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The Rehnquist Revolution

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I. INTRODUCTION

When historians look back at the Rehnquist Court, without a doubt they will say that its greatest changes in constitutional law were in the area of federalism. Over the past decade, and particularly over the last five years, the Supreme Court has dramatically limited the scope of Congress' powers and has greatly expanded the protection of state Sovereign Immunity. Virtually every area of law, criminal and civil, is touched by these changes. Since I began teaching constitutional law in 1980, the most significant differences in constitutional law are a result of the Supreme Court's revival of federalism as a constraint on federal power.

The federalism decisions are the product of a Court, with five conservative members, deeply committed to protecting state governments from federal encroachment. Virtually all of the recent Supreme Court cases, including *Bush v. Gore*[1] and the federalism decisions, have been five-four decisions, with the majority comprised of Rehnquist, C. J.; O'Connor, J.; Scalia, J.; Kennedy, J.; and Thomas, J. From a practical perspective, these five Justices are the Rehnquist Court.

In the October 2000 Term, for example, the Court decided seventy-eight cases; twenty-six were resolved by a five-four margin and in fourteen of those, the majority was comprised of Rehnquist, C.J.; O'Connor, J.; Scalia, J.; Kennedy, J.; and Thomas, J. In the October 2002 Term, the Court decided seventy-three cases and fifteen were decided five-four, with this grouping being the most frequent majority in six cases.

These five Justices revived federalism in three major ways. First, the Rehnquist Court created new limits on the scope of Congress' powers. Particularly, the Court placed limits on Congress' authority to legislate under the Commerce Clause and under Section Five of the Fourteenth Amendment. Second, the Court greatly expanded the scope of state Sovereign Immunity and protection from suit in federal court. Third, the Court reversed course and held that the Tenth Amendment is a limit on Congres-

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1. 531 U.S. 98 (2001).

sional power; specifically, that Congress cannot compel state legislative or regulatory action. Individually, and especially collectively, these three doctrines dramatically changed the law.

The Rehnquist Court's federalism revival is profoundly misguided because it denies the federal government needed authority to achieve important social objectives, especially advancing freedom and equality. This article considers what the Rehnquist Court has done in each area and why the decisions are undesirable changes in the law.

II. LIMITING THE SCOPE OF CONGRESS' POWERS

From 1937 until 1995, not one federal law was invalidated as exceeding the scope of Congress' Commerce Clause authority. Countless criminal and civil laws were enacted under this constitutional power. It was by far the most frequent source of authority for federal legislation. But in the last several years, the Supreme Court made it clear that the judiciary will enforce strict limits on Congress' power under this provision.

In *United States v. Lopez*,[2] the Supreme Court declared the federal Gun Free School Zone Act unconstitutional.[3] The Gun Free School Zone Act was a federal law that made it a crime to have a firearm within 1,000 feet of a school.[4] Alphonso Lopez, a twelfth grader at a San Antonio high school, was caught with a gun at school.[5] The district court convicted Lopez under the law,[6] but the Supreme Court reversed the conviction and held that the Gun Free School Zone Act exceeded the scope of Congress' Commerce Clause authority.[7]

Chief Justice Rehnquist wrote for the Court, in a five-four decision, and began by emphasizing that Congress' powers must be interpreted in a limited manner.[8] The Court held that Congress could regulate, under the Commerce Clause, only in three circumstances.[9] Congress may regulate: a) the channels of interstate commerce; b) the instrumentalities of interstate commerce and persons or things in interstate commerce; and c) activities that have a substantial effect on interstate commerce.[10] The Court found

2. 514 U.S. 549 (1995).
3. *Id.*
4. *Id.* at 567.
5. *Id.* at 551.
6. *Id.* at 552.
7. *Id.* at 567.
8. *Lopez*, 514 U.S. at 557.
9. *Id.* at 558.
10. *Id.* at 558-559.

that the federal law prohibiting guns near schools met none of these requirements and thus was unconstitutional.[11]

