Pace Environmental Law Review

Volume 21
Issue 1 *Symposium Edition*

Article 5

January 2004

Blowing the Whistle on Postmodern Federalism

Bradley C. Bobertz

Blowing the Whistle on Postmodern Federalism

BRADLEY C. BOBERTZ*

I. Introduction

There is no question that post-modern federalism, a belief-system I will discuss further, threatens the existence and effectiveness of environmental law. Leslie Carothers, President of the Environmental Law Institute (ELI), a nonpartisan research, publications, and membership group founded on the day Congress passed the National Environmental Policy Act of 1969,[1] was speaking for a large and growing coalition of people and organizations when she said,

> Today, ELI and other[s] . . . are concerned about some disturbing trends in judicial decisions that will weaken the framework of federal [environmental and public health] laws. . . . Supported by foundations and think tanks opposed to practically all federal regulation, many advocates in these cases are resurrecting antiquated and discredited legal theories to limit the power of the national government to protect the environment. We believe these arguments and the judicial decisions adopting them are bad law and bad policy.[2]

Antiquated and *discredited* legal theories. *Bad* law and *bad* policy. Created and nurtured for more than a quarter century by right-wing charities whose economic influence is seen in almost every law school in America, in the form of donations to conserva-

* I would like to thank the two generations of Pace Environmental Law Review editors, and everyone who helped them, for making this symposium a reality.

1. 42 U.S.C. §§ 4321-4370 (2000). President Nixon signed NEPA into law on national TV during the halftime break of the 1970 Rose Bowl, on January 1.

2. Open Letter from Leslie Carothers, President, Environmental Law Institute 1 (Sept. 18, 2003), *available at* www.endangeredlaws.org/PressRoom.htm. The letter continues, "In response, ELI is launching its new Endangered Environmental Laws Program to shine a light on these issues. Our program will educate and support people in the legal, policy, business and advocacy community in their work to safeguard the environment, including the legal framework that has served our nation well." *Id.* The activities of ELI's Endangered Laws program, as well as its partners and advisors, can be found at www.endangeredlaws.org (last visited Dec. 5, 2003).

tive student groups who use the cash for indoctrination and to pay for law school speaking tours by luminaries of the far-right. The group Media Transparency reports that "over just one three-year period highly conservative foundations gave some sixteen million dollars to support programs at the nation's top law schools aimed at encouraging deregulation."[3] Three years, $16 million, or more than $5 million a year, in support of law school programs alone.

The clout of this money is also seen in lawsuit after lawsuit challenging the legitimacy of an entire corpus of law developed from the early progressive era onward to curb corporate and individual malfeasance in economic affairs, to ensure dignity for the poor and the ill, to address and redress the ongoing effects of slavery, and to give coming generations greater freedom of choice by protecting the land, air, water, and natural resources that surround and outlive us. These lawsuits deploy legal theories gestated and spread willfully to dismantle the modern regulatory state.

This money also funds free educational getaways for sitting judges. Technically, parties in lawsuits are not allowed to influence judges outside the courtroom by means of what the law calls "ex parte," or one-sided out-of-the-courtroom, communications. But what if large numbers of parties who are involved in long-term strategic litigation create a non-profit front group to provide training and education seminars for judges and law professors? Would that be acceptable?

Thanks to Doug Kendall we have the inside story of how these getaways, provided free of charge by a group calling itself, of all things, FREE, go about educating sitting judges and active law professors. Mr. Kendall not only infiltrated the seminars, but also traced their funding back to their corporate sponsors.[4] The seminars include a mixture of attendees, including non-judges and even political liberals, although the imprimatur of "free market environmentalism," another intellectual catchphrase for advancing the purposes of anti-regulatory extremists, lies at the heart of

3. Press Release, Environmental Law Institute, Environmental Law Institute Program Highlights Effort to Weaken Environmental Protection (Sept. 22, 2003), *available at* http://www.endangeredlaws.org.PressRoom.htm (last visited Dec. 5, 2003) [hereinafter "Press Release"].

4. DOUGLAS KENDALL, COMMUNITY RIGHTS COUNSEL, NOTHING FOR FREE: HOW PRIVATE JUDICIAL SEMINARS ARE UNDERMINING ENVIRONMENTAL PROTECTIONS AND BREAKING THE PUBLIC'S TRUST (2000), *available at* http://www.tripsforjudges.org/crc.pdf.

these seminars.[5] When the overall message of the seminars is one-sided and aimed at protecting the long-term litigation interests of one large subset of parties, the message can affect the legal system over time in a way that hides its own influence. Whenever money and power need to hide their influence, a reasonable citizen is tempted to ask why.

We also must consider the ongoing, well-financed effort to pack the bench. Packing the bench is nothing new. After all, FDR threatened to do just that in the winter of 1937. However, FDR operated in the open, and his Court-packing plan was publicly debated and rejected, even if it did arguably persuade Justice Owen Roberts to end his alliance with a bloc of retrograde robber baron lawyers who had repeatedly struck down progressive and New Deal legislative reforms.

But court-packing agenda carried out in secret, it seems to me, is different from what FDR did. As the Nixon records continue to emerge, you can see court-packing schemes at their most baroque.[6] The bottom line is that Nixon appointed four Supreme Court Justices. In order, they were Chief Burger, Blackmun, and then, simultaneously in a live press conference on the evening of October 21, 1971, Powell and Rehnquist.

