NEW YORK LAW SCHOOL

NYLS Law Review

Volume 50
Issue 3 *Federal Courts from Warren to Rehnquist and Beyond: Federalism as Theory, Doctrine, Practice, and Instrument*

Article 5

January 2006

Reconceptualizing Federalism

Erwin Chemerinsky
Duke University

RECONCEPTUALIZING FEDERALISM

ERWIN CHEMERINSKY*

I. INTRODUCTION

The federalism of the 1990s and the early 21st century — in both the Supreme Court and Congress — has been about restricting federal authority for the sake of protecting states' autonomy. Ironically, at the same time, the Supreme Court often has interpreted preemption doctrines expansively in order to invalidate state and local regulations. The effect has been to limit government power at all levels. This article argues for an alternative vision: federalism should be reconceived as being about equipping each level of government with expansive tools to enhance liberty and deal with social problems.

The genius of having multiple levels of government is that there are many different actors — federal, state, and local — that can advance freedom and respond to society's needs. Yet, the federalism decisions of the last decade have been striking in that the Supreme Court has ignored these values and has been highly formalistic in its application of federalism principles in order to invalidate desirable government actions.

In the 1990s, the Supreme Court used federalism as the justification for declaring unconstitutional federal laws requiring the clean-up of nuclear waste,[1] prohibiting guns near schools,[2] requiring background checks for those seeking to own firearms,[3] and allowing victims of gender-motivated violence to sue in federal court.[4] All of these laws would unquestionably be socially beneficial. Few in our society would argue against containing radioactive material or keeping guns away from schools or argue in favor of permitting criminals to have unrestricted access to firearms. Yet, the Supreme Court's rulings in each of these cases expressly ig-

* Alston & Bird Professor of Law and Political Science, Duke University.

1. *See* New York v. United States, 505 U.S. 144 (1992).
2. *See* United States v. Lopez, 514 U.S. 549 (1995).
3. *See* Printz v. United States 521 U.S. 898 (1997).
4. *See* United States v. Morrison, 529 U.S. 598 (2000).

nored the social benefits of the laws and instead relied on a highly formalistic approach to federalism as the basis for limiting federal authority and striking down these statutes.

In the last few years, the Supreme Court also used federalism to dramatically limit the scope of Congress's powers to enforce the post-Civil War Amendments, which authorize the federal government to act to prevent and remedy civil rights violations by the states.[5] For example, the Court used federalism as the basis for invalidating a federal law that significantly expanded religious freedom, the Religious Freedom Restoration Act.[6] Although this Act was adopted by an almost unanimous vote in both houses of Congress,[7] the Court declared it unconstitutional without even considering the benefit of the law in advancing a crucial aspect of liberty.[8] Once more, the Court's reasoning was highly formalistic, and federalism was used entirely as a limit on federal power. Subsequently, the Court relied on this decision to limit Congress's power to authorize lawsuits against state governments that infringe patents or discriminate in employment based on age and disability.[9]

Ironically, at the same time, a Court that professes commitment to states' rights has repeatedly found that state laws are preempted. For example, in one case, the Court found that a state's product liability law was preempted by a federal law, despite a provi-

---

5. *See, e.g.*, Bd. of Trs. v. Garrett, 531 U.S. 356 (2001); *Morrison*, 529 U.S. at 627 (2000); Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000); City of Boerne v. Flores, 521 U.S. 507 (1997).

6. *City of Boerne*, 521 U.S. at 536 (invalidating the Religious Restoration Act of 1993, 42 U.S.C. § 2000bb (1994)).

7. 139 CONG. REC. H2356 (daily ed. May 11, 1993); 139 CONG. REC. S14461 (daily ed. Oct. 27, 1993); 139 CONG. REC. H8713 (daily ed. Nov. 3, 1993).

8. *City of Boerne*, 521 U.S. at 536.

9. *See Garrett*, 531 U.S. at 374 (2001) (holding that state governments cannot be sued for violating Title I of the Americans with Disabilities Act, which prohibits employment discrimination against the disabled); *Kimel*, 528 U.S. at 82–83 (2000) (holding that state governments cannot be sued for violating the Age Discrimination in Employment Act because the law does not fit within the scope of Congress's powers under section five of the Fourteenth Amendment); Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627 (1999) (declaring federal law authorizing suits against states for patent violations unconstitutional because the Eleventh Amendment bars such suits). *But see* Tennessee v. Lane, 541 U.S. 509 (2004) (holding that states may be sued pursuant to Title II of the Americans with Disabilities Act); Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721 (2003) (allowing suits against states for violations of the family leave provisions of the Family and Medical Leave Act).

sion in the federal law that expressly preserved all other causes of action.[10] In another decision, the Court found that a state could not refuse to contract with companies doing business in Burma, thus denying to states a basic choice as to how to spend their taxpayers' money.[11]

This article argues for a very different approach to federalism. In dealing with federalism, the Supreme Court's decisions should be based on open and express attention to, and where necessary a balancing of, how to best advance liberty and enhance effective governance. Generally, this will require the Court to abandon its use of federalism as a judicial limit on federal or state authority and to instead use it to uphold the power of each level of government to deal with social problems.

In other words, what has been overlooked in scholarly federalism discussions is that federalism is about the relationship between the federal and state governments. Protecting the powers and prerogatives of the federal government is every bit as much the proper focus of federalism as is safeguarding states' rights. Traditionally, federalism has been a synonym for limiting federal power in the name of upholding states' rights. This article argues for a very different conception: empowering both the federal and state governments to be able to deal with important social problems.

Part II of this article briefly sketches the political and historical context of the Supreme Court's recent federalism decisions. Part III then makes the point, which seems to have been consistently overlooked, that the Supreme Court has limited Congress's powers by repeatedly declaring unquestionably desirable laws unconstitutional without serving the values of federalism. Part IV argues that the Supreme Court's preemption decisions are in clear tension with its rulings limiting federal power; and that a court that cares about states' rights should be narrowly interpreting the preemptive effects of federal law. Finally, Part V describes an alternative vision: federalism as empowering government to deal with social problems.