In *United States v. Morrison*,[12] the Court followed *Lopez* and declared unconstitutional the civil damages provision of the Violence Against Women Act.[13] This provision had created a federal cause of action for victims of gender-motivated violence.[14] The case involved a woman, Christy Brzonkala, who was allegedly raped by football players at Virginia Polytechnic Institute.[15] The football players were not criminally prosecuted and ultimately avoided university discipline.[16] Brzonkala sued under the Violence Against Women Act.[17] The United States government intervened, and defended the law, on the ground that violence against women has a substantial effect on the national economy.[18] In enacting the Violence Against Women Act, Congress held lengthy hearings and found that gender-motivated violence costs the American economy billions of dollars a year.[19]

The Supreme Court expressly rejected these findings as insufficient to sustain the law.[20] Chief Justice Rehnquist emphasized that Congress was regulating non-economic activity that has traditionally been dealt with by state laws.[21] Moreover, the Court stressed that there is no jurisdictional requirement, in the statute, necessitating proof of an effect on interstate commerce.[22] The Court said that Congress could not justify regulation, in this area, by finding that the cumulative impact of an activity has a substantial effect on interstate commerce.[23] The Court thus concluded:

> We accordingly reject the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local.[24]

11. *Id.* at 567.
12. 529 U.S. 598 (2000).
13. *Id.* at 627.
14. *Id.* at 601-602.
15. *Id.* at 601-602. Virginia Polytechnic Institute is also known as Virginia Tech.
16. *See id.* at 603.
17. *Id.* at 604.
18. *Id.* at 613.
19. Sen. Rpt. 103-138 (Sept. 10, 1993).
20. *Morrison*, 529 U.S. at 615.
21. *Id.* at 618.
22. *Id.* at 613-618.
23. *Id.* at 614.
24. *Id.* at 617-618 (citing *Lopez*, 514 U.S. at 568).

Lopez and *Morrison* opened the door to constitutional challenges to countless federal laws, especially those that regulate non-economic activities. Federal environmental laws, such as the Endangered Species Act,[25] are likely to be challenged on the grounds that the law regulates conduct that does not involve channels of interstate commerce, instrumentalities of interstate commerce, or activities with a substantial economic effect. Similarly, federal gun laws, such as those that prohibit possession of a firearm while subject to a domestic violence protection order,[26] are also likely to be challenged.

Another area where the Court has dramatically limited the scope of Congress' powers, concerns the authority to legislate under Section Five of the Fourteenth Amendment. This provision empowers Congress to enact laws to enforce the Fourteenth Amendment.[27] In 1997, the Court significantly restricted this power by holding, in *City of Boerne v. Flores*,[28] that Congress may not use its Section Five powers to expand the scope of rights or to create new rights.[29]

The Supreme Court, in a six-three decision, declared unconstitutional the Religious Freedom Restoration Act (RFRA) because it exceeded the scope of Congress' Section Five powers.[30] The RFRA was adopted in 1993 to overturn a Supreme Court decision that had narrowly interpreted the Free Exercise Clause of the First Amendment.[31] In 1990, the Supreme Court had significantly lessened the protections of the Free Exercise Clause in *Employment Division Department of Human Resources of Oregon v. Smith*.[32] Oregon law prohibited the consumption of peyote, a hallucinogenic substance.[33] Native Americans challenged this law claiming that it infringed their free exercise of religion because their religious rituals required the use of peyote.[34] Prior Supreme Court precedents upheld government actions burdening religion only if the action was necessary to achieve a compelling government purpose.[35] The Supreme Court, in *Smith*, changed the law and held that the Free Exercise Clause cannot be used to challenge neutral laws of general applicability.[36] The Oregon law prohibiting consumption of peyote was deemed neutral because the law

25. 16 U.S.C. § 1538(a)(1) (2000).
26. *See generally* 18 U.S.C. § 922(g)(8) (2000).
27. U.S. Const. amend. XIV, § 5.
28. 521 U.S. 507 (1997).
29. *Id*. at 519.
30. *Flores,* 521 U.S. at 519.
31. *Id.* at 512.
32. 494 U.S. 872 (1990).
33. *Id.* at 874.
34. *Id.* at 874.
35. *See e.g Sherbert v. Verner*, 374 U.S. 398, 403 (1963).
36. *Smith*, 494 U.S. at 879.