Justices Powell and Rehnquist may be the odd couple of Supreme Court history. Powell was expected. Star of the Richmond

---

5. *Id.* at 9.

6. John Dean's book, THE REHNQUIST CHOICE: THE UNTOLD STORY OF THE NIXON APPOINTMENT THAT REDEFINED THE SUPREME COURT (2001), tells a fascinating story of the four Nixon appointees (in order, Burger, Blackmun, and, simultaneously, Powell and Rehnquist), the circumstances of their appointments, and the lengths the White House was willing to go to produce an ideologically uniform Court.

For one thing, we have the story of how a vacancy was created when Justice Abe Fortas resigned in 1969, in the midst of a scandal that, in retrospect, has all the earmarks of a dirty tricks campaign. *Id.* at 10-11. Fortas occupied the so-called "Jewish seat," occupied by Cardozo (briefly), Frankfurter, Goldberg (very briefly), and then Fortas. *Id.* at 14-15. Brandeis, the first Jewish Justice, served simultaneously with Cardozo for a few years before he retired. His seat went to Justices Douglas and then Justice Stevens. 1 LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW app. at 1383-84 (3d ed. 2000).

To fill the "Jewish seat," the White House considered, among others, Caspar Weinberger. Although Weinberger was in fact Episcopalian, Nixon's aides mistakenly believed that Weinberger was Jewish, possibly because of his surname. *See id.* at 51. There were thoughts of unseating Thurgood Marshall and creating a "Black seat" on the Court which they could fill with a black arch-conservative. *Id.* at 53-54. They also thought a permanent "woman's seat" would be another stealthy way of ensuring loyalty on the Court. *Id.* at 50. Nixon, pre-occupied as he was with paranoia about enemies in general and Jews in particular, seemed in fact to have thought Rehnquist, or "Renchbuerg," was Jewish or at least Jewish-*looking*. *Id.*

bar, he helped integrate the city and was a past president of the ABA. Powell had already turned Nixon down for the Fortas seat that went to Blackmun, but ultimately accepted the President's appointment to one of the two seats that opened when both Justices Hugo Black and John Harlan resigned within a week as they lay dying in Washington area hospitals. Nixon sent them both farewell letters on September 17, 1971 even though Justice Harlan had yet to actually resign.[7]

But who was Rehnquist? Contemporary photographs show his mutton-chop sideburns and thick glasses with squarish black frames and a questionable assembly of clothes from that era.[8] He looked too young, at forty-one, to be a serious appointment, but it turned out he was a brilliant man who, after finishing first in his law school class at Stanford, clerked for Justice Jackson, and most recently was the person "who did most of the heavy lifting" at the Department of Justice in helping Nixon select judicial candidates. His conservative convictions were known to the administration, and history shows that the Rehnquist appointment was by far the most important of Nixon's four. As John Dean summarizes,

---

7. To Hugo Black, Nixon wrote:

> 9/17/71
> Dear Mr. Justice Black
> This personal note expresses my deep appreciation as a fellow lawyer for your years of service in the Court.
> As I said in my statement when I received your letter of resignation—you were the best questioner of all when I appeared before the Court. . . .
> Mrs. Nixon joins me in sending many good wishes to you in this difficult time—
> Richard Nixon

To John Harlan, Nixon wrote:

> 9/17/71
> Dear John
> I was very distressed to learn from Warren Burger of your stay in the hospital.
> This note brings my very best personal wishes during what I know must be a difficult time for you.
> The Nation and The Court will always be in your debt for your superb public service.
> RN

DEAN, *supra* note 6, at 43.

8. Upon first seeing Rehnquist, Nixon famously commented "who the hell is that clown," referring to his pink shirt and other questionable clothing choices. Even more notable is Barry Goldwater's phone call to Nixon formally recommending Rehnquist as a Supreme Court candidate. Neither Goldwater nor Nixon could remember Rehnquist's name. "Rensler" was about as close as they came. *Id.* at 132.

> Nixon's last-ditch decision to select William Rehnquist proved to be among the most significant of his presidency. Its impact is still being felt. His other choices . . . were all men whose philosophies and rulings proved consistent with mainstream constitutional jurisprudence. The Rehnquist choice, however, has redefined the Supreme Court, making it a politically conservative bastion within our governmental system. Rehnquist's many years of service, and his ability as a legal scholar, have brought about the rewriting of fundamental aspects of the nation's constitutional law. With Rehnquist, Nixon found the conservative who would sit on the high bench for three decades, where he could work at undoing the legacy of the Warren Court. Nixon realized, perceptively, that in appointing a younger man as an associate justice he might also be appointing a future chief justice. In Nixon's words, he was appointing "a guy who's there 30 years. And who, also, if Republican is around, is a potential candidate for chief justice."[9]

Subsidies for conservative student groups and scholarship, subsidies for anti-regulatory litigation, the wining and dining of sitting judges, efforts to pack to the bench: they all have had their effect on American law. "These and allied activities are having a pernicious impact on the federal judiciary, both on nominees to fill judicial vacancies and on decisions that federal judges render," according to Pace University School of Law professor Jeffrey G. Miller.[10] "The public should know that judicial decisions undermining environmental protections aren't the result of blind justice, but a carefully orchestrated campaign by conservative extremists."[11]

