FEDERALISM AND FREEDOM:

THE PRECEDENTIAL AND NORMATIVE ROOTS

OF THE REHNQUIST COURT'S FEDERALISM REVOLUTION

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Abstract

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This dissertation examines the Rehnquist Court's federalism jurisprudence in four areas of federal-state conflict, addressing the following questions: (1.) Is this jurisprudence consistent with the Supreme Court's federalism precedents? (2.) Is this jurisprudence consistent with the structure and design of the Constitution as amended? (3.) Can the tenets of this jurisprudence find support in conceptions of liberty and the rule of law presented by earlier political theorists?

Critics, both in the academic literature and in the popular press, contend that the Rehnquist Court's federalism decisions break from precedent and adopt an unsound approach to the separation of powers. The few who have defended the decisions usually concede the point about precedent, offer a limited defense of its compatibility with originalist theory, and fail to comprehend the aspects of political theory that undergird the Rehnquist Court's decisions.

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I analyze the Court's decisions and the critics' responses through the lens of the three questions above. First, I argue that there is a substantial body of precedent with which the Rehnquist Court's federalism jurisprudence is consistent. Second, I address the context of the structure and design of the Constitution. I examine the competing federal-state arrangements considered at the Constitutional Convention and explain where the Rehnquist Court's federalism jurisprudence fits into the framework established at the Convention and through subsequent amendments. Third, I consider the place of this jurisprudence in the broader context of theoretical discussions by examining definitions of political liberty, the rule of law, and how a division of powers among different levels of government fits into the consideration of thinkers including Locke, Montesquieu, and Tocqueville. I conclude with a discussion of how these principles of federalism are founded in something more than ideology. Properly understood, federalism can promote local decision-making and deference to individual choices in a non-partisan manner. I examine marijuana regulations and sanctuary cities to provide concrete examples of this parity under the principles of federalism.

By combining an examination of precedent with a broad analysis of the tenets of the Rehnquist Court's federalism jurisprudence in relation to conceptions of the separation of powers, liberty, and constitutional design, this project places those decisions within an appropriately broad context. I show that this jurisprudence was not truly revolutionary but was, instead, consistent with earlier conceptions of liberty and the relationship between different spheres of government.

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For Heather, Madeline, Oliver, and Findlay.

You have made these years a joy.

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CHAPTER 1:

INTRODUCTION

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce . . . The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.
>
> - James Madison, *The Federalist* No. 45

1.1 Overview

In 1937, facing the pressure of President Roosevelt's court-packing plan, Justice Owen Roberts switched sides and voted to uphold a critical part of the New Deal. This "switch in time that saved nine" preserved the Supreme Court's nine-justice makeup, but it heralded an abandonment of the concept of federalism at the Court. For almost five decades, the Court would never rule that Congress had exceeded its powers under the Commerce Clause of Article I, Section 8 of the Constitution. The justices gave Congress carte blanche to shape virtually all areas of American government. This finally changed in 1995, when the Supreme Court ruled in *United States v. Lopez* that the Gun Free School Zones Act unconstitutionally exceeded congressional power.

This change in Commerce Clause jurisprudence was part of a larger movement we now know as the Rehnquist Court's federalism revolution. The concept of a practical

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division between federal and state authority reemerged in the Court's majority opinions, and the federalism drought was over. Chief Justice William Rehnquist was at the head of this resurgence, writing the Court's critical Commerce Clause cases and other important decisions in the realm of federalism. However, he certainly was not alone. Each of the other four justices in that era's federalism majority played an important role in shaping this jurisprudence. They stayed firm for the majority of their 14 years together on the Court.

Critics of this federalism resurgence often denigrate the Rehnquist Court's jurisprudence on the grounds that federalism is a dry structural issue with little impact on citizens' lives.[1] However, federalism is much more than mere structure. It defines governmental authority in our nation, and it makes us unique, even as other countries emulate our system. Our Constitution explicitly divides power between the federal government and state governments. Article I, Section 1 declares, "All legislative Powers herein granted shall be vested in a Congress of the United States." The federal government is, therefore, one of enumerated powers. Congress only has the authority granted to it by the Constitution. The Tenth Amendment provides firm confirmation of this arrangement: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." The Constitution gives the federal government certain powers, and residual governmental authority belongs to the state governments. Rehnquist and his allies insisted on enforcing the constitutional structure and policing the outer bounds of congressional power.

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[1] I will discuss this and other key criticisms in Chapter Two.

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But were they enforcing the correct boundaries, and do their decisions actually serve a greater good than mere structure? These questions tie together three distinct lines of inquiry that I will address. First, are these decisions consistent with the Supreme Court's federalism precedents? Second, is this jurisprudence consistent with the structure and design of the Constitution as amended? Finally, can the tenets of this jurisprudence find support in conceptions of liberty and the rule of law presented by earlier political theorists? Together, these lines of inquiry address whether Rehnquist and his allies were legally correct and, importantly, whether their decisions can actually do us any good.

I will show that this jurisprudence was not truly revolutionary but was, instead, consistent with earlier conceptions of liberty and the relationship between different spheres of government. The decisions authored by Rehnquist and his allies were consistent with the Court's approach to federalism before the New Deal. Certainly, the Rehnquist Court deviated from the post-New Deal permissiveness granted to Congress, but their arguments were firmly grounded in earlier opinions of the Court. Moreover, these decisions correctly enforced the boundary between the federal government and the states, deferring to Congress but never losing sight of the Court's responsibility to uphold the Constitution as amended. Finally, and perhaps most importantly, the Rehnquist Court's federalism jurisprudence served the liberty of the people and the rule of law. I draw on thinkers including Locke, Montesquieu, and Tocqueville to show that these decisions find extensive support in great works of political theory.

To properly address these three lines of inquiry we must first understand the arguments against this jurisprudence. Chapter Two addresses the key criticisms leveled against these decisions. Chapter Three examines the Rehnquist Court's opinions in light

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of the multitude of federalism precedents. Chapter Four provides a detailed examination of the relevant parts of the Constitution, the debate over the federal/state divide at the Constitutional Convention, and authoritative writings regarding the structure of that document. Chapter Five addresses the normative line of inquiry, surveying works of political theory to appraise the Rehnquist Court's federalism jurisprudence in this broader context. Chapter Six evaluates the legacy of these decisions and looks forward to the potential impact they could have.