was not motivated by a desire to interfere with religion, and it was a law of general applicability because it applied to everyone.[37]

In response to this decision, Congress overwhelmingly adopted the RFRA.[38] The RFRA's express purpose was to overturn *Smith* and restore the Compelling Government Purpose test.[39] The RFRA required courts considering free exercise challenges, including neutral laws of general applicability, to uphold the government actions only if they were necessary to achieve a compelling purpose.[40] Specifically, the RFRA prohibited "[g]overnment" from "substantially burden[ing]" a person's exercise of religion, even if the burden results from a rule of general applicability, unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[41]

In *Flores,* a church in Texas was prevented from constructing a new facility because its building was classified as a historic landmark.[42] The church sued under the RFRA and the city challenged the constitutionality of the law.[43] Justice Kennedy, writing for the Court, held that the RFRA was unconstitutional[44] because Congress, under Section Five of the Fourteenth Amendment, may not create new rights or expand the scope of existing rights.[45] He further noted Congress is limited to enacting laws that prevent or remedy violations of rights recognized by the Supreme Court.[46] These must be narrowly tailored – "proportionate" and "congruent" – to the constitutional violation.[47]

Justice Kennedy explained that Section Five gives Congress the authority to enact laws "to enforce" the provisions of the Fourteenth Amendment.[48] He stated:

> Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation. Were it not so, what

37. *Id.* at 890.
38. *Flores,* 521 U.S. at 515.
39. *Id.*
40. *Id.*
41. *Id.* at 515-516; 42 U.S.C. § 2000bb-1(b) (1994).
42. *Flores*, 521 U.S at 511-512.
43. *Id.* at 512.
44. *Id.* at 536.
45. *Id.*
46. *Id.* at 519.
47. *Id.* at 520.
48. *Id.* at 519.

> Congress would be enforcing would no longer be, in any meaningful sense, the "provisions of [the Fourteenth Amendment]."[49]

Congress thus, is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court. Moreover, the Court said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[50] Justice Kennedy's majority opinion declared the RFRA unconstitutional on the grounds that it impermissibly expanded the scope of rights and that it was not proportionate, or congruent, as a preventative or remedial measure.[51]

This is a radical change in the law. No prior case has hinted at such a limit on Congress' powers under Section Five of the Fourteenth Amendment. The decision opens the door to challenges to many federal laws. In three cases since *Flores*, namely *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, [52] *Kimel v. Florida Board of Regents,*[53] and *University of Alabama v. Garrett*,[54] the Supreme Court reaffirmed that Congress, under Section Five, cannot expand the scope of rights and that any federal law must be a "proportionate" and "congruent" measure to prevent and remedy constitutional violations. All three of these cases involved the issue of whether a federal law is a valid exercise of Congress' Section Five powers and thus a permissible basis for suing state governments.[55] In all three cases, the Court found that the federal laws at issue did not fit within the scope of Section Five under *Flores*. These three cases are presented in detail in the next section, which discusses Congress' power to authorize suits against state governments.

Together the limits on Congress' powers, under the Commerce Clause and Section Five of the Fourteenth Amendment, open the door to challenges to numerous federal laws. Even more profoundly, the Court reversed fifty years of expansive federal powers and imposed significant constraints on Congress' authority.

These decisions can be criticized on many grounds. They all involve the most conservative Justices, creating significant limits on federal power, so as to limit the ability of Congress to achieve socially desirable results.

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49. *Id.* (brackets in original).
50. *Id*. at 520.
51. *Id.* at 536.
52. 527 U.S. 627 (1999).
53. 528 U.S. 62 (2000).
54. 531 U.S. 356 (2001).
55. *Florida Prepaid*, 527 U.S. at 629 (discussing the Patent Remedy Act's constitutionality under Section Five); *Kimel*, 528 U.S. at 82-83 (discussing ADEA's constitutionality under Section Five); *Garrett*, 531 U.S. at 374 (discussing Title I of the ADA's constitutionality under Section Five).