---

10. *See* Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000).

11. *See* Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363 (2000).

II. The Political and Historical Context

No area of constitutional law has changed more dramatically in the last decade than federalism. In 1995, for the first time in 60 years, the Supreme Court declared a federal law unconstitutional, reasoning that it exceeded the scope of Congress's Commerce Clause power.[12] For only the second and third times in 60 years, the Court invalidated a federal law for violating the Tenth Amendment,[13] and the first of such Tenth Amendment cases has been expressly overruled.[14] At the same time, the Court used federalism to enlarge the states' immunity to suit in federal court for violations of federal statutes.[15] These decisions have spawned literally hundreds of lower court decisions concerning federalism and ensure that federalism will be a constant issue before the Supreme Court for years to come. Although it is yet to be seen how far the Court will extend these rulings, these cases signal a major change in constitutional law and American government.[16] There is no mistaking the Court's ardent desire to use federalism to limit the powers of Congress and the federal courts.

At the same time, the Republican-controlled Congress of the 1990s often invoked federalism. Soon after the Republican triumph in the 1994 elections, the new Congressional leaders, Bob Dole and Newt Gingrich, held a press conference during which they displayed a large poster board containing the words of the Tenth Amendment and proclaimed a return to principles of feder-

12. *See Lopez*, 514 U.S. 549.

13. *See Printz*, 521 U.S. 898; *New York*, 505 U.S. 144.

14. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976), *overruled by* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985).

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

16. For example, in the last few years, the Court has not extended its earlier federalism decisions limiting Congress's power. *See* Gonzales v. Raich, 125 S. Ct. 2195 (2005) (upholding the constitutionality of a federal law prohibiting cultivation and possession of small amounts of marijuana for medicinal purposes); Sabri v. United States, 541 U.S. 600 (2004) (upholding as valid exercise of Congress's spending power a federal law making it a crime to bribe officials of local governments receiving federal funds).

alism.[17] In fact, one of the first laws adopted by the new Congress was the "Unfunded Mandates Law," which prohibits Congress from enacting statutes that impose substantial costs on state and local governments.[18] Another recently enacted law with important federalism implications is the Anti-terrorism and Effective Death Penalty Act of 1996, which greatly restricts the ability of federal courts to grant habeas corpus relief to those convicted in state courts.[19]

Not surprisingly, these changes have occurred at times when conservatives were in control of both the Supreme Court and Congress. The Supreme Court's recent federalism rulings usually have been decided by a 5-4 margin, with the majority comprised of the five most conservative Justices: Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.[20] In Congress, of course, it also has been the conservatives that have invoked federalism in a wide variety of areas, such as in arguing for the radical changes in welfare law that were ultimately enacted in 1996.[21]

Conservative use of federalism is nothing new in American history. Since the country's earliest days, conservatives have used federalism as a political argument primarily in support of conservative causes. During the early 19th century, John Calhoun argued that states had independent sovereignty and could interpose their authority between the federal government and the people to nullify federal actions restricting slavery.[22] During Reconstruction, South-

---

17. *See* CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY, AND THE HOUSE REPUBLICANS TO CHANGE THE NATION (Ed Gillespie & Bob Schelihas eds.,1994).

18. Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501-1571 (2000).

19. Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

20. For example, *Fed. Mar. Comm'n*, 535 U.S. 743, *Garrett*, 531 U.S. 356, *Kimel*, 528 U.S. 62, *Alden*, 527 U.S. 706, *Coll. Sav. Bank*, 527 U.S. 627, *Printz*, 521 U.S. 898, Seminole Tribe v. Florida, 517 U.S. 44 (1996), and *Lopez*, 514 U.S. 549, all have been 5-4 decisions, with these Justices in the majority and Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg, and Stephen Breyer dissenting.

21. *See* The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified in scattered sections of 7, 8, 21 and 42 U.S.C.).

22. *See, e.g.*, SAMUEL H. BEER, TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM 224 (1993).

ern states claimed that the federal military presence was incompatible with state sovereignty and federalism.[23]

In the early 20th century, federalism was successfully used as the basis for challenging federal laws regulating child labor, imposing the minimum wage, and protecting consumers.[24] During the Great Depression, conservatives objected to President Franklin Roosevelt's proposals, such as Social Security, on the ground that such schemes would usurp functions properly left to state governments.[25]

During the 1950s and the 1960s, objections to federal civil rights efforts were phrased primarily in terms of federalism. Southerners challenged Supreme Court decisions mandating desegregation and objected to proposed federal civil rights legislation by resurrecting the arguments of John Calhoun.[26] Segregation and discrimination were defended less on the grounds that they were desirable practices, and more in terms of the states' rights to choose their own laws concerning race relations.[27]

In the 1980s, President Ronald Reagan proclaimed a "new federalism" as the basis for attempting to dismantle federal social welfare programs.[28] In his first presidential inaugural address, President Reagan said that he sought to "[restore] the balance be-

23. For example, in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), the Supreme Court narrowly construed the Reconstruction era amendments, in part, based on federalism considerations. Notably, the Court gave the "privileges or immunities clause" an extremely narrow construction because of its belief that the provision was not meant to alter federal-state relations. *Id.* at 78.

24. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936) (invalidating federal regulation of employment, including a minimum wage); Hammer v. Dagenhart, 247 U.S. 251 (1918) (invalidating the federal regulation of child labor); United States v. E.C. Knight, 156 U.S. 1 (1895) (holding that the Sherman Antitrust Act could not be applied to businesses engaged in production).

25. *See* FORREST MCDONALD, A CONSTITUTIONAL HISTORY OF THE UNITED STATES 193 (1982); WILLIAM RAYMOND MANCHESTER, 1 THE GLORY AND THE DREAM: A NARRATIVE HISTORY OF AMERICA, 1932 – 1972, 164-166 (1974).

26. BEER, *supra* note 22, at 19-20. R

27. *See, e.g.,* Brief for Appellee at 3, Brown v. Bd. of Educ., 347 U.S. 483 (1954) (No. 1) (arguing that race segregation falls within the province of state legislatures).