1.2 The Cases

Before proceeding, it is essential to understand which justices made up the Rehnquist Court's federalism majority and what, exactly, their decisions argued. President Ronald Reagan nominated Rehnquist to ascend from Associate Justice to Chief Justice upon the death of Chief Justice Warren Burger. The Senate confirmed Rehnquist's nomination, and he assumed his new position on September 26, 1986. He was joined in the critical federalism cases by four other justices. Sandra Day O'Connor was already on the Court when Rehnquist became the Chief Justice, having taken her position on September 25, 1981. Antonin Scalia was Rehnquist's replacement as Associate Justice, taking office on the same day that Rehnquist became the Chief. Anthony Kennedy assumed his office on February 18, 1988. Finally, Clarence Thomas took his place on the Court on October 23, 1991. Together, Rehnquist, O'Connor, Scalia, Kennedy, and Thomas made the five-justice majority that heralded this federalism revolution.

I will examine four areas of federal-state conflict: (1.) the Commerce Clause, (2.) the Section 5 powers, (3.) anti-commandeering principles, and (4.) state sovereign

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immunity. These categories form the core of disputes between the federal government and the states. In these areas, the laws passed by Congress come into conflict with the asserted powers of the states. The justices had to decide whether the particular action involved in a challenged law was a legitimate use of congressional authority or whether it was an exercise of power reserved to the states. Again, these are not merely structural questions. Instead, the answers to these questions determine how far the federal and state governments may go in the creation of law and, ultimately, how laws will impact individuals. The decisions handed down by the Rehnquist Court's federalism majority repeatedly returned to the theme of boundaries. The justices insisted that the Constitution imposes limits upon congressional power. This is true both because Article I makes it clear that the national government is one of enumerated powers and because the Tenth Amendment reserves unenumerated authority to the states. Because the authority "to say what the law is"[2] falls to the judiciary, it is the Supreme Court's job to ensure that Congress and the states stay within their own spheres of authority.

1.2.1 The Commerce Clause

In *United States v. Lopez* (1995), the Supreme Court struck down a law as beyond the scope of Congress's powers under the Commerce Clause for the first time since the New Deal. The law was the Gun-Free School Zones Act, and it made possession of a gun in a school zone a federal crime. The federal government defended the law on the grounds that possession of a gun in a school zone could eventually affect interstate commerce because insurance costs would rise and frightening school environments would hinder academic performance, which can have an economic effect. The Court

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[2] *Marbury v. Madison*, 5 U.S. 137 (1803), 177.

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explained that there are three permissible areas of regulation under the Commerce Clause: (1.) the channels of interstate commerce, (2.) the instruments of interstate commerce (people and goods), and (3.) actions that have a substantial effect on interstate commerce. The case obviously does not involve channels or instruments, so the Court only had to consider substantial effects.

In his opinion for the Court, Rehnquist explains that, though the Court must give substantial deference to Congress, the tie between possession of a gun in a school zone and interstate commerce is extremely attenuated. It requires a long chain of inference and does not meet any reasonable standard for "substantial" effects. He argues that the Gun Free School Zones Act is "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms" and that it is not "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated."[3]

Most importantly, the Court ruled that there must be outer bounds to congressional power under the Commerce Clause. The Constitution does not grant Congress a blanket power over commerce. Instead, it grants Congress power over commerce among the several states, with Indian tribes, and with foreign nations. All other regulation of commerce remains the province of the individual states. Because the Gun Free School Zones Act cannot meet the substantial effects test, the law exceeded the outer bounds of congressional power under the Commerce Clause.

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[3] *United States v. Lopez*, 514 U.S. 549 (1995), 561.

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However, the government still contended that the aggregate effect of the possession of firearms in a school zone would substantially affect interstate commerce. It presented a number of arguments for this position. First, the government argued that violent crime creates enormous financial cost and that society at large, and on a nationwide basis, carries those costs. Secondly, the government asserted that violent crime makes people unwilling to travel to certain areas, thus interfering with potential commerce across the country. Finally, the government argued that the presence of guns in schools impedes education, thus creating a less productive citizenry and dragging down the nation's economy.[4]

Rehnquist's opinion pushes back against these arguments. He explains that under the "theories that the government presents . . . it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign."[5] This leads him to the conclusion that if the Court accepted the arguments of the government, it would be "hard pressed to posit any activity by an individual that Congress is without power to regulate."[6] Rehnquist holds that such a conclusion is at odds with the text of the Constitution and the holdings in other cases, which all acknowledge that there is an outer limit to the commerce power.

He concludes that to "uphold the Government's contentions here, [the Court] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort

[4] *Lopez*, 563.

[5] *Lopez*, 564.

[6] *Lopez*, 564.

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retained by the States."[7] He acknowledges that past decisions of the Court have taken "long steps down that road" in consistently deferring to Congress, but the Court here declines "to proceed any further" on the grounds that Congress must be held within the limits of its enumerated powers. [8] Thus, the Court struck down the Gun Free School Zones Act on the basis of this outer-bounds doctrine.

United States v. Morrison (2000) largely reiterated the outer-bounds doctrine that the Court put forth in *Lopez*. The law being challenged was the Violence Against Women Act (VAWA). The respondent was sued by an a woman named Christy Brzonkala, who claimed that Morrison and another man raped her at Virginia Tech. The university conducted an investigation that eventually resulted in no punishment for Morrison. A state grand jury examined the evidence and determined that it was insufficient to issue a criminal indictment against Morrison. Brzonkala filed a federal civil suit against Morrison under a provision of VAWA.

In the decision Rehnquist extensively reviews the relevant portions of the Court's opinion in *Lopez*. He reiterates that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."[9] Moreover, he argues that gender-motivated crimes of violence "are not, in any sense of the phrase, economic activity" and that the Court has consistently declined to aggregate the effects "of any noneconomic activity in order to decide these cases."[10]

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[7] *Lopez*, 567.

[8] *Lopez*, 567.

[9] *United States v. Morrison*, 529 U.S. 598 (2000), 608.

[10] *Morrison*, 613.

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As a result, the Supreme Court struck the portion of VAWA that allowed for such civil suits. Rehnquist explained that, as in *Lopez*, Congress relied on a string of inferences about the results of violent actions to make a connection to interstate commerce. Such a chain of inference does not meet the standard for substantial effects. Moreover, the Court said that violence against women is only a subset of all violence. If violence against women has a substantial effect on interstate commerce, then the category of "all violence" obviously has an even more substantial effect on interstate commerce. This line of reasoning would allow Congress to regulate all violence, but such actions are clearly impermissible because these traditional police powers have always been reserved to the states.

Rehnquist acknowledges that, contrary to the Court's experience in *Lopez*, the government is able to present the Court with an extensive congressional record regarding the effect of gender-related violent crime on interstate commerce. However, he argues that the findings and the government's arguments only amplify "the concern that we expressed in *Lopez* that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority."[11] This kind of reasoning would allow the regulation of any kind of criminal activity, or perhaps any kind of noneconomic activity whatsoever, that could potentially have an attenuated effect on interstate commerce. Allowing Congress to legislate in these areas would eliminate any understanding of outer bounds to the Commerce Clause. Rehnquist and the majority in both *Lopez* and *Morrison* held that these outer bounds have always existed, both in the

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[11] *Morrison*, 615.