Preventing guns near schools, providing a remedy to victims of domestic violence, and expanding religious freedom, are all good things that the Court is limiting. These restrictions on federal power are a radical change in constitutional principles that have been followed since 1937 and are particularly undesirable when looked at from the perspective of freedom and liberty.

The *Boerne* decision means that people in the United States have far less protection for their religious practices. Laws of general applicability, whether prison regulations, zoning ordinances or historical landmark laws, that seriously burden religion might have been successfully challenged under the RFRA, but not any longer. Put simply, *Boerne* means that many claims of free exercise of religion, that would have prevailed, now certainly will lose. People in the United States have less protection of their rights after *Boerne* than they did before it.

There has been one other aspect of the Court's Section Five decisions: the Court has ruled that Congress cannot use this provision to regulate private conduct. In the *Civil Rights Cases*,[56] in 1883, the Supreme Court greatly limited Congress' ability to use its power under the Reconstruction Amendments to regulate private conduct.[57]

In *United States v. Guest*,[58] five Justices, although not in a single opinion, concluded that Congress may outlaw private discrimination, pursuant to Section Five of the Fourteenth Amendment.[59] *Guest* involved a federal law which made it illegal for two or more persons to go "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege."[60] The Court held that interference with the use of facilities in interstate commerce violated the law, whether motivated by a racial animus or not.[61]

The majority opinion did not reach the question of whether Congress could regulate private conduct under Section Five of the Fourteenth Amendment;[62] however, six of the Justices, three in a concurring opinion and three in a dissenting opinion, expressed the view that Congress could prohibit private discrimination under its Section Five powers.[63] Justice Tom Clark, in a concurring opinion, joined by Justices Hugo Black and Abe Fortas, said, "the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies - with or without state action - that

56. 109 U.S. 3 (1883).
57. *Id.*
58. 383 U.S. 745 (1966).
59. *Id.* at 755.
60. *See generally* 18 U.S.C. § 241 (1964).
61. *Guest*, 383 U.S. at 760.
62. *Id.* at 756.
63. *Id.* at 755.

interfere with Fourteenth Amendment rights."[64] Likewise, Justice William Brennan in an opinion that concurred in part and dissented in part, joined by Chief Justice Earl Warren and Justice William Douglas, concluded that Congress may prohibit private discrimination pursuant to Section Five.[65]

But in *Morrison,* the Supreme Court expressly reaffirmed the *Civil Rights Cases* and disavowed the opinions to the contrary from *Guest*.[66] As described above, in the discussion of Congress' commerce power, *Morrison* involved a constitutional challenge to the civil damages provision of the Violence Against Women Act, which authorized victims of gender-motivated violence to sue under federal law.[67]

The United States government intervened, to defend the law, arguing along with the plaintiff that the civil damages provision was constitutional, both as an exercise of Congress' Commerce Clause power and of its authority under Section Five of the Fourteenth Amendment.[68] As explained above, the Court in a five-four decision held the law exceeded the scope of the Commerce power because Congress cannot regulate non-economic activity based on a cumulative impact on interstate commerce.[69]

By the same five-four margin, the Court held that the law is not constitutional as an exercise of Congress' Section Five power.[70] Chief Justice Rehnquist writing for the Court said that Congress, under this authority, may regulate only state and local governments, not private conduct.[71] Chief Justice Rehnquist relied on "the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[72] He said that the opinions in *Guest,* indicating Congressional power to regulate private conduct, were only dicta.[73] Thus, the civil damages provision, of the Violence Against Women Act, was deemed to exceed the scope of Congress' Section Five powers because it "is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any state or state actor, but at individuals who have committed criminal acts motivated by gender bias."[74]

Again, it is clear that this decision, in the name of federalism, decreases protection of individuals. Congress is denied the ability to expand

