requirement were not germane to the purpose of highway funding, the federal law would impose an unconstitutional condition.⁴⁴ But the Court found teenage alcohol sales germane enough to highway funding to surmount the unconstitutional conditions problem, finding a sufficient nexus because, after all, teenage alcohol sales can cause drunk driving and drunk driving can cause damage to and require emergency services on the roads. Thus, spending conditions need only meet the most lenient test of rationality.

The failure to overrule *Dole* arguably renders trivial the *New York v. United States* line of cases. Given the massive scale of federal spending and the large percentage of state budgets that depend upon federal subsidies, Congress has considerable leverage over the states through spending conditions. If, with little judicial oversight, Congress may bribe the states into enacting the very regulatory programs that Congress may not

42. Indeed, after the decision in *Lopez*, Congress simply amended the Gun-Free School Zones Act to provide, "It shall be unlawful for any individual knowingly to possess a firearm that has moved in or that otherwise affects interstate or foreign commerce . . ." 18 U.S.C. § 922(q)(2)(A) (2000). This requirement of a jurisdictional nexus to interstate commerce negated the Commerce Clause objection; it could not have negated a reserved state-autonomy objection had *National League* been revived and extended from state governmental operations to state regulatory authority.

43. 483 U.S. 203 (1987).

44. The unconstitutional conditions doctrine holds across a broad range of constitutional areas that the government may not condition the receipt of a benefit on the waiver of a constitutional right. See generally Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413 (1989).

commandeer the states into enacting or enforcing, then the anti-commandeering cases can do little as a practical matter to shift power from the federal government to the states.

Third, the Rehnquist Court did not overrule *Ex parte Young*,⁴⁵ which allowed individual suits against state officials to circumvent sovereign immunity limits on suits against the states, based on the premise that when a state official attempts to enforce an unconstitutional law, he is no longer acting on behalf of the state. While many state litigants have invited the Court to extend its federalist revival by overruling this decision, it has continually declined to do so.

The failure to overrule *Ex parte Young* arguably renders the *Seminole Tribe* line of cases trivial by protecting the ability to sue state *officials* instead of state *governments*. Under the state sovereign immunity decisions, as noted above, one may not sue the state government (in the role of state government) over alleged harms ranging from patent infringement to faulty seaport regulations to disability and age discrimination. Under *Young*, however, one may still sue state officials in their individual capacities for alleged violations of federal law. As a practical matter, then, a considerable range of federal lawsuits may still be brought to constrain state deviations from federal norms.

Fourth, the Rehnquist Court declined to overrule the judicial implication of constraints on state regulation under the so-called "Dormant Commerce Clause." This venerable doctrine protects free trade across state borders by invalidating state regulations injurious to interstate commerce even when Congress has not expressly preempted them. The Court presumptively invalidates facial discrimination by states against outsiders,⁴⁶ and subjects even neutral regulations to balancing⁴⁷ that some Justices have criticized as standardless and improperly super-legislative.⁴⁸ Federal courts thus are able to strike down a variety of state experiments, including state environmental laws,⁴⁹ state antitakeover laws,⁵⁰ and state laws limiting the flow of waste and garbage.⁵¹

45. 209 U.S. 123 (1908) (allowing a private citizen suit against the Minnesota State Attorney General, in his individual capacity, to enjoin him from enforcing then-unconstitutional state laws regarding railroad rates).

46. See *Granholm v. Heald*, 544 U.S. 460 (2005) (striking down attempts by New York and Michigan to permit in-state wineries to ship wine directly to consumers while prohibiting out-of-state wineries from doing the same); *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951) (striking down a Madison, Wisconsin ordinance requiring that milk sold in the city be pasteurized locally).

47. See *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

48. See, e.g., *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring) (suggesting that *Pike* balancing is "like judging whether a particular line is longer than a particular rock is heavy" and advocating leaving such legislative judgments to Congress).

49. See, e.g., *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941 (1982) (striking down a law preventing the export of groundwater out of Nebraska unless the state to which the water was sent granted reciprocal rights to Nebraska).

The Rehnquist Court not only declined to roll back the Dormant Commerce Clause, but also created new judicially implied limits on state innovations that might interfere with federal initiatives or prerogatives—limits akin to judicially implied protection of the national market under the Dormant Commerce Clause. For example, in *U.S. Term Limits, Inc. v. Thornton*,⁵² the Court invalidated state-imposed limits on the duration of congressional terms. Just as *McCulloch v. Maryland*⁵³ held that no one state should be able to tax and potentially bankrupt an instrumentality of the federal government, so *Term Limits* held that no one state should be able to diminish the collective intelligence of Congress by limiting its members' seniority.⁵⁴

Nor does a clearer picture of aggressive states' rights protection emerge in other areas of the Rehnquist Court's decisions. For example, one might expect ardent federalist Justices to find consistently that ambiguous federal statutes do not preempt state law. But the Court's preemption decisions in fact produced unusual alliances that confounded such predictions. In many cases, for example, the usual states' rights advocates favored an aggressive reading of federal statutes to preempt state laws, while the usual federal power advocates favored upholding state laws.⁵⁵ Nor did the Rehnquist Court overrule expansive doctrines of conflict and field preemption that allow state regulation to be preempted by implication. Thus, it remains possible for the Court to evict the states from such fields as environmental or labor regulation even in the absence of a clear statement by Congress that state regulation is preempted.