28. BEER, *supra* note 22, at 2.

tween the various levels of government."[29] Federalism was thus employed as the basis for cutting back on countless federal programs.

Hindsight reveals that federalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare. There is, of course, nothing inherent to federalism that makes it conservative. In the relatively recent past, prominent liberals, such as Justice William Brennan, have argued that there should be more use of state constitutions to protect individual liberties.[30] The federalism of the 1990s, however, like federalism throughout much of American history, has been mostly a tool employed by conservatives to champion conservative goals.

More specifically, and more subtly, throughout American history, and especially in the 1990s, federalism has been used by conservatives as a way of trying to limit government power.[31] In other words, conservatives have used federalism as a procedural way of blocking substantive reforms with which they disagree. During the first third of the 20th century, a conservative Supreme Court used federalism to limit Congress's power and to strike down many federal laws. Since 1970, the conservative Burger and Rehnquist Courts used federalism as a basis for limiting federal court jurisdiction, especially in suits against state governments and in reviewing state court decisions.

In the last decade, the Court again used federalism to limit Congress's powers by restricting the scope of the commerce power, restricting authority under Section 5 of the Fourteenth Amendment (Section 5), reviving the Tenth Amendment as a constraint on federal authority, and greatly restricting Congress's power to authorize suits against state governments. In each instance, a conservative Court used federalism to invalidate progressive legislation such as gun control efforts and the expansion of religious free-

29. President Ronald Reagan, First Presidential Inaugural Address, 1981 PUB. PAPERS 1 (Jan. 20, 1981), *available at* http://www.reaganfoundation.org/reagan/speeches/first.asp.

30. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

31. *See, e.g.*, H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 921 (1999) (noting the conservatives' use of federalism).

doms. Simultaneously, federalism was used by the conservative Congress of the 1990s in a similar fashion, such as in greatly restricting prisoners' access to federal court in both the Prison Litigation Reform Act[32] and the Anti-terrorism and Effective Death Penalty Act.[33] In sum, conservatives use federalism as a tool to limit the power of the federal government, whether out of true concern for protecting state governments or as a way of blocking federal actions opposed on other grounds.

III. The Undesirable Nature of the Supreme Court's Federalism Decisions Limiting Congressional Power

What is striking about the Supreme Court's federalism decisions of the last decade is that they have consistently invalidated highly desirable social legislation without serving the underlying goals of federalism. A brief review of some of the key decisions reveals that applying federalism as a limit to Congress's authority has resulted in undesirable social policy.

In *United States v. Lopez*, the Supreme Court declared unconstitutional the Gun Free School Zone Act, a federal law that made it a crime to have a firearm within 1,000 feet of a school.[34] Surely, no one would argue that guns near schools are desirable. Although the majority of states have such laws, some do not, and the federal law was intended to extend this desirable law to all the states.

In *United States v. Morrison*, the Court followed *Lopez* and declared unconstitutional the civil damages provision of the Violence Against Women Act.[35] The provision created a federal cause of action for victims of gender-motivated violence.[36] 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.[37] Most importantly, Congress found that

32. Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

33. Anti-terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified in scattered sections of 8, 18, and 28 U.S.C.).

34. 514 U.S. at 551.

35. 529 U.S. at 627.

36. Violence Against Women Act of 1994, 42 U.S.C. § 13981 (1994).

37. S. Rep. No. 103-138, at 55 (1993).

state courts often insufficiently dealt with violence against women.[38] But the Supreme Court nonetheless invalidated the law.[39] Again, surely it is desirable to have an additional cause of action available for violence against women to compensate victims and to deter gender-motivated violence.

Another area in which the Court dramatically limited the scope of Congress's powers is in their authority to legislate under Section 5. This provision empowers Congress to enact laws to enforce the Fourteenth Amendment. In 1997, in *City of Boerne v. Flores*, the Court significantly restricted this power by holding that Congress may not use its Section 5 powers to expand the scope of rights or to create new rights.[40]

In *City of Boerne*, the Supreme Court, in a 6-3 decision, declared the Religious Freedom Restoration Act (RFRA) unconstitutional as exceeding the scope of Congress's Section 5 powers.[41] The RFRA was adopted in 1993 to overturn a recent Supreme Court decision that had narrowly interpreted the free exercise clause of the First Amendment.[42]

In enacting the RFRA, Congress sought to overturn the 1990 Supreme Court case, *Employment Division, Department of Human Resources of Oregon v. Smith*.[43] In *Smith*, the Supreme Court significantly lessened the protections of the free exercise clause.[44] *Smith* involved the constitutionality of an Oregon law that prohibited the consumption of peyote, a hallucinogenic substance.[45] Native Americans challenged this law claiming that it infringed on the free exercise of religion because their religious rituals required the use of peyote.[46] Under prior Supreme Court precedent, government actions burdening religion were upheld only if they were necessary to achieve a compelling government purpose.[47] The Supreme Court, in *Smith*, departed from precedent and held that the free exercise

38. *Id.*
39. *Morrison*, 529 U.S. at 627.
40. 521 U.S. at 527.
41. *Id.* at 536.
42. Religious Freedom and Restoration Act, 42 U.S.C. § 2000bb (1994).
43. 494 U.S. 872 (1990).
44. *Id.* at 890.
45. *Id.* at 874.
46. *Id.*
47. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 403 (1963).

clause cannot be used to challenge neutral laws of general applicability.[48] The Court deemed the Oregon law prohibiting consumption of peyote neutral because the legislature was not motivated by a desire to interfere with religion and the law was of general applicability, because it applied to everyone.[49]

In response to this decision, in 1993, Congress overwhelmingly adopted the RFRA, which was signed into law by President Clinton.[50] The RFRA expressly stated that its purpose was to overturn *Smith* and restore the test that was applied before that decision.[51] The RFRA required courts considering free exercise challenges, including challenges to neutral laws of general applicability, to uphold the government's actions only if they are necessary to achieve a compelling purpose.[52]

In *City of Boerne*, the Supreme Court held that the RFRA was unconstitutional.[53] The Court held that under Section 5 Congress may not create new rights or expand the scope of rights; rather, Congress is limited to enacting laws that prevent or remedy violations of rights recognized by the Supreme Court and that such laws must be narrowly tailored — "proportionate" and "congruent" — to the constitutional violation.[54]

A statute expanding religion freedom — restoring protections to what they were before 1990 — was thus invalidated. The result of *Boerne* is that people in the United States have far less protection for their religious practices. Laws of general applicability — whether prison regulations or zoning ordinances or historical landmark laws — that seriously burden the free exercise of religion might have been successfully challenged under RFRA, but cannot be any longer. Put most simply, *Boerne* means that many claims of free exercise of religion that previously would have prevailed, now

48. *Smith*, 494 U.S. 884-86.