64. *Guest,* 383 U.S. at 762 (Clark, J., concurring).
65. 383 U.S. at 776 (Brennan, J., concurring in part and dissenting in part).
66. *Morrison,* 529 U.S. at 623-624.
67. *See id*. at 601-602.
68. *See generally U.S. v. Morrison*, 529 U.S. 598 (2000).
69. *Id*. at 617.
70. *Id*. at 627.
71. *Id*. at 616.
72. *Id.* at 621.
73 *Id*. at 624.
74. *Id*. at 626.

rights and protections against private infringers of liberty. More generally, the Court's narrowing of Congress' ability to protect rights is inherently rights regressive. Perhaps there is some other justification for what the Court has done, but the limitation on Congress' Section Five powers clearly lessens the protection of rights.

Whatever its other merits, there is no possible argument that *Morrison* advances liberty. Congress enacted a law, to expand the rights of victims of gender-motivated violence, based on findings of a serious social problem and the inadequacy of remedies in the state courts. The Supreme Court's invalidation of the statute thus restricts the rights of women throughout the country. Conceivably, it could be argued that *Morrison* protects the rights of those accused of sexual violence, by preventing them from being sued in federal court. Then the question would have to be, which is more rights progressive: expanding the ability of victims of gender-motivated violence to sue or protecting those accused of such acts from being sued? Merely stating the question makes the answer obvious.

III. THE EXPANSION OF SOVEREIGN IMMUNITY

The Rehnquist Court made another key change in the law. The Supreme Court significantly expanded the scope of state Sovereign Immunity. In *Alden v. Maine*,[75] the Court held that a state government may not be sued in state court, even on a federal claim, without its consent, because of state Sovereign Immunity.[76] *Alden* involved a claim by probation officers in Maine, that they were owed overtime pay under the Federal Fair Labor Standards Act.[77] They sued in federal court, but their suit was dismissed because of the Eleventh Amendment.[78] Then the probation officers sued in state court.[79] The Supreme Court in a five-four decision, however, held that Sovereign Immunity broadly protects state governments and precludes suits against un-consenting states in state courts.[80]

In a series of recent cases, the Court has greatly limited the ability of Congress to authorize suits against state governments in federal courts. In 1996, the conservative majority of the Court held, in *Seminole Tribe v. Florida*,[81] that Congress may authorize suits against states only pursuant to

75. 527 U.S. 706 (1999).
76. *Id.* at 732.
77. *Id.* at 711.
78. *Id.* at 712.
79. *Id.*
80. *Id.*
81. 517 U.S. 44 (1996).

laws enacted under Section Five of the Fourteenth Amendment.[82] As described above, in *Flores*, the Court limited Congress' Section Five powers to enacting laws that prevent or remedy violations of rights recognized by the Supreme Court; Congress cannot expand the scope of rights or create new rights.[83]

The combination of *Seminole Tribe* and *Flores* has already had a devastating effect on many types of claims. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that state governments could not be sued for patent infringement;[84] in *Kimel v. Florida Board of Regents,* the Court decided that state governments may not be sued for violating the Age Discrimination in Employment Act;[85] and in *University of Alabama v. Garrett*, the Court ruled that state governments may not be sued for employment discrimination in violation of section one of the Americans with Disabilities Act.[86] In each case, the Court, in a five-four decision, concluded that Congress expanded the scope of rights, and that the laws could not be justified as narrowly tailored to prevent or remedy constitutional violations.

These decisions mean that state governments cannot be sued, when they violate federal law. How can the supremacy of federal law be assured and vindicated if states can violate the Constitution, or federal laws, and not be held accountable?