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text of the Constitution and in the decisions of the Supreme Court, and that the Court has a responsibility to enforce those bounds.

1.2.2 Section 5 Powers

Section 5 of the Fourteenth Amendment allows Congress to enforce the terms of that amendment with appropriate legislation. This means, in practice, that Congress may ensure that no state shall "deprive any person of life, liberty, or property, without due process of law" and that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[12] The question of equal protection has become particularly relevant in federalism cases. The Rehnquist Court again held that there are outer bounds to congressional power under Section 5 of the Fourteenth Amendment.

In *City of Boerne v. Flores* (1997) the justices considered a dispute over congressional power between Boerne, Texas and the Archdiocese of San Antonio. The Archdiocese wanted to expand its old, mission-style church in Boerne in order to accommodate the growing Hispanic, Roman Catholic population in that area. The city of Boerne objected, saying that the building needed to be preserved essentially as-is under Boerne's historical preservation ordinances. The archdiocese sued in federal court, claiming that Boerne had violated the Religious Freedom Restoration Act (RFRA), which required that government infringement upon religious action must (1.) serve a legitimate governmental purpose and (2.) use the least restrictive means.[13]

The Court struck down RFRA as applied to the states. Writing for the majority Justice Kennedy explained that its power under Section 5 only allows Congress to

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[12] United States Constitution, Amendment XIV, Section 1

[13] The Religious Freedom Restoration Act, 42 U.S.C. §2000bb

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enforce existing constitutional rights as defined by the Court. Congress had tried to expand the definition of "free exercise of religion" after the Court limited that definition in *Employment Division v. Smith* (1990). In *Boerne* the Court determined that such an expansion of rights was impermissible. The Fourteenth Amendment gives Congress broad power to prohibit violations of constitutional rights by the state governments, but Congress cannot change the definitions of those rights.[14]

Kennedy explains that Congress "relied on its Fourteenth Amendment enforcement power in enacting the most far-reaching and substantial of RFRA's provisions, those which impose its requirements on the states."[15] While he acknowledges that Section 5 is a positive grant of legislative power, Kennedy insists that Congress's power under Section 5 allows only the enforcement of the provisions of the Fourteenth Amendment. He claims that the "design of the Amendment and the text of §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the states."[16] If the Court interpreted the Section 5 power as allowing Congress to "[change] what the right is," then "what Congress would be enforcing would no longer be, in any meaningful sense," the provisions of the Fourteenth Amendment.[17]

To make his case Kennedy turns to the congressional record from the passage of the Fourteenth Amendment and to the Court's early precedents on legislation passed

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[14] RFRA still applies to federal laws and regulations, as established in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal* (2006) and recently applied in *Burwell v. Hobby Lobby Stores, Inc.* (2014).

[15] *City of Boerne v. Flores*, 521 U.S. 507 (1997), 516.

[16] *Boerne*, 519.

[17] *Boerne*, 519.

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under the Fourteenth Amendment. He argues that those framing the Fourteenth Amendment intentionally refused to "give Congress a power to intrude into traditional areas of state responsibility," while also ensuring that the states would not trample upon the rights of the people.[18] This line of reasoning leads Kennedy to the conclusion that the Fourteenth Amendment does not make or allow any changes to the substance of the first eight amendments, which set forth "self-executing prohibitions on governmental action" and rely upon judicial interpretation for their enforcement.[19]

Finally, Kennedy and the majority conclude that RFRA is not remedial in nature and that Congress unduly intruded "into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[20] Because RFRA could not be justified under the Section 5 power, the Court struck it down as applied to the states. As in the Commerce Clause cases, the Rehnquist Court struck down the law because it exceeded the outer boundary of congressional power.

United States v. Morrison also had a Section 5 dimension. The government made the case in its briefs and during oral arguments that if the Court struck the relevant portion of VAWA on Commerce Clause grounds, the law should still be permitted under Congress's power to enforce the terms of the Equal Protection Clause. The Court dismissed this argument. Rehnquist explained that the justices must adhere to the "state action doctrine," which holds that the Equal Protection Clause may only be wielded

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[18] *Boerne*, 521.

[19] *Boerne*, 524.

[20] *Boerne*, 534.

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against state actors. Morrison was a private citizen, not an agent of the government. Therefore, any action taken against him had to be taken in state courts.

1.2.3 Anti-Commandeering Principles

The Rehnquist Court's anti-commandeering cases involved direct conflict between Congress and the states over congressional authority to direct state action. The first critical case was *New York v. United States* (1992). Congress, which has a generally undisputed authority to regulate the disposal of nuclear waste under the Commerce Clause, went a little farther. It ordered state legislatures to either pass laws regulating nuclear waste according to the precise prescriptions of Congress or take title to and possession of the nuclear waste. The Court struck down this provision, holding that it attempted to unconstitutionally commandeer the state legislatures. Congress is permitted to incentivize the states to do things by offering grants in exchange for compliance. However, Congress may not actively punish state legislatures for refusing to comply, and forcing the states to take title to and possession of nuclear waste qualifies as a punishment. State legislatures are independent bodies. If Congress wishes to regulate nuclear waste in a particular way, it must do so on its own, using the resources of the federal government. It may not force the states to comply under the threat of a penalty.

In her opinion for the Court, Justice O'Connor notes that Congress "may not simply 'comandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[21] She provides a detailed history of the consideration of the federal government employing state governments as agents at the Constitutional Convention. The delegates to the Convention considered many proposals

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[21] *New York v. United States*, 505 U.S. 144 (1992), 161.

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regarding the relationship of the state governments to the federal government. In some of these proposals, including in one of the predecessors to the New Jersey plan, the "state governments would occupy a position relative to Congress similar to that contemplated by the Act at issue in these cases."[22] However, the delegates to the Convention declined to put such a plan into the Constitution. Instead, they "opted for a Constitution in which Congress would exercise its legislative authority directly over individuals rather than over States."[23] This disposition is key for O'Connor and the majority because it demonstrates the rejection of a simple system of subordination.

Still, O'Connor certainly does not claim that Congress cannot include the states in its regulatory plans in any way. She explains that Congress has "the ability to encourage a State to regulate in a particular way" and that "Congress may . . . hold out incentives to the States as a method of influencing a State's policy choices."[24] These concepts are based in the precedents of the Court and do not offend the Tenth Amendment sphere of the states. As a result, the Court upheld the first two provisions of the Act as constitutional exercises of the commerce and spending powers.