These limits on the scope of the Rehnquist Court's federalism revolution should not be overstated. The Rehnquist Court returned significant power from federal courts to state governments in a number of sub-constitutional lines of decisions. First, the Court established new limitations on the power of habeas corpus petitions to impose federal constitutional norms on errant

50. See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624 (1982) (striking down the Illinois Business Take-Over Act for imposing tender offer restrictions on interstate securities sales).

51. See, e.g., *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383 (1994) (invalidating a municipal "flow control" ordinance requiring waste carriers to pass all solid waste generated in Clarkstown, New York through the city's solid waste processing facility); *Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353 (1992) (invalidating a law that prevented St. Clair County landfills from receiving waste generated outside the county); *City of Phila. v. New Jersey*, 437 U.S. 617, 619 (1978) (invalidating a New Jersey law that prohibited out-of-state "solid or liquid waste" from being imported into New Jersey).

52. 514 U.S. 779 (1995).

53. 17 U.S. (4 Wheat.) 316 (1819).

54. See generally Sullivan, *supra* note 7.

55. See *id.* at 109 & n.217. For a recent example, consider *Pharmaceutical Research and Manufacturers of America v. Walsh*, 538 U.S. 644 (2003), in which Justices John Paul Stevens, David Souter, and Ruth Bader Ginsburg declined to find that Medicaid preempted a state law threatening Medicaid penalties unless drug companies paid rebates to a state fund to lower drug prices for non-Medicaid recipients, while dissenters Justice Sandra Day O'Connor, Chief Justice William Rehnquist, and Justice Anthony Kennedy would have found the state law preempted.

state courts.⁵⁶ Second, the Court expanded immunity doctrines to protect a greater range of actions by state officials from federal suit.⁵⁷ Finally, the Court diminished the role of “managerial judges”⁵⁸ to supervise state institutions such as public school systems.⁵⁹ These lines of cases substantially removed federal supervision from a range of state governmental realms. Nonetheless, the Rehnquist Court’s shift of power from Washington, D.C. to the states is more limited in political practice than the rhetoric of the federalist revival might suggest.

III. FEDERALIST JURISPRUDENCE: THREE THEORIES

The Rehnquist Court’s federalism revival was theoretically deep even if practically limited. The Rehnquist Court’s federalism decisions suggested two principal theoretical bases for devolving greater power to local levels of government, one deontological and the other utilitarian. The first, deontological justification for federalism emphasizes self-rule: the notion of giving government to oneself. On this view, it is immoral to cede self-government to a distant bureaucrat in a remote capital rather than engaging in self-government alongside nearby neighbors. This position implies a default rule in favor of local power and requires very strong justifications for federal intervention.

The second justification, based on utilitarianism, takes the view that different levels of government have different expertise and competence in serving the general welfare. States are better at solving some and the nation better at solving other local and national problems. For example, the federal government can correct market failures that defy state control, such as regulating externalities like pollution that cross over state borders, providing public goods like national defense that would have free-rider problems if provided by the states, preventing races to the bottom that would occur if the states were left to compete among themselves on labor or welfare legislation, or providing a larger insurance pool for disasters such as earthquakes and hurricanes that would swamp local resources. On this view, state governments will be better at just about everything else because they are more efficient, more flexible given their smaller scale, and more responsive to problems that differ across localities. This justification applies a view of federalism that entrusts neutral technocratic expertise to

56. See, e.g., *Teague v. Lane*, 489 U.S. 288 (1989) (declining to apply a bar on race-based jury selection retroactively to a case on collateral review).

57. See, e.g., *Anderson v. Creighton*, 483 U.S. 635 (1987) (extending qualified immunity to an officer who could reasonably have thought a search lawful under the Fourth Amendment even if it was not).