At oral argument in *Alden*, the Solicitor General of the United States, Seth Waxman, quoted to the Court from the Supremacy Clause of Article VI.[87] Waxman contended that suits against states are essential to assure the supremacy of federal law.[88] Justice Kennedy's response to this argument is astounding. He states:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important as-

82. *Id.* at 60.
83. 521 U.S. at 519-520.
84. 527 U.S. at 629.
85. 528 U.S. at 82.
86. 531 U.S. at 356.
87. Seth Waxman, Oral Argument Supreme Court of the United States, *Alden v. Maine* (Washington D.C., Mar. 31, 1999) (copy of transcript on file at 1999 WL 216178 (U.S.)).
88. *Id.*

> surance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land."[89]

What, then, is the assurance that state governments will comply with federal law? Is it the trust in the good faith of state governments? Is it possible to imagine that thirty or forty years ago, at the height of the civil rights movement the Supreme Court would have issued such a statement; state governments simply could be trusted to voluntarily comply with federal law? Justice Kennedy's words in *Alden* reflect the Rehnquist Court's strong faith in state governments and desire to limit both federal legislative and judicial power.

Sovereign Immunity is an anachronistic relic. The principle of Sovereign Immunity is derived from English law, which assumed that "the King can do no wrong."[90] Since the time of Edward the First, the Crown of England has not been suable unless it has specifically consented to suit.[91] Throughout American history, United States courts have applied this principle, [92] although they often have admitted that its justification in this country is unclear.[93]

A doctrine derived from the premise, "the King can do no wrong," deserves no place in American law. The United States was founded on a rejection of a monarchy and of royal prerogatives.[94] American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable. Sovereign Immunity undermines that basic notion.

Sovereign Immunity is inconsistent with the United States Constitution. Nowhere does the document mention, or even imply, that governments have complete immunity to suit. Sovereign Immunity is a doctrine based on a *common law* principle borrowed from the English common law.[95] However, Article VI of the Constitution states that the Constitution,

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89. *Alden*, 527 U.S. at 754-755.

90. *See* Kenneth Davis, *Administrative Law Treatise,* vol. 5, § 27:2, 6-7 (2d ed., K.C. Davis Pub. Co. 1984) (quoting Blackstone); Charles H. Koch, Jr., *Administrative Law and Practice,* vol. 2, 210 (West 1985).

91. *U. S. v. Lee*, 106 U.S. 196, 205 (1882).

92. *Id.* at 207. ("The principle has never been discussed or the reasons for it given, but it has always been treated as an established doctrine.") (citations omitted).

93. *Id.*

94. *See e.g.* U.S. Const. art. I § 9 (stating "[n]o Title of Nobility shall be granted by the United States.").

95. *See supra* n. 90, at 6-7; Charles H. Koch, Jr., *Administrative Law and Practice,* vol. 2, 210 (West 1985). Actually, as John Orth pointed out to me, the phrase, "the King can do no wrong," has many possible meanings. It might simply mean that when a wrong occurs, someone else must have done it, because the King can do no wrong. Alternatively, it might mean that a remedy must exist, because the King cannot do a wrong, as would occur if a harm went un-remedied.

and laws made pursuant to them, are the supreme law and, as such, it should prevail over claims of Sovereign Immunity.[96] Yet, Sovereign Immunity, a common law doctrine, trumps even the United States Constitution and bars suits against government entities, when they violate the Constitution and federal laws.

Sovereign Immunity is inconsistent with a central maxim of American government: that no one, not even the government, is above the law. The effect of Sovereign Immunity is to place the government above the law. It ensures that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.[97] The judicial role of enforcing and upholding the Constitution is rendered illusory when the government has complete immunity to suit. Moreover, Sovereign Immunity undermines the basic principle, announced in *Marbury v. Madison*,[98] that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury."[99]

IV. REVIVAL OF THE TENTH AMENDMENT

A final aspect of the Rehnquist Court's federalism revival has been its use of the Tenth Amendment as a limit on federal power. In the first third of the twentieth century, the Supreme Court held that the Tenth Amendment reserved a zone of activities for exclusive state control. In *Hammer v. Dagenhart*,[100] for example, the Court struck down a federal law prohibiting child labor on the grounds that it violated the Tenth Amendment.[101] After 1937, however, the Court rejected this view.[102] No longer was the Tenth Amendment seen as a limit on federal power. It was just a reminder that Congress could not act unless there was express or implied constitutional authority.