Yet, according to O'Connor, the take-title provision "is of a different character."[25] She argues that this provision is not an incentive at all and is, instead, a command issued to the states. The choice Congress has presented to the states crosses "the line distinguishing encouragement from coercion."[26] In short, O'Connor argues that Congress

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[22] *New York*, 164.

[23] *New York*, 165.

[24] *New York*, 166.

[25] *New York*, 174.

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is attempting to pass off two unconstitutional orders as a choice. The Act orders the states to choose between ownership of radioactive waste and regulation of that waste according to the specifications set by Congress. As O'Connor points out, "Respondents do not claim that the Constitution would authorize Congress to impose either option as a freestanding requirement."[27] If they are unconstitutional individually, they are also unconstitutional when combined together in an apparent choice for the states. She argues that whether "one views the take title provision as lying outside of Congress' enumerated powers, or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, the provision is inconsistent with the federal structure" of constitutional government in the United States.[28] While Congress has wide discretion in dealing with matters such as nuclear waste, it may not assert this level of control over state governments.

Justice O'Connor then addresses the primary objection raised by the government, which held that the Court has allowed federal directives to state judges and that the provision in question was a logical extension of that authority. However, O'Connor dispenses with this line of argument by pointing out that federal statutes "enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."[29] The Constitution does not allow the federal government to treat the state legislatures in a similar manner, in the majority's assessment.

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[26] *New York*, 174.

[27] *New York*, 175.

[28] *New York*, 177.

[29] *New York*, 178.

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Printz v. United States (1997) involved a dispute over the Brady Handgun Violence Prevention Act, which established a federal system for background checks before gun purchases. Because the FBI would have to build the system from scratch, the law included an interim provision to provide for background checks until that system was online. The law required chief law enforcement officers in cities and counties (i.e., police chiefs and sheriffs) to run background checks on gun purchases until the FBI could create the database. Multiple sheriffs took umbrage to the federal government ordering them to do something, and they filed suit. The Court struck down the interim provision in question while leaving the rest of the law in place.

Justice Scalia delivered the opinion of the Court. In his decision he notes that the specific question at hand is whether the federal government can order state officials to administer federal law. Scalia says that the Constitution itself does not address this precise question, so "the answer to the [petitioners'] challenge must be sought in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[30] Scalia first addresses the historical aspect of the question. He acknowledges the federal government's argument that Congress compelled state courts to enforce some matters of federal law in the early stages of the republic. However, he notes that these were under specific circumstances and that the officials in question in *Printz* were officers of the executive branch of state government, not the judicial branch. While the state courts can be ordered to execute federal law under some circumstances due to the explicit mandate in the Supremacy Clause, as noted in *New York*, the same rules do not apply to the states' executive branches.

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[30] *Printz v. United States*, 521 U.S. 898 (1997), 925.

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Scalia writes that "the enactments of the early Congresses, as far as we are aware, contain no evidence of an assumption that the Federal Government may command the States' executive power in the absence of particularized constitutional authorization" and that those enactments "contain some indication of precisely the opposite assumption."[31] Scalia notes that there were no "executive-commandeering" statues early in the republic or more recently. In his assessment this attempt is truly novel. He establishes an interpretation of the historical record that draws a distinct line between judicial administration and executive administration. While the Court acknowledges the authority of Congress to place specific burdens on the state courts, it rejects from a historical perspective any commandeering of the executive branches of state governments.

Moving on to the consideration of the structure of the Constitution, Scalia notes the "incontestable" doctrine of dual sovereignty, the restrictions implied by enumerated powers, and the explicit regulation of the Tenth Amendment.[32] He argues that the "Framers' experience under the Articles of Confederation had persuaded them that using the States as instruments of federal governance was both ineffectual and provocative of federal-state conflict," noting the rejection of centralized government acting through the states at the Constitutional Convention and multiple references to the rejection of such a system in *The Federalist.*[33] Scalia follows this argument by repeating what the Court declared in *New York*, "The Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not states."[34] In the remainder of the opinion,

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[31] *Printz*, 927.

[32] *Printz*, 934.

[33] *Printz*, 934.

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he repeatedly refers to O'Connor's decision in *New York*, painting it as a remarkably similar circumstance of Congress trying to dictate state action. In fact, Scalia argues that the action ordered under the Brady Act attempts to circumvent the ruling of the Court in *New York*.

Finally, the Court rejected the argument that the imposition on state officials was minor and, thus, excusable. The opinion acknowledged that the Brady Act did not require a lot of work on the part of state officials. Additionally, the actions required were temporary in nature, lasting only until the national background check system could be set up for use at the point of sale. However, Scalia argued that this line of reasoning entirely missed the point. It is not the size of the burden that matters. Rather, it is the fact that Congress was attempting to control state executive officials. Such action, regardless of the size of its imposition, is a violation of the division of powers inherent in the system of dual sovereignty. In short, the Constitution cannot be violated on the grounds that the violation should not be difficult for the offended party to manage.

These cases fit within the broad theme of the Rehnquist Court's federalism jurisprudence: enforcing outer bounds to congressional power. The Court again acknowledged the importance of general deference to Congress but insisted on enforcing constitutional limitations on the federal government. The justices did not touch the majority of the legislation implicated in both *New York* and *Printz*. Instead, they struck down small portions that they thought went too far and attempted to unconstitutionally control or coerce state governments.

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[34] *Printz*, 934.

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1.2.4 State Sovereign Immunity

The principle of sovereign immunity holds that a government may not be sued without its consent. The Eleventh Amendment protects this right in the states, at least to some degree: “The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” It explicitly prohibits federal courts from hearing lawsuits brought against states by citizens of other states or by aliens. The Fourteenth Amendment allows some abrogation of state sovereign immunity, but up until the late twentieth century, the Commerce Clause and other portions of the original constitution were never held to allow Congress to restrict the sovereign immunity of the states. That changed in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), when the Court essentially ruled that Congress could abrogate the sovereign immunity of the states at will. The *Garcia* jurisprudential regime barely lasted a decade, as the Rehnquist Court proceeded to reinforce state sovereign immunity.

The key cases in question were *Seminole Tribe of Florida v. Florida* (1996) and *Alden v. Maine* (1999). The Court ruled that Congress could not abrogate the sovereign immunity of the states under the Commerce Clause or any other portion of the Constitution, with the sole, but powerful, exception of the Fourteenth Amendment. Congress may authorize lawsuits for money damages against the states to help protect the rights of citizens under the Due Process Clause or the Equal Protection Clause, but it may not allow such lawsuits for any other reason.