49. *Id.* at 882.

50. 139 CONG. REC. D1201-02 (1993) (showing 97 yeas to 3 nays in the Senate); 140 CONG. REC. H80-01 (1994) (reporting of Executive signature of RFRA into law).

51. 42 U.S.C. § 2000bb(a) (1994).

52. 42 U.S.C. § 2000bb(b) (1994).

53. *City of Boerne*, 521 U.S. at 536 ("RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

54. *Id.* at 520 ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

certainly will lose. People in the United States have less protection of their rights after *Boerne* than they did before it.

Another aspect of the Rehnquist Court's federalism revival was its use of the Tenth Amendment as a limit on federal power. In the first third of the 20th century, the Supreme Court held that the Tenth Amendment reserves a zone of activities for exclusive state control.[55] In *Hammer v. Dagenhart*, for example, the Court struck down a federal law prohibiting child labor on the ground that it violated the Tenth Amendment.[56] After 1937, however, the Court rejected this view and 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.[57]

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."[58] In 1976, the Court appeared to revive federalism as a limit on Congressional powers in *National League of Cities v. Usery*, in which the Court invalidated a federal law that required state and local governments to pay their employees a minimum wage.[59] In an opinion by then Justice Rehnquist, the Court held that Congress could not regulate states in areas of "traditional" or "integral" state responsibility.[60] But just nine years later, in *Garcia v. San Antonio Metropolitan Transit Authority*, the Court expressly overruled *National League of Cities*.[61] Justice Rehnquist, in a short dissent, said that he believed that his view would again triumph on the Court.[62]

---

55. *See Hammer*, 247 U.S. at 274 ("The grant of authority over a purely federal matter was not intended to destroy the local power always existing and carefully reserved to that States in the Tenth Amendment to the Constitution.").

56. *Id.* at 276 ("[The act] not only transcends the authority delegated to Congress over commerce but also exerts a power as to a purely local matter to which federal authority does not extend.").

57. United States v. Darby, 312 U.S. 100, 116-17 (1941) (overruling *Hammer v. Dagenhart* and reasoning that it was a departure from the prevailing interpretation of the Commerce Clause).

58. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 378 (2d ed. 1987).

59. 426 U.S. 833.

60. *Id.* at 852.

61. 469 U.S. 528, 531.

62. *Id.* at 579–80.

Subsequently, the Rehnquist Court did just that and revived the Tenth Amendment as a constraint on Congress's authority. In *New York v. United States*, the Court — for only the second time in 55 years and the first since the overruled *National League of Cities* decision — invalidated a federal law as violating the Tenth Amendment.[63] The federal law at issue was the Low-Level Radioactive Waste Policy Amendments Act of 1985 (LRWPAA), which created a statutory duty for states to provide for the safe disposal of radioactive waste generated within their borders.[64] The LRWPAA provided monetary incentives for states to comply with the law and allowed states to impose a surcharge on radioactive waste received from other states.[65] Additionally, and most controversially, to ensure effective state government action, the law provided that states would "take title" to any waste within their borders that were not properly disposed of by January 1, 1996 and then would "be liable for all damages directly or indirectly incurred."[66]

In *New York*, the Supreme Court ruled that pursuant to its authority under the Commerce Clause, Congress could regulate the disposal of radioactive waste.[67] However, by a 6-3 margin, the Court held that the "take title" provision of the law was unconstitutional because it gave state governments the choice between "either accepting ownership of waste or regulating according to the instructions of Congress."[68] Justice O'Connor, writing for the Court, stated that it was impermissible for Congress to impose either option on the states.[69] Forcing states to accept ownership of radioactive waste would impermissibly "commandeer" state governments, and requiring state compliance with federal regulatory statutes would impermissibly require states to implement federal legislation.[70] The Court concluded that it was "clear" that because of the

63. 505 U.S. 144.

64. Low-Level Radioactive Waste Policy Amendments Act of 1985, 42 U. S. C. §§ 2021b–2021j (2000).

65. *See id.*

66. *Id.* at 42 U.S.C. § 2021e(d)(2)(C).

67. *See New York*, 505 U.S. at 159-60.

68. *Id.* at 175-77.

69. *Id.*

70. *Id.*

Tenth Amendment, "[t]he Federal Government may not compel the States to enact or administer a federal regulatory program."[71]

Again, surely it is desirable to clean up nuclear waste. The federal law reflected a widespread sense of a serious problem and was the product of a proposal made by the National Conference of Governors.[72] The Court stated that allowing the federal government to commandeer state governments would undermine accountability,[73] but voters certainly could understand that there are times when state governments were acting because of a federal mandate.

A few years later, in *Printz v. United States*, the Court applied and extended *New York v. United States*.[74] *Printz* involved a challenge to the federal Brady Handgun Violence Prevention Act (Brady Act).[75] The Brady Act required that the "chief law enforcement officer" of each local jurisdiction conduct background checks on permit applicants before issuing permits for firearms.[76] In a 5-4 decision, the Court found that the Brady Act violated the Tenth Amendment.[77] Once more, from the perspective of social desirability, can there be any doubt that it is desirable to have background checks before issuing permits for guns?