58. The term “managerial judges” was introduced in Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976).

59. See, e.g., *Missouri v. Jenkins*, 515 U.S. 70 (1995) (holding funding increases for desegregation decrees to be beyond the remedial authority of the lower courts).

make utilitarian judgments about which level of government has greater comparative advantage at solving different problems.⁶⁰

There is a third theoretical justification for federalism that is not well developed in the Rehnquist Court cases, but that might well be desirable to elaborate going forward, especially by those favoring liberal causes. This theory sees federalism as one among many guarantees in the Constitution facilitating social fluidity, and preventing the entrenchment of individual identity. On this theory, liberals should stop singing the states' rights blues and begin embracing blue states' rights.⁶¹

This is so because the traditional federalism paradigm has been inverted by the entrenchment of Republican dominance of all three branches of government over the last six years. Under the traditional structural paradigm, liberals favor federal government while conservatives favor government by the states. On this view, liberals view the federal government as an efficient means to correct market failures (as in the New Deal) and a just means to correct local tyranny (as in the Civil Rights Acts). At the same time, liberals traditionally view the states as backwaters of tyranny and discrimination epitomized by Jim Crow laws and continued resistance to desegregation in the South. On this traditional view, liberals endorse expansive views of federal governmental power and close checks on local options for the states. Conversely, under the traditional paradigm, conservatives view "big government" as the enemy, and the federal government as presumptively inefficient and unjust, stifling libertarian initiative and small business under a massive code of environmental, consumer protection, labor, and safety regulations. State governments, by contrast, traditionally appear to conservatives both more efficient and more responsive to the people, justifying, for example, the switch to block grants rather than formula grants to states during the Nixon and Reagan Administrations.

But once the Republican Party obtained simultaneous control of the White House, House, and Senate for the first time since 1954,⁶² local and state initiatives began to do more than federal programs to advance progressive social ends. Gay weddings took place through the executive

60. See generally David L. Shapiro, *Federalism: A Dialogue* (1995); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. Chi. L. Rev. 1484 (1987) (book review).

61. Colloquial political parlance routinely refers to the divide between predominantly liberal "blue" states and predominantly conservative "red" states. See, e.g., Liz Marlantes, *Continental Divide: A Look at America's Polarized Electorate*, Christian Sci. Monitor, July 14, 2004, at 1, available at <http://www.csmonitor.com/2004/0714/p01s03-usgn.html>.

62. The Republican Party lost both the Senate and the House after the 1954 mid-term elections under Dwight D. Eisenhower. The 83rd Congress was comprised of a House with 221 Republicans, 213 Democrats, and one independent, and a Senate with fifty Republicans, forty-nine Democrats, and one independent. The Democrats controlled both the House and Senate of the 84th Congress beginning in 1954.

action of Mayor Gavin Newsom of San Francisco⁶³ and the state constitutional interpretation of Chief Justice Margaret Marshall writing for the Massachusetts Supreme Judicial Court.⁶⁴ Oregon pioneered physician-assisted suicide⁶⁵ while California experimented with allowing severely ill patients to use marijuana medicinally.⁶⁶ Suddenly states' rights were no longer just for segregationist southerners. Conversely, conservatives have sought to transform entrenched control of the federal government into nationwide social restrictions—from regulating late-term abortion to limiting stem-cell research—that were once unthinkable at the federal level.

Against this backdrop, it is promising to articulate a third possible normative premise for federalism—one rooted in a larger constitutional norm of social fluidity. Social fluidity assumes that each individual has the freedom to shape and change identity without entrenchment into any fixed class, caste, nationality, religion, race, or locality. Our nation's lack of such entrenched national, tribal, or sectarian identity separates us from such balkanized societies as Belfast, Belgrade, and Beirut, in which national or religious identity determines all of one's social, economic, familial, and residential relationships.

The original Constitution contains a number of provisions that support this notion of social fluidity and that resist entrenchment of identity into fixed silos that go all the way down, constraining citizens within one group. The Establishment Clause⁶⁷ forbids any national union of church and state. The Titles of Nobility Clause⁶⁸ forbids the establishment of any aristocratic caste. In addition, the modern First Amendment has been held to imply a freedom of association that helps formalize Alexis de Tocqueville's observation that early nineteenth-century America had substituted ever-changing voluntary associations for fixed medieval hierarchies of guild and caste.⁶⁹ If the Boy Scouts exclude someone for reason of sexual

63. See Rachel Gordon, *The Battle over Same-Sex Marriage: Bush's Stance Led Newsom to Take Action*, S.F. Chron., Feb. 5, 2004, at A1, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/02/15/MNGMNS1F8Q1.DTL>.

64. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

65. See *Gonzales v. Oregon*, 126 S. Ct. 904 (2006) (finding invalid the U.S. Attorney General's interpretation of federal controlled substance legislation to prevent the state-authorized medical prescription of a controlled substance to assist suicide for the terminally ill).