Professor Laurence Tribe remarked that "[f]or almost four decades after 1937, the conventional wisdom was that federalism in general - and the rights of states in particular - provided no judicially enforceable limits on congressional power."[103] In 1976, the Court appeared to revive federalism

96. U.S. Const. art. VI.

97. John E. H. Sherry, *The Myth That the King Can Do No Wrong: A Comparative Study of the Sovereign Immunity Doctrine in the United States and the New York Courts of Claims*, 22 Admin. L. Rev. 39, 56 (1969).

98. 5 U.S. 137 (1803).

99. *Id.* at 163.

100. 247 U.S. 251 (1918).

101. *Id.* at 277.

102. *See U. S. v. Darby*, 312 U.S. 100, 116 (1941).

103. Laurence Tribe, *American Constitutional Law,* 378 (2d ed. Foundation Press, Inc. 1987).

as a limit on Congressional powers in *National League of Cities v. Usery*,[104] where the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage.[105] The Court, in an opinion by then Justice Rehnquist, held that Congress could not regulate states in areas of "traditional" or "integral" state responsibility.[106] But just nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*,[107] the Court expressly overruled *National League of Cities*.[108] Justice Rehnquist, in a short dissent, said that he believed that his view would again triumph on the Court.[109]

In two decisions, the Rehnquist Court has done just that, and it revived the Tenth Amendment as a constraint on Congress' authority. In *New York v. United States*,[110] the Court, for only the second time in fifty-five years and the first time since the overruled *National League of Cities* decision, invalidated a federal law as violating the Tenth Amendment.[111] In *New York*, the federal Low-Level Radioactive Waste Policy Amendments Act of 1985[112] created a statutory duty for states to provide for the safe disposal of radioactive wastes generated within their borders.[113] The Act provided monetary incentives for states to comply with the law, allowing states to impose a surcharge on radioactive wastes received from other states.[114] Additionally, and most controversially, the law provided that states would "take title" to any wastes within their borders that was not properly disposed of by January 1, 1996, to ensure effective state government action.[115] The state government would "be liable for all damages directly or indirectly incurred."[116]

The Supreme Court ruled that Congress, pursuant to its authority under the Commerce Clause, could regulate the disposal of radioactive wastes;[117] however, by a six-three margin, the Court held that the "take title" provision of the law is unconstitutional, because its gives state governments the choice between "either accepting ownership of waste or regulating accord-

104. 426 U.S. 833 (1976).
105. *Id*. at 855-856.
106. *Id*. at 853-855.
107. 469 U.S. 528 (1985).
108. *Id.* at 531.
109. *Id*. at 580.
110. 505 U.S. 144 (1992).
111. *Id.*
112. 42 U.S.C. §§ 2021b-2021e (1988).
113. *Id.* at §§ 2021c(a)(1)(A).
114. *Id.* at §§ 2021e(d)(1).
115. *Id.* at §§ 2021d(2)(c)(i).
116. *Id.*
117. *N.Y. v. U.S.*, 505 U.S. 144, 160 (1992).

ing to the instructions of Congress."[118] Justice O'Connor, writing for the Court, said that it was impermissible for Congress to impose either option on the states.[119] Forcing states to accept ownership of radioactive wastes would impermissibly "commandeer" state governments[120] and requiring state compliance with federal regulatory statutes would impermissibly impose, on states, a requirement to implement federal legislation.[121] The Court concluded that it was "clear" that because of the Tenth Amendment, "[t]he Federal Government may not compel the States to enact, or administer, a federal regulatory program."[122]

A few years later, in *Printz v. United States*,[123] the Court applied and extended *New York*. *Printz* involved a challenge to the federal Brady Handgun Violence Prevention Act.[124] The law required that the "chief law enforcement officer," of each local jurisdiction, conduct background checks before issuing permits for firearms.[125] The Court, in a five-four decision, found that the law violated the Tenth Amendment.[126]