Another key change in the law from the Rehnquist Court is the Supreme Court's significant expansion in the scope of state sovereign immunity. In *Alden v. Maine*, the Court held that because of state sovereign immunity a state government may not be sued in state court without its consent, even on a federal claim.[78] *Alden* involved a claim by probation officers in Maine that they were owed overtime pay under the federal Fair Labor Standards Act.[79] They sued in federal court, but their suit was dismissed based on the Elev-

71. *Id.* at 188.

72. H.R. Rep. No. 99-314(I), at 14 (1985).

73. *New York*, 505 U.S. at 169.

74. *Printz*, 521 U.S. 898.

75. *Id.* at 902.

76. Brady Handgun Violence Protection Act, Pub. L. No. 103-159, 107 Stat. 1536 (codified in scattered sections of 18 U.S.C.).

77. *Printz*, 521 U.S. at 935.

78. 527 U.S. 706.

79. *Id.* at 711.

enth Amendment.[80] The officers then sued in state court.[81] The Supreme Court, however, in a 5-4 decision, held that sovereign immunity broadly protects state governments and precludes suits against non-consenting states in state courts.[82]

Additionally, in a series of recent cases, the Court has greatly limited the ability of Congress to authorize suits against state governments in federal courts. In 1996, in *Seminole Tribe of Florida v. Florida*, the conservative majority of the Court held that Congress may authorize suits against states only through laws enacted pursuant to its enforcement power under Section 5.[83] As described above, in 1997, in *City of Boerne*, the Court limited Congress's Section 5 powers to preventing or remedying violations of rights recognized by the Supreme Court, reasoning that Congress cannot expand the scope of rights or create new rights.[84]

The combination of *Seminole Tribe* and *City of Boerne* already has had a devastating effect on many types of claims. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, in 1999, the Court held that state governments cannot be sued for patent infringement.[85] 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.[86] In *Board of Trustees of the 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.[87] Each case was a 5-4 decision, and in each case, the Court concluded that Congress was expanding the scope of rights, and that the laws could not be justified as narrowly tailored to preventing or remedying constitutional violations.[88]

---

80. *Id.* at 711-12 (applying the principal set out in *Seminole Tribe*, 517 U.S. 44, that the eleventh Amendment prevents Congressional authorization of private suits against non-consenting states in federal court).

81. *Id.*

82. *Id.*

83. 517 U.S. at 74-77.

84. *See supra* text accompanying notes 42-56.

85. 527 U.S. at 630.

86. 528 U.S. at 66-67.

87. 531 U.S. at 360.

88. However, in *Hibbs*, 536 U.S. 721, the Court allowed suits against the states for violations of the family leave provisions of the Family and Medical Leave Act. And in

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 and contended that suits against states are essential to assure the supremacy of federal law.[89] Justice Kennedy's response to this argument was astounding. He stated:

> The constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design. We are unwilling to assume the States will refuse to honor the Constitution or obey the binding laws of the United States. The good faith of the States thus provides an important assurance that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land."[90]

What, then, is the assurance that state governments will comply with federal law? 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 that 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

---

Lane, 541 U.S. 509, the Court held that states may be sued pursuant to Title II of the Americans with Disabilities Act for discriminating against people with disabilities with regard to access to the courts.

89. Transcript of Oral Argument at 12-13, *Alden*, 531 U.S. 706 (No. 98-436).

90. *Alden*, 521 U.S. at 754 (quoting U.S. CONST. art. VI).

that "the King can do no wrong."[91] 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.[92] American government is based on the fundamental recognition that the government and government officials can do wrong and must be held accountable.[93] Sovereign immunity undermines that basic notion.

The doctrine of 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. However, Article VI of the Constitution states that the Constitution and laws made pursuant to it are the supreme law and, as such, they should prevail over claims of sovereign immunity.[94] Yet, sovereign immunity, a common law doctrine, trumps even the United States Constitution and bars suits against government entities for relief 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 and to ensure that some individuals who have suffered egregious harms will be unable to receive redress for their injuries.[95] 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*, that "[t]he

---

91. *See* 5 KENNETH DAVIS, ADMINISTRATIVE LAW TREATISE 6-7 (2d ed. 1984) (quoting Blackstone); 2 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE 210 (1st ed. 1985).

92. *See* U.S. CONST. art. I, § 9, cl. 8 ("No title of nobility shall be granted by the United States.").

93. *See generally* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1213 (2001) (presenting interpretations of the Constitution and early case law that support the tenet that the government was formed with the intent that it would be held accountable to the people).

94. U.S. CONST. art. IV, § 2.

95. 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 New York Courts of Claims*, 22 ADMIN. L. REV. 39, 57-58 (1969).

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."[96]

Finally, it is striking that the Court's use of federalism as a limit on government power has little to do with the values that it has identified as being served by federalism.[97] The values traditionally invoked to justify federalism — states are closer to the people, states serve as a barrier to tyranny by the federal government, states are laboratories for experimentation — have virtually nothing to do with the Court's decisions and, on reflection, are of little use in constitutional decisionmaking. For example, it is difficult to see how preventing Congress from requiring states to clean up their nuclear waste lessens the likelihood of government tyranny or enhances desirable experimentation. Nor do the decisions striking down laws expanding liberties — such as the Violence Against Women Act or the Religious Freedom Restoration Act — lessen the likelihood of tyranny or encourage desirable state experimentation. The frequently mentioned values of federalism are little more than slogans invoked to explain the benefits of having multiple levels of government. They have virtually no relationship to any of the Court's federalism decisions.

Moreover, these values, and the Court's use of them, focus on only part of federalism: protecting state governments. Although the phrase "dual sovereignty" always has been invoked as a basis for protecting the states, the other half of "dual" is the federal government and its interests under the Constitution. Federalism also concerns safeguarding the federal government and the supremacy of federal law. Yet, the federalism decisions of the 1990s have given no weight, or even mention, to this consideration. For example, in expanding the Eleventh Amendment's bar on federal court jurisdiction, the Court did not even discuss whether this jeopardizes the successful enforcement and implementation of federal laws.

---

96. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

97. See Evan Caminker, *Printz, State Sovereignty and the Limits of Formalism*, 1997 SUP. CT. REV. 199, for an excellent argument that the Supreme Court's federalism decision in *Printz v. United States* was highly formalistic.