---

9. DEAN, *supra* note 6, at 265.

10. Press Release, *supra* note 3 (quoting Professor Jeffrey G. Miller).

11. *Id.* For further discussion of the role of right-wing philanthropy in the evolution of American law and culture, see JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA (1996); J. William Futrell, *Closing Statement, Now on Endangered List: Environmental Law Itself*, 19 ENVTL. FORUM 1, 64 (2002); Karen Paget, *Lessons of Right-Wing Philanthropy*, 9 AM. PROSPECT 40 (1998), *available at* http://www.prospect.org/print/V9/40/paget-k.html (last visited Dec. 10, 2003); SALLY COVINGTON, NAT'L COMM. FOR RESPONSIVE PHILANTHROPY, MOVING A PUBLIC POLICY AGENDA: THE STRATEGIC PHILANTHROPY OF CONSERVATIVE FOUNDATIONS (1998); PEOPLE FOR THE AMERICAN WAY, BUYING A MOVEMENT: RIGHT-WING FOUNDATIONS AND AMERICAN POLITICS (1996), *available at* http://www.pfaw.org/pfaw/dfiles/file_33.pdf; LEON HOWELL, UNITED CHURCH BOARD FOR HOMELAND MINISTRIES FUNDING THE WAR OF IDEAS (1995); LEON HOWELL, ALLIANCE FOR JUSTICE, JUSTICE FOR SALE: SHORTCHANGING THE PUBLIC INTEREST FOR PRIVATE GAIN (1993), *available at* http://www.allianceforjustice.org/images/collection_images/Justiceforsale.pdf.

II. What is Postmodern Federalism?

The Constitution that I interpret is not living, but dead. . . .[12]

—Antonin Scalia

* * * *

HENRY

Crazy am I? We'll see whether I'm crazy all right . . . I am going to turn that ray on that body and endow it with life.

WALDMAN

And you really believe that you can bring life to the dead?

HENRY

That body is not dead. It has never lived. I created it. I made it with my own hands from the bodies I took from graves, from the gallows—anywhere.

* * *

HENRY

Look—it's moving. It's alive. It's alive. It's moving. It's alive!

MORITZ

Henry, in the name of God.

HENRY

In the name of God? Now I know what it feels like to be God![13]

If these quotes from Justice Scalia's speech and the script of the 1931 film, *Frankenstein*, suggest by ironic juxtaposition that the Rehnquist Court is engaging in something remotely comparable to Dr. Frankenstein's reanimation of a monster from pieces of the dead, the suggestion is obviously unfair, unfounded and grossly hyperbolic. Yet I believe that one lesson of the Frankenstein tale—that arrogant pride can unleash monsters that escape the control of their makers—is worth remembering as the Rehnquist Court continues to propel us in new directions.

Let us begin by demystifying the word "federalism." Federalism, itself, simply refers to any system of power-sharing in which authority is distributed between what is typically a larger political unit, such as the United States, and what are typically smaller political subdivisions, such as the states, which are a part of, but

12. Justice Antonin Scalia, Remarks at Pew Forum on Religion and Public Life Conference, A Call for Reckoning: Religion and the Death Penalty (Jan. 25, 2001), *available at* http://pewforum.org/deathpenalty/resources/transcript3.php (last visited Dec. 11, 2003).

13. FRANKENSTEIN (Universal Studios 1931).

at least partially independent from, the larger body.[14] The European Union and its constituent nations are an example of federalism, as were the Articles of Confederation that the Constitution supplanted.

Federalism, in other words, is a structural notion that has no meaning independent of its particularizing details. Under any given system of federalism, the larger political body can have a great deal more power than its political subunits, as is the case in some European nations, or the subunits can wield comparatively more power than the larger political unit, as was the case under the Confederate Constitution during the American Civil War. In normal usage, then, the term "federalism" is agnostic as to how power is distributed. "Federalists" of the founding generation favored a strong national government in relation to the states,[15] while the modern Federalist Society appears to favor the diminishment of national power vis-à-vis the states.

So a word of caution for anyone tempted to use the words "federalist" or "federalism" to represent any one set of specific ideas or one side of a partisan debate: over time the term "federalism" has been used to cover so many contradictory constitutional positions that it almost ceases to carry any meaning independent of its details. We hood our eyes if we sign on with a particular brand name of federalism, because the selective presentation of information inherent in any theoretical or ideological system is less complete than the information available generally.[16]

American federalism jurisprudence is thought to consist of three overlapping strands of doctrine. The first strand involves

---

14. Black's Law Dictionary defines the term "federalism" as meaning "the relationship and distribution of power between the national and regional governments within our federal system of government." BLACK'S LAW DICTIONARY 627 (7th ed. 1999). Professor Edward Rubin defines federalism to mean "a principle of political organization in which a single polity, or nation, has both a central government and separate, geographically defined governments that are subordinate to the central government in certain matters but independent of it in others." Edward L. Rubin, *The Supreme Court's Federalism: Real or Imagined? Puppy Federalism and the Blessings of America*, 574 ANNALS OF THE AM. ACAD. POL. & SOC. SCI. 37, 38 (2001).

15. The Supremacy Clause, in effect, codifies the federalists' victory: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, in the Authority of the United States, shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2.

16. My understanding of "federalism" here includes separation of powers issues. So I'd like to include within the scope of our analysis the deliberate trisection of power evident in the constitutional plan in the form of separate Articles on the Legislative (I), Executive (II), and Judicial (III) Branches.

congressional authority to enact national legislation. The constitutional provisions primarily at issue are the Commerce Clause[17] and section five of the Fourteenth Amendment,[18] though curtailment of other congressional powers, including the spending power, is also evident in the lower federal courts.