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The opinions in *Seminole Tribe* and *Alden v. Maine* made it clear that the Rehnquist Court majority would not accept any abrogation of state sovereign immunity under Article I. In *Seminole Tribe* the Court considered the constitutionality of the congressional decision in the Indian Gaming Regulatory Act of 1988 to allow district courts to hear lawsuits brought by tribes against the states. Writing for the majority, Rehnquist acknowledges that "Congress clearly intended to abrogate the States' sovereign immunity."[35] The Court undertook this inquiry because the clear-statement rule requires that Congress must actively intend to abrogate sovereign immunity. Ambiguities in congressional intentions should be decided in favor of respecting immunity. However, there was no issue with an unclear statement in the Indian Gaming Regulatory Act. Congress clearly allowed for tribes to bring lawsuits against the states and gave authority over such lawsuits to the federal district courts.

The Supreme Court had decided in *Pennsylvania v. Union Gas Co.* (1989) that Congress could abrogate state sovereign immunity under the Interstate Commerce Clause. By that standard, Congress could also abrogate sovereign immunity under the Indian Commerce Clause, which was at issue in *Seminole Tribe*. Rehnquist explains that the majority "feel[s] bound to conclude that *Union Gas* was wrongly decided and that it should be, and now is, overruled."[36] He argues that the Court must "reconfirm that the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under

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[35] *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), 57.

[36] *Seminole Tribe*, 66.

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the exclusive control of the Federal Government."[37] Congressional power under Article I cannot be used to eliminate the sovereign immunity of the states.

Justice Kennedy's opinion for the Court in *Alden v. Maine* affirms this argument. He goes into more detail on the background of the Eleventh Amendment and its interpretation. Ultimately, Kennedy argues that no one at the time of the Founding, "not even the Constitution's most ardent opponents, suggested that the document might strip the States of the immunity."[38] Indeed, he says that "our federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation."[39] The sovereign immunity of the states is firm unless the Constitution clearly allows Congress to abrogate it.

This point brings us to the cases where Congress may abrogate sovereign immunity by using its power under the Fourteenth Amendment. The crucial Rehnquist Court cases on this front were *Board of Trustees of the University of Alabama v. Garrett* (2001) and *Tennessee v. Lane* (2004). Both cases concerned provisions of the Americans with Disabilities Act of 1990, which allowed individuals to sue states for money damages. Writing for the majority in *Garrett*, Rehnquist explained that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation."[40] The Court ruled that the provision in question in *Garrett* did not meet this

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[37] *Seminole Tribe*, 72.

[38] *Alden v. Maine*, 527 U.S. 706 (1999), 741.

[39] *Alden v. Maine*, 748.

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standard and was, therefore, constitutional. In *Lane* Justice O'Connor sided with the liberal bloc in ruling that the provision in question did meet the standard to allow abrogation of state sovereign immunity. It is clear that the particulars of the cases affected their outcomes, but all of the justices agreed, at least, that Section 5 of the Fourteenth Amendment allows Congress to abrogate state sovereign immunity under some circumstances.

In the area of sovereign immunity, Rehnquist and his allies again made it clear that they would police the outer bounds of congressional power. In these cases their standard of review was much more stringent. As a rule, the Supreme Court defers to Congress in reviewing the constitutionality of a law. However, the sovereign immunity of the states is such an important, foundational principle that deference is owed to the states. Congress must prove that the Constitution permits its abrogation of state sovereign immunity, and according to the Rehnquist Court, only the Fourteenth Amendment can allow that incursion. Article I, most notably the Commerce Clause, does not allow Congress to abolish the sovereign immunity of the states.

1.2.5 The Conundrum of *Gonzales v. Raich*

The Court's decision in *Gonzales v. Raich* (2005) had the potential to deal a significant setback to the federalism jurisprudence of the Rehnquist Court. As the last federalism case before Rehnquist's death 2005, it was essentially the final word on the Rehnquist Court's federalism jurisprudence. That final word was at odds with the rest of the Rehnquist-era federalism decisions. Justices Scalia and Kennedy voted with the

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[40] *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 536 (2001), 374.

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Court's liberal bloc to uphold national power in drug regulations. Chief Justice Rehnquist, joined by Justices O'Connor and Thomas, dissented strongly in *Raich*.

While both the majority and Justice Scalia made efforts to distinguish the case from the decisions in *Lopez* and *Morrison*, there were many clear similarities among the cases. This fact gives rise to the question of whether *Raich* to some extent repudiated *Lopez* and *Morrison* and returned the Court to something closer to its New Deal-era Commerce Clause jurisprudence. At issue in *Raich* was whether federal prohibitions on the cultivation of marijuana are constitutional when the plants in question are grown legally under state law for personal, medicinal use and when those plants never enter intrastate or interstate commerce. The Court upheld the federal law as applied under these circumstances.

In his opinion for the Court, Justice Stevens explains that the "main objectives of the [Controlled Substances Act (CSA)] were to conquer drug abuse and to control the legitimate and illegitimate traffic in controlled substances."[41] To this end, Congress "devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA."[42] Stevens goes on to explain that the "respondents' challenge is actually quite limited," in that they argue only that the "CSA's categorical prohibition of the manufacture and possession of marijuana as applied to the intrastate manufacture and possession of marijuana for medicinal purposes . . . exceeds Congress' authority under

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[41] *Gonzales v. Raich*, 545 U.S. 1, 13.

[42] *Raich*, 14.

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the Commerce Clause."[43] The respondents do not argue that the CSA as a whole is unconstitutional. Nor do they even suggest that one of the provisions is necessarily unconstitutional. Instead, they limit their argument to the claim that one of the provisions is unconstitutional as applied to their particular circumstances.

Stevens begins the substance of his opinion by asserting that when "assessing the validity of congressional regulation, none of our Commerce Clause cases can be viewed in isolation."[44] This point sets the foundation for his insistence that the circumstances in the case resemble the 1942 case *Wickard v. Filburn* far more than they resemble *Lopez* and *Morrison*. Before starting this argument, Stevens provides a restatement of the Court's findings from over the course of more than a century that Congress may regulate (1.) the channels of interstate commerce, (2.) the instrumentalities of interstate commerce, and (3.) activities that substantially affect interstate commerce. The question of substantial effects is at issue in *Raich*. He then proceeds to explain that *Wickard* "firmly [established] Congress' power to regulate purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce."[45] Because this approach to congressional regulation is established, the Court chooses to apply the rational basis test in this case, requiring only that there be some rational basis for the law in order to uphold it.

Stevens notes the striking similarities between *Wickard* and *Raich*. In *Wickard* the issue was the cultivation of wheat for use in the individual's home and private farm. In

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[43] *Raich*, 16.

[44] *Raich*, 16.

[45] *Raich*, 17.