IV. Presumption in Favor of Preemption?

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

The Supreme Court has correctly stated that concerns about federalism and state authority justify a presumption against preemption.[98] The Court has observed: "Congress . . . should manifest its intention [to preempt state and local laws] clearly. . . . The exercise of federal supremacy is not lightly to be presumed."[99] Recently, the Court emphasized that states "are independent sovereigns in our federal system" and, therefore, there is a presumption against finding preemption.[100]

The Supreme Court's recent preemption decisions are striking because they are so at odds with deference to the states. To illustrate, this article briefly describes several recent cases and how they put the presumption in favor of preemption.

A. Geier v. American Honda Motor Co.[101]

Alexis Geier drove a 1987 model Honda Accord.[102] In 1992, Geier was seriously injured when the car crashed into a tree.[103] She sued on grounds that the absence of airbags was a design defect that was responsible for her injuries.[104] The defendant argued that Geier's suit was preempted by federal law because it built the car in compliance with federal safety requirements.[105] The Department of Transportation had promulgated rules governing the safety restraint systems of 1987 automobiles pursuant to the National Traffic

98. *See* N.Y. State Dep't of Soc. Servs. v. Dublino, 413 U.S. 405 (1973).
99. *Id.* at 413 (citation omitted).
100. Medtronic, Inc. v. Lohr, 518 U.S. 470, 485 (1986).
101. 529 U.S. 861.
102. *Id.* at 865.
103. *Id.*
104. *Id.*
105. *Id.*

and Motor Vehicle Safety Act.[106] One of these regulations required that cars have passive restraint systems and gave manufacturers three choices; one was airbags, another was the lap and shoulder belts that were in Geier's car.[107]

The problem with the National Traffic and Motor Vehicle Safety Act — which was the basis for the Department of Transportation regulations — is that it had a savings clause stating that nothing within the law was meant to preempt any other cause of action that might exist.[108] The law expressly stated that "[c]ompliance with" a federal safety standard does "not exempt any person from any liability under the common law."[109] Geier argued that this provision prevented a finding of federal preemption.[110]

The Supreme Court rejected Geier's argument and found federal preemption notwithstanding the savings clause.[111] Justice Breyer, writing for the majority, said that this was not a situation of express preemption, but instead one of conflicts preemption.[112] Allowing state liability for cars made in compliance with the federal safety standard was deemed to conflict with the federal law.[113] Justice Breyer stated that the savings clause did not foreclose preemption because there was no indication that Congress wanted to permit lawsuits when cars were made in compliance with the Department of Transportation's safety regulations.[114]

The only way to make sense of the case is to see it as putting a presumption in favor of preemption.[115] The federal statute expressly said that it did not preempt state law tort suits.[116] There was no conflict between allowing Geier to sue and any provision of fed-

106. The rule promulgated under the Traffic and Motor Vehicle Safety Act at issue in *Geier* was Federal Motor Vehicle Safety Standard 208, 49 CFR § 571.208 (1984).

107. *Id.*

108. 15 U.S.C. § 1397(k) (1988) (repealed 1994).

109. *Id.*

110. *Geier,* 529 U.S. at 867.

111. *Id.* at 885.

112. *Id.* at 869-870.

113. *Id.* at 867.

114. *Id.* at 869.

115. The dissent by Justice Stevens forcefully makes this point. *See* 529 U.S. at 907 (Stevens, J., dissenting); *see also*, Susan Raeker-Jordan, *A Study in Judicial Sleight of Hand: Did Geier v. American Honda Motor Co. Eradicate the Presumption Against Preemption,* 17 BYU J. PUB. L. 1 (2002).

116. 15 U.S.C. § 1397(k) (1988) (repealed 1994).

eral law. Yet, the Court nonetheless ruled in favor Honda and deemed a state tort action to be preempted.[117]

B. Lorillard Tobacco Co. v. Reilly[118]

In *Lorillard*, the Court invalidated a Massachusetts law that prohibited outdoor advertising for cigarettes, such as billboards, within 1,000 feet of a playground or school.[119] The Supreme Court relied on the language of a federal law adopted in 1969, the Federal Cigarette Labeling and Advertising Act (FCLAA), that proscribes any "requirement or prohibition based on smoking and health . . . imposed under State law with respect to the advertising or promotion" of cigarettes.[120] The Court reviewed the history of federal regulation of cigarette advertising and concluded:

> In the 1969 amendments, Congress not only enhanced its scheme to warn the public about the hazards of cigarette smoking, but also sought to protect the public, including youth, from being inundated with images of cigarette smoking in advertising. In pursuit of the latter goal, Congress banned electronic media advertising of cigarettes. And to the extent that Congress contemplated additional targeted regulation of cigarette advertising, it vested that authority in the FTC.[121]

Justice Stevens, in a dissenting opinion, argued that the state law was not preempted because it regulated the location and not the content of cigarette advertisements.[122] The majority, however, rejected this distinction and declared:

> But the content/location distinction cannot be squared with the language of the pre-emption provision, which reaches all "requirements" and "prohibitions" "imposed

117. *Geier*, 529 U.S. at 886.

118. 533 U.S. 525 (2001).

119. *Id.* The Court found that the Massachusetts law was preempted in its regulation of advertising of cigarettes. *Id.* at 571. As for the regulation of advertising of cigars and smokeless tobacco, which are not the subject of federal regulation, the Court found that the law violated the First Amendment. *Id.* at 567.

120. *Id.* at 537 (quoting the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1334(b) (2000)).

121. *Id.* at 547-48.

122. *Id.* at 592-94 (Stevens, J., dissenting).