Between April 12, 1937, when the Court abandoned an overly restrictive understanding of the commerce power,[19] and April 25, 1995, the day before *United States v. Lopez*[20] was decided, the Court did not invalidate a single federal law on the ground that it was beyond the reach of the Commerce Clause. Litigants are now relying on *Lopez* and its progeny to challenge the constitutionality of many federal laws, including the Clean Water Act,[21] the Safe Drinking Water Act,[22] and the Endangered Species Act,[23] though their ultimate success in this enterprise appears increasingly doubtful.[24]

Section five of the Fourteenth Amendment gives Congress the power "to enforce, by appropriate legislation, the provisions of this [amendment]."[25] In 1997, the Court surprised many observers by

17. U.S. CONST. art. I. § 8, cl. 3.

18. U.S. CONST. amend. XIV, § 5 ("The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.").

19. The switch came in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Two weeks earlier, the Court had rejected the idea that the due process clause barred governments from regulating working conditions such as minimum wages and maximum hours. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

20. United States v. Lopez, 514 U.S. 549 (1995).

21. 33 U.S.C. §§ 1251-1387 (2000).

22. 42 U.S.C. §§ 300f-300j-26 (2000).

23. 16 U.S.C. §§ 1531-1544 (2000). If the latest decisions of the federal courts' are any guide, these broad-scale attacks on environmental protections are meeting with heavy skepticism.

24. *See, e.g.*, Nebraska v. Envtl. Prot. Agency, 331 F.3d 995 (D.C. Cir. 2003) (holding that the Safe Drinking Water Act does not exceed the scope of the Commerce Clause in light of evidence that a number of utilities sell drinking water across state lines); Treacy v. Newdunn Assocs., 344 F.3d 407 (4th Cir. 2003) (holding a particular wetland fell under the jurisdiction of the Clean Water Act because water flowed intermittently from the wetland, through a manmade ditch that crossed under an interstate highway, and into traditional navigable waters); GDF Realty Invs. v. Norton, 326 F.3d 622 (5th Cir. 2003) (holding the Endangered Species Act, even as applied to species found only within one state, is valid under the Commerce Clause because the harming of endangered species in the aggregate has a substantial effect on interstate commerce).

25. U.S. CONST. amend. XIV, § 5. Early in the amendment's history, the Supreme Court ruled that that section does not give Congress the authority to regulate private action. The Civil Rights Cases, 109 U.S. 3 (1883). This was one of the reasons why the civil rights laws of the 1960s were enacted under the commerce power, rather than the Fourteenth Amendment. The *Civil Rights Cases* fell into disfavor among the

adding, as an additional test for the validity of congressional action under section five, the requirement that "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to the end."[26]

The second strand of federalism doctrine arises under the Tenth Amendment, which states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[27] For most of the twentieth century, the Tenth Amendment was thought not, by its own power, to place restrictions on congressional authority. As the Court explained in 1941:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.
>
> From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end. Whatever doubts may have arisen of the soundness of that conclusion, they have been put at rest by the decisions under the Sherman Act and the National Labor Relations Act. . . .[28]

After his appointment to the Supreme Court in 1971, Justice Rehnquist made the revival of the Tenth Amendment a high priority. Within five years he had assembled a temporary five-justice majority that struck down a federal law on Tenth Amendment

---

justices for most of the twentieth century, and the validity of the *Civil Rights Cases* was criticized in *United States v. Guest*, 383 U.S. 745 (1966). The Rehnquist majority, however, often cites the *Civil Rights Cases* as a source of good law and binding precedent. *See, e.g.*, City of Borne v. Flores, 521 U.S. 507, 532 (1997) ("Remedial legislation under § 5 'should be adapted to the mischief and wrong which the [Fourteenth] Amendment was intended to provide against.'" (quoting The Civil Rights Cases, 109 U.S. at 13)).

26. City of Borne v. Flores, 521 U.S. 507, 520 (1997).

27. U.S. CONST. amend. X.

28. United States v. Darby, 312 U.S. 100, 124 (1941) (citations omitted).

grounds in *National League of Cities v. Usery*.[29] This decision was itself overturned nine years later in *Garcia v. San Antonio Metropolitan Transit Authority*, when Justice Blackmun abandoned as unworkable the legal test created in *National League of Cities*.[30] Dissenting in *Garcia*, Justice Rehnquist temporarily removed the mask of judicial objectivity to make a political observation: "[*National League of Cities* recognized a basic] principle that will, I am confident, in time again command the support of a majority of this Court."[31] Rehnquist was right as the Court once again made an about-face in 1992, when it ruled in *New York v. United States*[32] that the "take-title" provision of the Low-Level Nuclear Waste Policy Act violated the Tenth Amendment. The Court later extended this holding to strike down parts of the Brady Handgun law.[33]

Though some say the third strand of the federalism doctrine, state sovereignty, is linked to the Eleventh Amendment, it is in fact a freestanding constitutional doctrine. Its advocates say state sovereignty is both implicitly recognized in that amendment, and it emanates from tacit, unstated, beliefs of the Framers about the proper relationship between states and the national union at the time the Constitution was written, debated, and ratified in 1787 and 1788. Although state sovereignty cases have been a part of the national scene since well before the 1990s,[34] the theory came into its own with the Court's 1996 decision in *Seminole Tribe of Florida v. Florida*,[35] which held that Congress may not abrogate state sovereign immunity under its Commerce Clause authority. Since *Seminole Tribe*, the Court has accepted and decided a series of state sovereignty cases that further expand the doctrine.[36]

---

29. 426 U.S. 833 (1976) (5-4 decision) (first decision since the 1930s to strike down an act of Congress on federalism grounds, overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968)).

30. Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985) (5-4 decision).

31. *Id.* at 580 (Rehnquist, J., dissenting).

32. 505 U.S. 144 (1992) (5-4 decision).

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

34. *E.g.*, Edelman v. Jordan, 415 U.S. 651 (1974); Hans v. Louisiana, 134 U.S. 1 (1890); Louisiana *ex rel.* v. Jumel, 107 U.S. 711 (1882).

35. 517 U.S. 44 (1996) (5-4 decision) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989) (5-4 decision)).

36. These decisions include three announced simultaneously in 1999: *Fla. Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank*, 527 U.S. 627 (1999) (5-4 decision) (striking down portions of the Patent and Plant Variety Protection Remedy Clarification Act); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999) (5-4 decision) (holding Trademark Remedy Clarification Act did not validly abrogate Florida's sovereign immunity); *Alden v. Maine*, 527 U.S. 706

* * * *

So what then is "postmodern" federalism? I use the term in reference to the specific changes in constitutional law over the past decade that makes our present time, depending on the expert you ask, either a new constitutional moment, a period of rapid systemic change, a time of instability among the ordering paradigms of constitutional thought, or something else momentous and important.

Of course, the term "postmodern" implies knowledge of the "modern." Stated simply, "modern" federalism is the narrative I learned in law school when I took Constitutional Law in the mid-1980s. My old constitutional law textbook represents it well.[37] According to this account, those on the side of increased national power won every battle, including ratification of the Constitution itself, the Civil War and the constitutional amendments that followed it, the New Deal and rise of the modern state, and the desegregation struggles. Indeed, modern twentieth century America seemed shaped more by what unified us as a nation than by what separated us as citizens of different states.

According to Brest and Levinson, the story of modern federalism's triumph could be summed up in a chapter entitled "The Decline of Judicial Intervention and the Current Doctrine of Federalism."[38] The story is a version of the "switch in time that saved nine" narrative. Before 1937 those who believed in unregu-

---

(1999) (5-4 decision) (holding state immunity from private suit in their own courts beyond congressional power to abrogate by Article I legislation). After the 1999 trilogy, the Court issued several more decisions applying state sovereignty principles. *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000) (5-4 decision) (holding Age Discrimination in Employment Act does not contain a clear statement of congressional intent to abrogate state immunity from suit); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356 (2001) (holding state sovereign immunity bars suits in federal court seeking money damages for state's violation of Americans with Disabilities Act); Fed. Mar. Comm'n. v. S.C. State Ports Auth., 535 U.S. 743 (2002) (holding sovereign immunity extends to administrative adjudications).

The most recent in this line of cases, *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003), *upheld* the right of employees to recover money damages under the Family and Medical Leave Act, though it did so in a manner that left the reasoning of its earlier decisions intact. In fact, the result of *Hibbs* centered on application of the court-created test for gender discrimination rather than any deference to congressional action.

37. State sovereignty, back in the days of modern federalism, seemed like a discarded costume worn by history's losers to cover up slavery, Jim Crow, and even, to the bitter end, school desegregation. *See* PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISONMAKING: CASES AND MATERIALS (2d ed. 1983).

38. *Id.* at 287.

lated commerce and labor—either because regulation was an unacceptable extension of congressional power or because it intruded into an inviolable zone of freedom over one's economic affairs to the extent that even commonly accepted labor reforms, including the prohibition against child labor, were blocked as unconstitutional—had managed to slow the inexorable forces of modernity fueled by the Depression and the nation's other domestic and international predicaments.

Then everything changed in 1937. The *Lochner v. New York*[39] Justices were deposed once and for all within a span of about two weeks in the spring of that year, when the Court decided to abandon both its substantive due process[40] and commerce clause[41] lines of decisions and forever, we then believed, alter the course of constitutional history. In my old casebook there's a subpart called the "residue of state sovereignty."[42] Arguments about the reach of the federal commerce power seemed so well settled as to be virtually taken for granted.

Modern federalism, then, was a time when most forms of congressional action, including the enactment of environmental laws, sailed through the courts under presumptions of legislative rationality that the postmodern Court seems to be abandoning. Even the *Chevron* doctrine tilted in this direction, as it seemed to discourage courts from second-guessing agency action in the absence of clear statutory directives to the contrary.[43]

"Post-modern federalism," in contrast, means the doctrine as it currently stands after more than a decade of activist reformation. It can be represented by the current edition of my old Constitutional Law casebook,[44] which replaces phrases like "the residue of state sovereignty" with ones like "The Rehnquist Court: Finding Affirmative Limits." I also use the term "postmodern" because the methodology used by the Court's conservative members is distinctly postmodern in its skepticism about our ability to decipher the meaning of language; its willingness to borrow across disciplines and realms of experience; its self-absorption; and its will-

39. Lochner v. New York, 198 U.S. 45 (1905).

40. *See* W. Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

41. *See* Nat'l Labor Rel. Bd. v. Jones, 301 U.S. 1 (1937).