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Raich the issue is the cultivation of marijuana for medicinal use within the individual's home. The Court determines that "Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would . . . affect price and market conditions" in a manner similar to the way in which leaving home-consumed wheat outside federal control could affect the market for wheat.[46] In particular, Stevens argues that there is a great likelihood that the "high demand in the interstate market will draw such marijuana into that market."[47] Because there is an established, illegal interstate market for marijuana, there is a rational basis for the determination that it is likely that the marijuana the respondents claim to grow for medicinal consumption at home may ultimately land in that interstate market. As a result, Stevens says that the "regulation is squarely within Congress' commerce power because production of the commodity meant for home consumption, be it wheat or marijuana, has a substantial effect on supply and demand in the national market for that commodity."[48]

The majority in *Raich* contended that the decision was consistent with *Lopez* and *Morrison*. However, because four of them dissented so fervently throughout the Rehnquist federalism revolution, it is highly likely that they would have favored scrapping that jurisprudence. As a result, the majority's insistence that the decision in *Raich* does not interfere with *Lopez* and *Morrison* comes across as a hollow assurance, a point that the dissenters emphasize repeatedly. Justice Kennedy silently joined the

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[46] *Raich*, 20.

[47] *Raich*, 20.

[48] *Raich*, 20.

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majority in *Raich*, but he sided with the Court in *Lopez* and *Morrison*, so his precise position remains unclear.

For his part, Justice Scalia wrote a concurring opinion to ensure that his views on the matter were made clear and to ensure that he could distinguish his view of the situation in *Raich* from the circumstances in *Lopez* and *Morrison*. He argued that, as enacted, the Controlled Substances Act fit within the allowances of the Necessary and Proper Clause, with relation to the Commerce Clause. Thus, its regulation of intrastate activity qualified as a valid means to the constitutionally legitimate end found within this broader regulatory scheme. He established a requirement that drastically limited the involvement of the Court in reviewing regulations after the justices find that (1.) Congress has implemented a legitimate, comprehensive regulatory scheme and (2.) the means are reasonably adapted to the legitimate ends of Congress under the Commerce Clause. In doing so, he argued that the circumstances in *Raich* differed so dramatically from those in *Lopez* and *Morrison* that they naturally led to this different standard of review and the outcome prescribed by the majority over the dissent of Rehnquist, O'Connor, and Thomas.

O'Connor, writing the joint dissent, reminds the Court that "[o]ne of federalism's chief virtues . . . is that it promotes innovation by allowing the possibility that 'a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.'"[49] Areas of legislative authority not granted to Congress in Article I are reserved to the states. Because of this,

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[49] *Raich*, 42.

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states may experiment and try to provide a model for others. If their experimental policies fail, the nation as a whole is not on the hook for one state's mistakes.

From a legal perspective, the dissenters argue that the decision in *Raich* is "irreconcilable with our decisions" in *Lopez* and *Morrison*.[50] O'Connor insists that you cannot get around the structural requirements in *Lopez* and *Morrison* by saying that Congress may take expansive action. On issues both large and small, the same rules and principles of federalism apply. She argues that if "the Court always defers to Congress as it does today, little may be left to the notion of enumerated powers."[51] *Lopez* and *Morrison* were built on the concept of outer bounds and limits to congressional power. According to the dissenters, *Raich* repudiates the core principles expressed in those earlier Rehnquist Court cases. The Rehnquist Court's federalism jurisprudence insisted on outer bounds and inherent limits to the enumerated powers of Congress. *Raich* seems to break with those principles. In his separate dissent Thomas makes this points strongly, "If Congress can regulate this under the Commerce Clause, then it can regulate virtually anything—and the Federal Government is no longer one of limited and enumerated powers."[52]

The Court's decision in *Raich* added a question mark to the Rehnquist Court's federalism revolution. The decision to grant more deference to Congress seems to be at odds with *Lopez* and *Morrison*, even though the majority and Justice Scalia insisted that the two jurisprudential strands could be reconciled. Rehnquist's death before the start of

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[50] *Raich*, 43.

[51] *Raich*, 47.

[52] *Raich*, 58.

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the Court's next term threw this jurisprudence further into turmoil. He was the intellectual leader of the Court's pro-federalism bloc. But his federalism-related career ended with a loss, finding him in the minority in an absolutely critical case that carried immediate implications for the states.

1.3 Implications

Uncertainty after *Raich*, coupled with the new federalism jurisprudence of the Roberts Court, has thrown the legacy of the Rehnquist Court's federalism jurisprudence into question. It is not clear where the majority of the Court's justices ended the Rehnquist era with regard to federalism. Moreover, Chief Justice Roberts has shown more willingness to defer to Congress on issues of federal-state conflict, as has been evident in his rulings on the Affordable Care Act. With Justice Scalia's death in early 2016, the Court lost one of its strongest voices for federalism in the Roberts era. Scalia stood insistently against the fairly deferential stance that Roberts has taken toward Congress. With Scalia's replacement likely to be nominated by the next President, the future of the Court's federalism jurisprudence is uncertain.[53]

It is important to understand that the principles found in the Rehnquist Court's federalism jurisprudence are blind to political ideology. As I will discuss in Chapter Six, crucial experiments in today's federal system do not fall under the "conservative" label that is consistently applied to the Rehnquist-era federalism decisions. In particular, political conservatives often oppose ongoing experiments with marijuana policy and new resistance to aiding the federal government in enforcing its immigration laws. As O'Connor said in dissent in *Raich*, this is one of the beauties of our federal system. The

[53] I discuss these prospects in Chapter Six.

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states are free to test policies without federal interference to find what will best serve their people. Those policies may be liberal, conservative, or something more difficult to label. The ideological label makes no difference from the perspective of the theoretical arguments that form the framework of this jurisprudence.

For these reasons it is crucial that we understand the merits of the Rehnquist Court's federalism jurisprudence. These decisions were on-target from the perspectives of precedent and constitutional structure. Additionally, they built on a strong tradition of political theory regarding individual liberty and the rule of law. It is important for scholars to understand the value of this jurisprudence. But it is even more important for the justices of the Supreme Court and lower court judges to understand it. Rehnquist and his allies restored the constitutional relationship between the federal and state governments. As they repeatedly insisted, particularly through Justice O'Connor's opinions, they did so not for the sake of the structure but for the service that structure provides to the nation and its people. Therefore, it is critical as we proceed to keep in mind that these arguments are not merely academic. The federal judiciary's decision to accept or reject this jurisprudence will have enormous, long-lasting implications for governance and individual liberty.