Justice Scalia wrote for the majority and revived the phrase "dual sovereignty," to explain the structure of American government.[127] The Court concluded that Congress violated the Tenth Amendment by compelling states to implement federal mandates.[128]

These decisions can be criticized on many levels. The anti-commandeering principle that these decisions rest on has no constitutional basis. Indeed, for a Justice who emphasizes text as the central focus of constitutional analysis, these conclusions should be especially troubling. Where the Constitution wanted state sovereignty to be constitutionally protected, the text provides such protection. For example, barring suits against states by citizens from other states and, perhaps, in the Tenth Amendment. But in other areas, it is troubling that such Justices allow a non-textual value to trump textual protections.

More generally, the key question is: Why is protecting states so important that it should be seen as limiting the very definition of Congressional powers under Article I? If the Court is serious, that state sovereignty restricts the scope of Article I, entirely apart from Tenth Amend-

118. *Id.* at 175.
119. *Id.*
120. *Id.*
121. *Id.* at 176.
122. *Id.* at 188.
123. 521 U.S. 898 (1997).
124. 18 U.S.C. § 922 (1994).
125. *Id.* at § 922 (s)(2).
126. *Prinz*, 521 U.S. at 935.
127. *Id.* at 918.
128. *Id.* at 935.

ment considerations, then *New York* has even broader implications than generally recognized. The case could portend a return to pre-1937 constitutional jurisprudence, where the Court also used considerations of state sovereignty, to narrowly define the scope of federal powers, such as defining commerce to apply to only one stage of business, distinct from mining, manufacture, or production. Although it is unlikely that these particular distinctions will reemerge, others could arise in the future.

The anti-commandeering principle in *New York* and *Printz* is based on ensuring government accountability. Justice O'Connor's opinion in *New York*, emphasized that when Congress compels state government action, accountability is undermined.[129] She explained that Congress can make the decision, but then states are held politically responsible for the decision that is not theirs.[130]

On the one hand, Justice O'Connor is to be commended for articulating an explicit value of federalism; something that is all too rare in the federalism cases. On reflection, however, the factual assumptions behind Justice O'Connor's position are highly questionable. Justice O'Connor assumes that if Congress forces the states to do something, voters will not hold Congress responsible, but will blame the conduct on the primary actor, state governments. Voters, however, can surely understand that the state is acting because it is required to by federal law. Federal mandates force every person to do unwanted things. Paying taxes is a simple example. Why would people not understand that state governments, might also have to do something because of a federal mandate?

State government officials, of course, can explain to the voters that the federal government required the particular actions. Justice O'Connor never explains why the federal government will not be held accountable under such circumstances.

V. CONCLUSION

It is impossible to overstate the significance of these changes in constitutional law. For over fifty years, after 1937, the assumption was that Congress' powers were to be broadly interpreted. The Supreme Court interpreted the Constitution to empower the federal government to deal with national problems. Now, however, the Court is restricting congressional powers and aggressively protecting state governments.

129. *New York*, 505 U.S. at 168.
130. *Id*. at 168-169.

The key question is what, if anything, is gained by this change in the law? Is the country better or worse because of these rulings? It is striking to look at the laws that the Rehnquist Court has invalidated: statutes prohibiting guns near schools; allowing victims of gender-motivated violence to sue; expanding religious freedom; permitting states to be sued for patent infringement and employment discrimination against the elderly and people with disabilities; requiring states to clean up nuclear wastes; and mandating that state and local governments do background checks before issuing permits for firearms. All of these are enormously desirable and important laws; most passed Congress by overwhelming margins.

The Supreme Court's decisions invalidating these laws serve no apparent purpose other than the goal of limiting federal power. The rulings, which are a dramatic change in course in constitutional law, are a policy choice by the conservatives on the current Court. I have no doubt that someday a new set of Justices will reverse these cases, and return to the broad definitions of federal power, which were followed from 1937 until the 1990s. The complex world, of the early twenty-first century, demands a federal government with the powers to handle its national problems.