> under State law." A distinction between the content of advertising and the location of advertising in the FCLAA also cannot be reconciled with Congress' own location-based restriction, which bans advertising in electronic media, but not elsewhere.[123]

Again, this case can be understood only if it is seen as putting a presumption in favor of preemption.[124] The federal law was designed to limit cigarette advertising so as to protect children. The federal preemption provision was meant to keep states from adopting conflicting requirements for warning labels on cigarette packages. There is nothing in the law that says or implies that *any* regulation of cigarette advertising is preempted by federal law. Indeed, the Massachusetts law advances the goals of the federal statute by protecting children from tobacco ads. The federal statute has nothing to do with whether there can be billboards near schools or whether ads in stores need to be a certain level above the floor. These, as the dissent points out, go entirely to placement, an issue not addressed by the federal law. Nonetheless, the Court protected the tobacco industry and invalidated the Massachusetts statute.

C. Crosby v. National Foreign Trade Council[125]

Massachusetts adopted a law which prohibited the state and its agencies from purchasing goods or services from companies that do business with Burma (Myanmar).[126] The state adopted this law because of human rights violations in that nation.[127] The Supreme Court unanimously found that the state law was preempted by federal law.[128] Justice Souter, writing for the Court, explained that Congress had enacted a sanctions law against Burma and found that this preempted states from imposing their own sanctions.[129]

---

123. *Id.* at 548-49.

124. This article's focus here is only the preemption issue and not whether the Massachusetts law violated the First Amendment.

125. 530 U.S. 363.

126. *Id.* at 366.

127. *See id.* at 368.

128. *Id.* at 366.

129. *Id.* at 368-369, 373-74, 388.

Justice Souter rejected the State's argument that its policy furthered the federal objective of imposing sanctions on a nation that violated basic norms of human rights. Justice Souter wrote: "The conflicts are not rendered irrelevant by the State's argument that there is no real conflict between the statutes because they share the same goals and because some companies may comply with both sets of restrictions. The fact of a common end hardly neutralizes conflicting means."[130]

Justice Souter said that the existence of the state law

> undermines the President's capacity . . . for effective diplomacy. It is not merely that the differences between the state and federal Acts in scope and type of sanctions threaten to complicate discussions; they compromise the very capacity of the President to speak for the nation with one voice in dealing with other governments.[131]

The decision, though unanimous, again must be seen as putting a presumption in favor of preemption. Congress had not expressed or implied any intent to preempt states from imposing sanctions, and the state law was not inconsistent with the federal law. There was no conflict between the Massachusetts law and actions taken by the President. The state was simply choosing how it would spend its taxpayers money and with whom it would do business. Many state and local governments adopted similar laws refusing to contract with companies doing business in South Africa at the time of apartheid.[132] Nonetheless, the Court found preemption.

D. American Insurance Association v. Garamendi[133]

California's Holocaust Victim Insurance Relief Act of 1999 (HVIRA) required "any insurer doing business in that State to disclose information about all policies sold in Europe between 1920

130. *Id.* at 379 (citations omitted).

131. *Id.* at 381.

132. *Id.* at 387. *See generally* David D. Caron, *Panel: Cities, States, and Foreign Affairs: The Massachusetts Burma Case and Beyond: The Structure and Pathologies of Local Selective Procurement Ordinances: A Study of the Apartheid-Era South Africa Ordinances*, 21 BERKELEY J. INT'L. L. 159 (2003) (discussing legislative action taken by cities and counties in the United States as indirect sanctions against the South African apartheid regime).

133. 539 U.S. 396 (2003).

and 1945 by the company."[134] As Justice Ginsburg noted in her dissent:

> For insurance policies issued in Germany and other countries under Nazi control, historical evidence bears out, the combined forces of the German Government and the insurance industry engaged in larcenous takings of gigantic proportions. For example, insurance policies covered many of the Jewish homes and businesses destroyed in the state-sponsored pogrom known as Kristallnacht. By order of the Nazi regime, claims arising out of the officially enabled destruction were made payable not to the insured parties, but to the State. In what one historian called a "charade concocted by insurers and ministerial officials," insurers satisfied property loss claims by paying the State only a fraction of their full value.[135]

Despite some efforts by the federal government, insurance companies had been largely successful in stonewalling and not disclosing their Holocaust-era policies.[136] To remedy this, and to protect its many residents who are Holocaust survivors or their descendants, California enacted a law which declared that "[i]nsurance companies doing business in the State of California have a responsibility to ensure that any involvement they or their related companies may have had with insurance policies of Holocaust victims [is] disclosed to the state. . . ."[137] HVIRA required insurance companies doing business in California to disclose information concerning insurance policies they or their affiliates sold in Europe between 1920 and 1945, and directed California's Insurance Commissioner to store the information in a publicly accessible "Holocaust Era Insurance Registry."[138] The Commissioner was further directed to suspend the license of any insurer that failed to comply with HVIRA's reporting requirements.[139] These measures,

---

134. *Id.* at 401 (citations omitted).

135. *Id.* at 430-31 (Ginsburg, J., dissenting) (citations omitted).

136. *See generally* Alicia Appleman-Jurman & Bernard Caron, *The Claimants Speak: Insurance Claims of Holocaust Victims and Their Heirs*, 20 WHITTIER L. REV. 61 (1998) (discussing attempts to recover Nazi assets).

137. CAL. INS. CODE § 13801(e) (1999).

138. CAL. INS. CODE § 13803 (1999).

139. CAL. INS. CODE § 13806 (1999).

the HVIRA declares, were "necessary to protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California, as necessary."[140]

The Supreme Court, in a 5-4 decision, found that the California law was preempted by federal law.[141] The Court reasoned that the statute interfered with the President's conduct of the nation's foreign policy and held that the statute was therefore preempted.[142] The Court focused on executive agreements that the President had negotiated with Germany, France, and Austria.[143] However, the problem with the Court's reasoning is that the California law did not conflict with any executive agreement and as Justice Souter, writing for the majority admitted, "petitioners and the United States as *amicus curiae* both have to acknowledge that the agreements include no preemption clause . . . ."[144]