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CHAPTER 2:

THE REHNQUIST COURT'S CRITICS

2.1 Overview

Before I begin my analysis of the Rehnquist Court's federalism jurisprudence, it is important to set out the key criticisms of those decisions and to explain how the approach I employ in this dissertation is well suited to evaluating the critics' claims. The five crucial categories of criticism are charges of novelty, allegations of activism, concerns about structuralism, concerns about the normative value of the decisions, and doubt over the ultimate impact of the cases. Each of the concerns bears significant weight. Novelty and activism from the Rehnquist Court would represent a hypocritical separation between the Court's actions and the prescription for judicial restraint delivered by the justices in the majority. If the Court improperly leaned on structure to avoid addressing textual issues or the needs of the people, this jurisprudence becomes highly problematic. Similarly, if the Rehnquist Court could not lean on a theory of the good done by its federalism jurisprudence, these decisions may carry less authority. Finally, if these cases have no real impact, it is not essential to focus on them anymore. By analyzing precedent, constitutional structure, and normative arguments, I will address these areas of criticism and analyze the claims of both the Court and its critics.

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2.2 Novelty

The most common criticism of the Rehnquist Court's federalism jurisprudence is that it was novel. *United States v. Lopez* (1995) marked the first time the Court had overturned an act of Congress under the Commerce Clause since the New Deal. Critics of the Rehnquist Court argue that the justices brought new arguments to the table, ignoring the historical interpretations of the powers of Congress under the Commerce Clause. Critics also make the case that the Rehnquist Court's jurisprudence on state sovereign immunity was altogether without basis, that the anti-commandeering principles set forth by the Court were new, and that the Court's Section 5 jurisprudence was inconsistent with past treatments of congressional power.

These individuals, including Noonan, Fallon, and Barber, take aim at many particular areas within the Rehnquist Court's federalism jurisprudence, but it is important to understand that the arguments must be taken as a whole. Critics make the case that the Court did not have a foundation for this entire area of jurisprudence and was, instead, forging new ground throughout the process. John T. Noonan argues that the Rehnquist Court was "composed of judges often categorized as conservative but in fact highly original in their treatment of the Constitution."[1] He goes on to say that it is an "illusion to suppose that they are less inventive than their predecessors in the interpretation of constitutional texts."[2] Additionally, Richard H. Fallon, Jr., asserts that by forging new ground the "Court's pro-federalism majority has purported to leave leading cases

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[1] John T. Noonan, Jr., *Narrowing the Nation's Power: The Supreme Court Sides with the States* (Berkeley: University of California Press, 2002), 9.

[2] Noonan, 10.

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undisturbed, while at the same time surrounding them with exceptions and qualifications."[3] The critics of the Rehnquist Court see the body of federalism jurisprudence as working around past (and proper) interpretations of the Constitution by creating new mechanisms for the states to use. This approach allowed the Court to ignore the standing position on federal-state relations without actually overturning those decisions. By utilizing novel arguments the justices advanced their agenda much more efficiently.

With regard to the Commerce Clause, Keith E. Whittington argues that the Rehnquist Court's revival of federalism took the concept that "there were theoretical limits to the authority of the national government" and put them into judicial practice in a manner that, even only ten years earlier, would have been difficult to imagine."[4] This approach to the jurisprudence represents a common theme among critics. They see the issue of federal-state relations, particularly in the area of the Commerce Clause, as settled. That "settled" doctrine acknowledges that there might be some activity that does not fall under the regulatory power that Congress has over commerce. However, in practical terms, this approach leaves the boundaries up to Congress, insisting that these theoretical boundaries are unenforceable by the judiciary. In essence, the boundaries must be rhetorical in nature. Lawmakers should avoid overreaching, but the Court is not in a position to tell them they have overreached because the boundaries are not concrete.

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[3] Richard H. Fallon, Jr., "The 'Conservative' Paths of the Rehnquist Court's Federalism Decisions," *The University of Chicago Law Review* 69.2 (2002), 492.

[4] Keith E. Whittington, "Taking What They Give Us: Explaining the Court's Federalism Offensive," *Duke Law Journal* 51.1 (2001), 518.

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The criticisms of state sovereign immunity doctrines are even starker. This line of reasoning holds that the Rehnquist Court invented a new set of powers for the states to accompany the Eleventh Amendment. The critics argue that the Eleventh Amendment should be, and traditionally has been, interpreted narrowly and that the Rehnquist Court invents a new scope for the Eleventh Amendment in order to immunize the states in a manner unseen in the past.

Noonan levels strong criticisms against the state sovereign immunity principles of the Rehnquist Court. He acknowledges that the concept of state sovereign immunity is not completely novel, having been clearly addressed in *Hans v. Louisiana* (1890). However, he argues that the Rehnquist Court extended the principles of sovereign immunity farther than ever envisioned by earlier decisions. Specifically, he makes the case that the "claim that the sovereignty of the states is constitutional rests on an audacious addition to the eleventh amendment, a pretense that it incorporates the idea of state sovereignty" and that neither "the text nor the legislative history of the amendment supports this claim, nor does an appeal to the history contemporaneous with this amendment."[5] This is a comprehensive claim that the Rehnquist Court's jurisprudence in this area was novel. It holds that the state sovereign immunity doctrines cannot find support in existing precedent, in the meaning of the text as envisioned by its drafters, or even in the more general area of contemporaneous events. Rehnquist and his allies have created a new set of principles divorced from the reality and meaning of the Eleventh Amendment, according to adherents of this approach.

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[5] Noonan, 156.

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Noonan also makes the case that harsh dissent on the Court reflected "the degree to which the court had departed from precedent to keep the states from being sued."[6] He cites the "continuing division in the court" as evidence of "the magnitude of the shift in the middle ground where the power of the nation was being narrowed."[7] This argument shows that disapproval of the novelty of the state sovereign immunity doctrines was not limited to outside critics. The dissenters on the Court made strong, repeated arguments that Rehnquist and his allies were doing something new. They sounded the alarm regarding the danger of novelty, and those outside are echoing their calls for a proper interpretation of the Eleventh Amendment.

Fallon reiterates these concerns. He argues that the "constitutional text . . . embarrasses the Court's enterprise" and that "the Court has not contended otherwise. Nor can the Court's sovereign immunity decisions be explained as dictated by the original understanding. The history is complex and controverted."[8] In particular, he asserts that the Court knew that it was forging new ground in the state sovereign immunity cases. He explains that because of difficulties in advancing states' rights in other areas of federalism, the Rehnquist Court embraced state sovereign immunity as an area where it could make an immediate impact. Creating new doctrines in this area allowed the Court to pursue its overall aims more efficiently. Though more constrained by is sphere of action in other areas, prohibiting suits for financial damages is something the Court could easily and efficiently do.

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[6] Noonan, 119.

[7] Noonan, 119.

[8] Fallon, 481.