42. BREST & LEVINSON, *supra* note 37, at 336.

43. Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

44. PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING: CASES AND MATERIALS (4th ed. 2000).

ingness to covet ideals and principles at high levels of abstraction while ignoring particularized facts.[45]

Specifically, I think one can identify postmodern federalism by a series of presumptions and logical maneuvers, six in all, that give away its presence in what might otherwise seem like a normal court opinion.

III. Six Signs of Postmodern Federalism

Here are six hallmark presumptions and beliefs we can call the "signs" of postmodern federalism. These signs lay mostly in the background but contribute mightily to the outcome of Supreme Court decisions:

1. Agencies of state and federal governments, if not the U.S. Congress itself, are generally overreaching in their regulation of business.
2. The Supreme Court, and by extension the lower federal courts, can and should use the full extent of their power to curb the excesses of the democratic branches of government and the bureaucracies they create.
3. Words and phrases in the Constitution and its amendments are linguistically different but *a priori* equivalent at all other meaningful levels and can therefore be stripped of their historical and cultural context and deciphered by textual analysis alone.
4. The truth or falsity of an assertion of fact, including disputed historical fact, can be resolved by citation to legal authority, thus abandoning the need to recognize the distinction between fact and law that is central to Anglo-American jurisprudence.
5. Constitutional holdings need not confront their real-world consequences.
6. Pragmatic, fact-based reasoning from evidence can be ignored.

Much has been said and written about signs one, two, and three, so I'd like to spend our time on the others. The object of analysis will be the Supreme Court's decision in *Federal Maritime Commission v. South Carolina State Ports Authority* (*FMC*),[46] and more specifically the opinions of Justices Thomas (writing for a 5-

45. For an introduction to postmodernism, see STEVEN CONNOR, POSTMODERN CULTURE: AN INTRODUCTION TO THEORIES OF THE CONTEMPORARY (1989).

46. 535 U.S. 743 (2002).

4 majority) and Justice Breyer (writing for himself and three colleagues in dissent). At first glance, *FMC* would seem to have little bearing on environmental protection. The case arose after the South Carolina Ports Authority denied a berth to a gambling vessel, relying on state policy, an action the ship owner challenged under the adjudicative proceedings used by the Federal Maritime Commission to resolve disputes within its jurisdiction.

But adjudications before administrative law judges too closely *resembled* real trials to survive the Court's new chastity-based formulation of state sovereign immunity. Under this formulation, the states entered the Union with their sovereign immunity "intact." If being sued in court were enough to threaten the maidenhood of state immunity, the same would be true of being dragged before a federal agency in a quasi-trial. I suppose it would still feel the same to the entity (the state itself) whose dignity hangs in the balance.

Sign 4

First, let's inspect the *FMC* majority opinion for evidence sign four, a belief that the "truth or falsity of an assertion of fact, including disputed historical fact, can be resolved by citation to legal authority." Part II of the opinion, a four-paragraph passage describing the law of state sovereign immunity, contains numerous assertions of historical fact over which historians disagree, but which are presented as settled facts. Authority for these assertions does not lie in Constitution's text[47] or in the historical record, as the Court openly acknowledges.[48] Rather, it lies in the historical dicta and speculation of *Alden v. Maine* combined with a pinch of the now-standard quotation from Alexander Hamilton, in which he muses about sovereign immunity as something within "the general sense and the general practice of mankind."[49]

In effect, the *FMC* majority treats the realm of disputed historical fact as if it could be forever resolved and cemented into place by a five to four vote of the Supreme Court. As they have in many of their sovereign immunity decisions, the five Justices who

47. "[T]his Court has repeatedly held that the sovereign immunity enjoyed by the States extends beyond the literal text of the Eleventh Amendment." *Id.* at 754.

48. The search for the Constitution's original understanding yields "a relatively barren historical record. . . . In truth, the relevant history does not provide direct guidance for our inquiry." *Id.* at 755.

49. THE FEDERALIST NO. 81, at 248 (Alexander Hamilton) (Ray P. Fairchild ed., 2d ed. 1981).

comprised the majority in *FMC* revert to a magical world in which open, perhaps unanswerable, questions of history can be answered by judicial decree. The result is a self-perpetuating cycle of judicial holdings and dicta that needs only cite itself to support its own suppositions.

Signs 5 and 6

Let's next look for evidence of signs five and six, the idea that constitutional rulings need not confront their real-world consequences, and the corollary conclusion that pragmatic arguments based on evidence have little place in constitutional analysis. Before doing so, though, I'd like to tell the stories of four real people whose lives were affected by the *FMC* ruling.

Paul Jayko.[50] When residents of Merion, Ohio, learned that graduates of River Valley High School were suffering from leukemia and other cancers in unusually high numbers, they called Paul Jayko, a site coordinator with the Ohio Department of Environmental Protection in Bowling Green. It turned out that the school had been built on the site of a World War II military depot where radioactive materials and toxic wastes still lay buried. Then-governor Voinovich directed Jayko and other environmental and health officials to "leave no stone underturned" in investigating the cancer cluster. As site coordinator for the Merion site, Jayko was in charge of all aspects of the investigation. But when he began to uncover evidence that suggested a possible linkage between the cancers and exposure to toxic materials at the site, Jayko found his superiors were more concerned about keeping a lid on the information than responding to the threat. Jayko wrote internal memos critical of the Department's efforts and his superiors quickly concluded that he was not a "team player." When he continued to insist on a thorough investigation, his responsibility over the site investigation was sharply curtailed.