The Court relied on its prior decision in *Zschernig v. Miller*, which created a dormant foreign affairs power of the President.[145] In *Zschernig*, the Court declared unconstitutional an Oregon probate statute that prohibited inheritance by a nonresident alien, absent showings that the foreign heir would take the property "without confiscation" by his home country and that American citizens would enjoy reciprocal rights of inheritance there.[146] As Justice Souter explained in his majority opinion in *Garamendi*, the Court in *Zschernig* found "that state action with more than incidental effect on foreign affairs is preempted, even absent any affirmative federal activity in the subject area of the state law, and hence without any showing of conflict."[147] Even though no decision since *Zschernig* had relied on that decision, the Court said that it provided a basis for invalidating California's law.[148] The Court stressed that the California disclosure statute limited what the President might

140. CAL. INS. CODE § 13801(f) (1999).
141. *Garamendi*, 539 U.S. at 401.
142. *Id.* at 421.
143. *Id.* at 408.
144. *Id.* at 417.
145. 389 U.S. 429 (1968).
146. *Id.* at 430, 432.
147. 539 U.S. at 418.
148. *Id.* at 420.

do in some hypothetical future negotiations.[149] Moreover, Justice Souter said,

> [i]f any doubt about the clarity of the conflict remained, however, it would have to be resolved in the National Government's favor, given the weakness of the State's interest, against the backdrop of traditional state legislative subject matter, in regulating disclosure of European Holocaust-era insurance policies in the manner of HVIRA.[150]

At the very least, *American Insurance Association v. Garamendi* can be understood as creating an enormous presumption in favor of federal preemption of state laws. In the absence of any express preemption or any conflict with federal law, the Court nonetheless found preemption simply because the California statute was seen as touching on an issue of foreign policy.[151] The California law, of course, regulated businesses operating within its borders and did not directly deal with foreign nations. Nonetheless, the Court found that a broad "dormant foreign affairs power" of the President was sufficient to preclude California from enacting the state law protecting its residents.[152] It is hard to imagine a stronger presumption in favor of preemption.

V. An Alternative Vision: Federalism as Empowerment, Not Limitations

The conservative conception of federalism as a way of limiting federal power, on examination, is highly formalistic and should be replaced by a functional analysis of how to best equip each level of government with the power to deal with social problems and enhance liberty. While the traditional approach to federalism has been about limiting federal government power, an alternative conception would be to see federalism as a basis for empowering each level of government to deal with social problems. The benefit of having three levels of government is that there are multiple power centers capable of acting. Both federal and state courts, from this view, should be available to protect constitutional rights. Federal,

149. *Id.* at 423-24.
150. *Id.* at 425.
151. *Id.*
152. *Id.*

state, and local legislatures should have the authority to deal with social problems, such as unsafe nuclear waste, guns near schools, and criminals owning firearms.

Constitutional doctrines about federalism should focus on how to empower each level of government with the necessary authority to deal with the complex problems of the 21st century. Viewing federalism as a means of empowerment, rather than a means of limitations, would have major implications for areas of constitutional law such as the scope of Congress's powers, federal court jurisdiction, and preemption doctrines.

More specifically, seeing federalism as empowerment rather than limitations will profoundly reorient constitutional law in three major ways. First, it will mean a broad conception of Congressional power unconstrained by concerns of federalism. Congress's power under provisions such as the Commerce Clause and Section 5 will be expansively interpreted, limited primarily by the political process and judicial protection of other parts of the Constitution, such as separation of powers and individual rights. The Tenth Amendment should not be interpreted as an independent basis for invalidating federal laws.

Second, viewing federalism as empowerment will mean significant expansion in the availability of federal courts to hear federal claims. Since the end of the Warren Court, the Supreme Court has repeatedly and significantly narrowed the scope of federal jurisdiction in the name of federalism. This has occurred through the Court's restrictions on who has standing to sue in federal court,[153] its expansion of states' Eleventh Amendment immunity,[154] its creation of new abstention doctrines,[155] and its great narrowing of the availability of federal courts to grant habeas corpus petitions.[156] In

153. *See, e.g.*, City of L.A. v. Lyons, 461 U.S. 95 (1983) (relying on federalism, in part, to hold that plaintiffs seeking injunctive or declaratory relief must show a likelihood of future harm and denying standing to a plaintiff to challenge the police use of a chokehold).

154. *See, e.g.*, *Seminole Tribe*, 517 U.S. 44 (holding that Congress can authorize suits against states only when acting pursuant to Section 5 of the Fourteenth Amendment and not pursuant to any other Congressional power).

155. *See, e.g.,* Younger v. Harris, 401 U.S. 37 (1997) (holding that federal courts must abstain and may not enjoin pending state court proceedings).

156. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467 (1991) (holding that federal courts may not hear successive habeas corpus petitions unless there is a showing of cause and

particular, this article is very critical of the unprecedented expansion of sovereign immunity in which the Court has invented a principle found nowhere in the Constitution and has made it supreme over the enforcement of the Constitution and all federal laws. These rulings neither advance liberty nor enhance effective government. Rather than using federalism to limit federal court authority, a better view would be to use federalism to open the doors to both federal and state courts to those asserting federal, and especially, constitutional claims.

Third, reorienting federalism as being about empowerment and not limitations also would mean an enhancement in state and local power. Actions by these levels of government are repeatedly limited in the name of federalism by preemption. Removing the shackles of federalism would result in a much more limited preemption doctrine, with courts finding preemption only based on an express Congressional declaration of a need to serve an important governing interest.

The central idea is that federalism should not be a highly formalistic doctrine used to limit the ability of government to deal with important problems. Instead, federalism should be reconceived as a functional analysis of how to best equip each level of government with the authority that it needs to respond to the serious problems facing American society.

VI. Conclusion

The federalism decisions of the Rehnquist Court in many different areas — commerce power, Section 5, Tenth Amendment, sovereign immunity, and preemption — need to be examined together. When looked at in this way, it is clear that the Supreme Court has been using federalism to limit government power and to prevent it from adopting desirable and needed social legislation. This article argued for an alternative vision where federalism should be about empowering government at all levels to deal with social problems.

---

prejudice or actual innocence); Teague v. Lane, 489 U.S. 288 (1989) (holding that federal courts may not hear habeas petitions asserting new constitutional rights unless they are rights that would have retroactive application).