66. See *Gonzalez v. Raich*, 125 S. Ct. 2195 (2005) (holding that the Commerce Clause gives sufficient power to Congress for the federal government to prosecute medical marijuana users in California, but leaving intact the California law). It is striking that in *Raich*, two normally reliable proponents of federalism, Justices Antonin Scalia and Kennedy, defected to the majority, rejecting a claim of state autonomy—an echo of the larger phenomenon of surprising new conservative deference to federal power.

67. U.S. Const. amend. I.

68. U.S. Const. art. I, § 9.

69. 1 Alexis De Tocqueville, *Democracy in America* (Francis Bowen ed., Henry Reeve trans., Boston, John Allyn 6th ed. 1876) (1835), available at <http://www.hti.umich.edu/cgi/t/text/text-idx?c=moa;idno=AHM4083.0001.001> (public domain).

orientation,⁷⁰ then there remains the option to start an alternative Boy Scouts instead.⁷¹ Another aspect of social fluidity is physical mobility. The right to migrate among the states, which itself migrated around the Constitution before the Court found a home for it in the Citizenship Clause,⁷² guarantees free movement across state boundaries without penalty for relocation or recency of state citizenship.⁷³

Federalism, by providing exit options from local repression, provides similar support to this crosscutting constitutional commitment to social fluidity. On this view, the answer to local prejudice is exit; a gay person inhibited by pre-*Lawrence v. Texas*⁷⁴ Wyoming laws and social norms in a rural locale has the freedom to move to more welcoming urban environments. Federalism provides an opportunity for socially fluid self-definition according to each locality's different legislative and cultural environment. Such local norms provide an opportunity for self-definition and redefinition until a national consensus forms to extend any one local norm more universally.

This view of federalism as worthy of judicial protection to facilitate social fluidity is subject to several criticisms. First, it requires a presumption of strong judicial enforcement to maintain state and local autonomy from federal prohibitions on such activities as gay marriage and stem-cell research that fall outside the main purview of regulating the national market. This cannot please those who favor leaving issues of structure to the political safeguards of federalism. Second, by allowing economic decisions to be made at the national level while social decisions are made at the state level, such a view of federalism might seem to thwart decentralized economic policies that might allow for progressive local environmental, labor, antitakeover, and other laws.⁷⁵ While such concepts of local economic rule might well be intuitively appealing, they also seem quixotic given the interconnectedness of a globalized economy. Third, some people will have more mobility than others to migrate across the lines that divide red and blue states—consider the gay cowboy who cannot leave Wyoming because ranching is the only job he knows and he has child support obligations, or the teenager in Montana for whom there is no in-state abortion provider. Where such constraints are present, federalism

70. See *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (upholding the First Amendment expressive association right to exclude a gay scoutmaster despite state law prohibiting discrimination based on sexual orientation).

71. See, e.g., *Scouting for All*, <http://www.scoutingforall.org/> (last visited Oct. 31, 2006) (describing the "Scouting for All" movement responsive to the exclusion upheld in *Dale*).

72. U.S. Const. amend. XIV, § 1.

73. See *Saenz v. Roe*, 526 U.S. 489 (1999) (invalidating the durational residency requirement for receipt of state welfare payments on the ground that it penalized the right to equal citizenship among state residents, replacing the equal protection basis for similar holdings in prior cases).

74. 539 U.S. 558 (2003) (holding Texas sodomy laws to be unconstitutional).

75. See David J. Barron, *Reclaiming Federalism*, *Dissent*, Spring 2005, at 64, available at <http://www.dissentmagazine.org/article/?article=249> (arguing for a "progressive federalism" that would promote local regulation of business).

might appear to maroon some unlucky individuals in distinctly un-fluid backwaters. The only correction in such situations can be the national protection of individual rights through federal judicial decision or congressional exercise of Fourteenth Amendment enforcement powers. But there is reason to believe that federalist experimentation at the local level will help promote the ultimate spread of such norms. Massachusetts, for example, having launched an experiment in allowing gay marriage, declined the first legislative opportunity to roll back that experiment, apparently finding the effects of the experiment more salutary than pernicious.

CONCLUSION

The Rehnquist Court's revival of the structural principles of federalism has been unfairly maligned as an opportunistic vehicle for freeing gun-toters, wife-beaters, and other bigots from desirable federal laws. Under entrenched conservative dominance of all three branches of the federal government, however, federalism is better seen as protecting blue states and red states alike—that is, as a potential device for protecting progressive state and local experiments that advance the ends of liberty and equality. The Rehnquist Court did less than is often supposed to redistribute political power from the federal government to the states; its federalism decisions were qualified on their own terms and never reached as far as they might have. The Rehnquist Court did more than is often supposed, however, to redevelop the political theory of federalism, and to remind us of our more overarching constitutional commitments to social fluidity.

Notes & Observations