In the summer of 1997, Jayko was suspended without pay for ten days for allegedly seeking reimbursement for the beer he ordered with his dinner at Pizza Hut with his boss and colleagues on the investigation team. A federal administrative law judge later found this allegation to be unfounded, and the suspension moti-

50. *See* Ohio Envtl. Prot. Agency v. U.S. Dep't of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) (the state settled the case while Jayko's appeal was pending before the U.S. Court of Appeals for the Sixth Circuit); Jill Riepenhoff, *EPA Whistle-Blower Gets Job Back*, COLUMBUS DISPATCH, Feb. 24, 2001, at A1.

vated by a desire to punish Jayko because of his role in the investigation. That conclusion was of no comfort on the morning after the suspension, when Jayko found his wife in tears with the newspaper opened to a headline "EPA Investigator Accused of Boozing on the Job."

Omar Shafey.[51] To combat a Mediterranean fruit fly infestation in east central Florida, state agriculture officials sprayed fields with a mixture of corn syrup and malathion, an insecticide. More than two hundred people in the spray area were sickened. A four-year-old asthma patient was hospitalized for two days. A lawn service worker broke out in blisters where malathion-coated grass clippings stuck to his neck, arms, and legs. A woman suffered two weeks of vomiting, diarrhea, and respiratory problems after washing the malathion/corn syrup mixture off her car.

Dr. Omar Shafey, a nationally recognized epidemiologist with the state Department of Health, conducted a study of the health effects of the spraying program, concluding that there were "documented adverse health effects attributable" to the spraying and that the state should consider safer alternatives than aerial spraying. Although Shafey's findings were ultimately corroborated by the federal Centers for Disease Control, his superiors demanded that he tone down the report. He refused. When the final report was released, after editing by the health department officials, it recommended only more study and concluded that Shafey's findings "do not allow an association" between the spraying program and the reported illnesses. The Health Department then commenced a painstaking review of Shafey's personnel records. This internal investigation, which took a month to complete, found that he had overstated his expense reports by $12.50. Shafey was fired for this alleged fraud, escorted from his office by an armed Tallahassee police officer.

Beverly Migliore.[52] Beverly Migliore's rise within the Rhode Island Department of Environmental Management was rapid and impressive. She was hired as an intern with the air program in 1986. By 1992 she was in charge of overseeing the hazardous waste activities of 5,000 Rhode Island companies. Her reputation as a tough law enforcer helped propel her career, but it became a liability after a pro-business governor, Lincoln Almond, was

51. Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001).
52. Rhode Island v. United States, 115 F. Supp. 2d 269 (D.R.I. 2000).

elected to office in 1994. The Department's newly appointed director announced a new enforcement policy that would emphasize informal discussions and voluntary actions over citations and enforcement actions. In 1996, the Department was reorganized and Migliore was transferred to a new position. She now reported to someone who had no experience in hazardous waste matters.

In fiscal year 1993, when Migliore ran the state's Resource, Conservation, and Recovery Act's enforcement office, the Department handed out 211 citations for noncompliance. In fiscal year 1998, by contrast, twenty-nine citations were issued. Migliore complained about the drop-off in enforcement. She was transferred to a small, windowless office and given the job of briefing state Economic Development Commissioners every two weeks, a job that consumed a few hours a week at most. "They basically want me to do nothing. I'm a non-person here," Migliore told a reporter in 1999. "I feel terrible. I've lost my career. It was something I loved to do. . . . I worked my way up and I was very happy representing the state and planned to keep doing it until I retired."

Anne Rapkin.[53] Anne Rapkin was promoted to chief counsel of the Connecticut Department of Environmental Protection (DEP) in 1992, four years after joining the agency. Rapkin, a graduate of the University of Chicago's prestigious law school, had turned down lucrative offers in the private sector because she was committed to serving the public. The election of 1994, however, brought into office a new governor, John Rowland. Like Rhode Island governor Almond, Rowland promised to bring a business-friendly attitude to environmental enforcement. To carry out this new policy, the governor appointed Sidney J. Holbrook as commissioner of the DEP. Immediately upon his appointment, Holbrook demoted Rapkin from head of the agency's legal department to staff attorney. She regained this position only after threatening legal action. When Holbrook became Governor Rowland's co-chief of staff, his replacement, Arthur Roque, reorganized the Department to take supervision of the agency's attorneys away from Rapkin. This decision was reversed a month later after Rapkin again threatened legal action.

In January 1998, Rapkin complied with a Freedom of Information request by releasing documents to the Hartford Courant

53. Conn. Dep't of Envtl. Prot. v. Operational Safety & Health Admin., 138 F. Supp. 2d 285 (D. Conn. 2001).

that indicated Holbrook and an aide had given the Bridgeport Hydraulic Co. access to internal environmental information. Bridgeport Hydraulic's chief executive was the chief of Governor Rowland's transition team. That August, Roque was quoted in a local newspaper as saying, "Anne has a tendency to characterize things in a way that mask the truth." Rapkin was yanked off a case after providing a legal opinion on a controversial garbage loading station, and her responsibilities at the agency were gradually stripped away. She remained at the agency. "I love what I do . . . and I'll be damned if I was going to let those people chase me out of the agency," she said. On January 5, 2001 commissioner Roque fired Rapkin for the release of internal documents and public criticism of the agency.

Under the environmental whistleblower provisions of federal law, all four individuals were protected from exactly the sort of retaliation they suffered for standing up to their superiors.[54] In enacting these whistleblower measures, Congress understood that employees of state environmental agencies were and would continue to face stiff pressure from the states' economic and political establishment. Without legal protection, they would imperil their careers and families if they attempted to resist these pressures. Since the enactment of the whistleblower provisions, scores of state workers have prevailed in administrative actions, gaining job reinstatement and damages when faced with job retaliation for voicing unpopular or controversial views within or outside of the agency.

Each person whose case is described in this article sought protection under the whistleblower laws. The two whose cases were decided by federal administrative law judges initially obtained the relief they sought. Beverly Migliore was awarded over $800,000 in damages, while Paul Jayko received a more modest recovery. Ten years ago these awards would have easily withstood judicial review. But the views of the judiciary have changed radically over the past decade.

54. Congress enacted seven environmental whistleblower protection bills between 1972 and 1980. *See* Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (2000); Clean Air Act, 42 U.S.C. § 7622 (2000); Energy Reorganization Act, 42 U.S.C. § 5851 (2000); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. § 9610 (2000); Solid Waste Disposal Act, 42 U.S.C. § 6971 (2000); Clean Water Act, 33 U.S.C. § 1367 (2000).

Now the "sovereign dignity" of the states trumps the rights of individuals who have been wronged by state action. In other words, the states may not suffer the indignity of being made to answer for their actions before federal courts and administrative hearings. These precedents bind the lower federal courts. In each of the four environmental whistleblower cases, district judges either overturned the administrative remedies awarded by the Department of Labor or blocked ongoing investigations before decision.[55]

On August 30, 2002, the First Circuit affirmed the district court's dismissal of the Migliore case on sovereign immunity grounds, becoming the first federal appellate court to rule on the issue.[56] The fates of all four whistleblowers were sealed by the *FMC* decision. Each of them, using a long-established set of federal whistleblower laws, filed administrative complaints to recover money damages for the illegal retaliation they suffered. But now, in light of *FMC*, we know that even administrative hearings brought by state environmental protection workers against their own agencies so affront the dignity of the states qua states as to be barred by sovereign immunity.

Writing in dissent, Justice Breyer challenges the majority to justify the *FMC* decision "in terms of its practical consequences."[57] Justice Breyer cited environmental laws and called the majority's attention to their whistleblower provisions, suggesting those provisions might be threatened as a practical consequence.[58] In fact, they were, but the majority had nothing to say about these or other consequences of its ruling. Indeed, the consequences of the decision seemed barely to enter the majority's thinking at all.

IV. Conclusion: Toward a New Consequentialism

A long-range strategy for minimizing the adverse environmental impacts of the Court's post-modern federalism jurisprudence might lie in continuing to emphasize, as Justice Breyer does in his *FMC* dissent, the practical, real-world consequences of this

55. *See* Ohio Envtl. Prot. Agency v. U.S. Dep't of Labor, 121 F. Supp. 2d 1155 (S.D. Ohio 2000) (the state settled the case while Jayko's appeal was pending before the U.S. Court of Appeals for the Sixth Circuit); Florida v. United States, 133 F. Supp. 2d 1280 (N.D. Fla. 2001); Rhode Island v. United States, 115 F. Supp. 2d 269 (D.R.I. 2000); Conn. Dep't of Envtl. Prot. v. Operational Safety & Health Admin., 138 F. Supp. 2d 285 (D. Conn. 2001).

56. R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002).

57. 535 U.S. 743, 785 (Breyer, J., dissenting).

58. *Id.* at 786 (Breyer, J., dissenting).

body of constitutional doctrine. This paper shows how decisions such as *FMC*, which on their face seem to have little bearing on environmental protection, can in fact profoundly affect the integrity and stability of our environmental protection laws.

For Paul Jayko, Omar Shafey, Beverly Migliore, and Anne Rapkin, *FMC* effectively rescinded the legal protections each of them needed to bring charges of governmental malfeasance into the judicial and public arenas where the drafters of our federal environmental statutes expected such charges to be aired, confronted, and resolved. This harms not only the individual whistleblowers, robbing them of their ability to seek redress for retaliatory action, but also undermines the purpose of the whistleblower provisions themselves and sends a clear signal to all potential whistleblowers that the laws written to protect their right to speak out cannot actually be relied on in practice.

Renewed attention to facts and consequences—a new "consequentialism"—is nothing new in American law. Amicus briefs, whether submitted to the Supreme Court or lower federal courts, are intended, among other things, to inform the judiciary about the real-world effects their decisions will produce. Indeed, Justice Breyer and other justices and judges rely on amicus briefs for this very purpose.

Evaluating abstract legal holdings and theories in light of their empirical effects is also well within the mainstream of American philosophical and jurisprudential thought. America pragmatism, from William James and Oliver Wendell Holmes, Jr., to Richard Rorty, is a uniquely American contribution to world philosophy, and pragmatism in a more general sense is deeply embedded in American thought and law. If post-modern federalism claims a theoretical hold on current notions of constitutional law, its proponents bear the burden of showing how their theories and dogma will operate in the living world. It is a burden they have thus far failed to meet.