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Critics also argue that the Court strayed from well-developed principles in cases regarding the powers of Congress under Section 5 of the Fourteenth Amendment. For example, Noonan says that there is no reason "in the constitution or the nature of things or any acts of Congress [that] supplies an answer" to the question of why states should not be financially accountable for their actions.[9] He makes the case that in *City of Boerne v. Flores* (1997) the Court

> "created, for possible future use against Congress, two new and powerful weapons to be deployed in constitutional litigation: that the congressional record could be closely inspected for convincing evidence of the evil legislated against, and that the legislation responding to the evil must be congruent or proportionate or both. The test of 'congruence and proportionality' was unchallenged by any member of the court. Two of the dissenters explicitly agreed with it. The absence of challenge to the creation of new criteria vitally affecting the balance between the courts and Congress was an unusual characteristic of this case."[10]

Noonan finds the dissent's embrace of this new test to be particularly troublesome. Unlike in the state sovereign immunity jurisprudence, the driving doctrine of the Rehnquist Court's push on Section 5 went unchallenged by the dissenters. This raised the likelihood that the test would be embraced more broadly and reduced the chances that it would be recognized as novel.

In the face of these detailed criticisms regarding the novelty of this jurisprudence, others argue that these decisions are not entirely novel. In particular, those who disagree with the claims of novelty tend to focus on the judicial process and the questions addressed by the Court. They make the case that though aspects of the jurisprudence are novel, the justices were not really forging new ground with these decisions.

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[9] Noonan, 156.

[10] Noonan, 40.

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Richard A. Brisbin, Jr., argues that this jurisprudence was not novel in what it was doing from a broad perspective. He says that the "Rehnquist Court has revitalized a long-standing conflict over the deployment of government power within a legally constituted regime"[11] and that the debate among the justices is a "revival of the conflict that surfaced in the early years of the republic about how the federal Constitution, other legal and foundational legal-historical texts . . . and federal and state statutes affecting federal-state relations ought to be read or interpreted."[12] The debates facing the Court in each of its federalism areas were not new, in other words. The broader issues have existed since the creation of the Constitution.

Cornell W. Clayton and J. Mitchell Pickerill add that the "revolution" did not enter uncharted territory. In particular, they argue that the "Court's rediscovery of constitutional federalism has its roots in, and was prefigured by, political changes initiated within the electoral political system and advanced by the political parties."[13] Noonan's vision of dissenters and critics raising the alarm is less relevant from this perspective, which holds that the Court was simply following paths carved out by the political system. This interpretation of the Rehnquist Court's federalism jurisprudence cuts against the claims of novelty not by looking to earlier decisions of the Court, but instead by addressing the political atmosphere surrounding the Court's decisions.

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[11] Richard A. Brisbin, Jr., "The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations 1991-1997," *Publius* 28.1 (1998), 189.

[12] Brisbin, 190.

[13] Cornell W. Clayton and J. Mitchell Pickerill, "Guess What Happened on the Way to Revolution? Precursors to the Supreme Court's Federalism Revolution," *Publius* 34.3 (2004), 112.

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Still, those who defend the Court against claims of novelty generally stop short of a complete analysis of earlier federalism jurisprudence in the interest of providing a detailed account of whether each area of this jurisprudence is novel. This is the task I shall undertake in addressing the precedents that undergird this jurisprudence. A common approach when assessing precedent and arguing that these decisions are not novel is to acknowledge a "revival or reassertion of pre-Civil War federalism principles"[14] and to leave it at that. The invocation of, and even the direct listing of, earlier doctrines cannot provide the detail necessary to determine whether the Court has forged new ground. Instead, I shall look in detail at the broad spectrum of cases upon which this jurisprudence relies. Considering the general principles is a necessary first step, but a complete analysis of the novelty of this jurisprudence must look in detail at the context of earlier decisions and at how the specific rulings of the Court in the past worked with or against the decisions issued by the Rehnquist Court.

Additionally, it is vital to consider non-judicial precedents. I will engage primary texts to understand the structure and design of constitutional clauses related to federalism and the alterations to these clauses, as brought about by later amendments. As seen in the arguments made by Whittington and Noonan, critics hold that the Rehnquist Court's decisions were inconsistent with drafting records and other documents that indicate the thought processes and meanings underlying the relevant constitutional clauses. Engaging with a broad spectrum of these documents is essential to understanding whether the Rehnquist Court brought about something novel.

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[14] Christopher P. Banks and John C. Blakeman, *The U.S. Supreme Court and New Federalism: From the Rehnquist Court to the Roberts Court* (New York: Rowan & Littlefield, 2012), 69.

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2.3 Activism and Policy Preferences

The argument that the Rehnquist Court's federalism jurisprudence was activist goes hand-in-hand with the claim that these decisions were novel. The Court's critics trumpet the alleged activism as hypocritical. While Rehnquist, his allies, and their supporters inveighed against the activism of earlier courts, critics say that the Rehnquist Court was at least as activist in the area of federalism. They argue that the Rehnquist Court imposed its desired ends upon the Constitution, twisting interpretations of the document so that it said what they thought it should say.

A common thread in this line of criticism is the claim that the Court had structural ends in mind and was willing to use the judiciary to reach those ends, even if the Constitution did not work in their favor. For example, Erin Ryan argues that "the theoretical model implied by these cases imposes a judicially mandated balance among federalism values that privileges some at the expense of others, sometimes without justification."[15] Banks and Blakeman deliver an even blunter analysis,

> Although remaining faithful to the constitutional text undergirds his judicial philosophy, Rehnquist's line drawing indicates he adopted a more flexible, structurally-based approach to judicial decision-making in federalism cases—one that arguably is set loose from textual constitutional moorings."[16]

Indeed, Rehnquist and his fellow conservatives on the Court put great emphasis on adhering to the text of the Constitution and its original meaning. They heavily criticized attempts to manipulate the Constitution to support claims that are not endorsed by the

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[15] Erin Ryan, *Federalism and the Tug of War Within* (Oxford: Oxford University Press, 2011), 369.

[16] Banks and Blakeman, 78.

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text. Critics argue that the Rehnquist Court adopted an attitude of "do as I say, not as I do."

The implications of such activism are broad and of great concern to the integrity of the Constitution. In particular, Noonan argues that an activist approach in the area of federalism will do long-term damage to the division of power under the Constitution. He discusses Alexander Hamilton's famous line in *Federalist* No. 78 regarding the lack of force or will in the judiciary, and he makes the case that the Rehnquist Court turned this assumption on its head. Specifically, he argues that Hamilton "did not foresee a court with an agenda for restoring power to the several states" and that the Rehnquist Court's federalism jurisprudence "points to the present danger to the exercise of democratic government."[17] Because the Court chose to entrench itself behind structural arguments, it found a way to protect states at a cost to our democratic system, according to Noonan. Providing judicial protection for the force and will of the state governments against that of the national government throws the constitutional order out of balance.

Underlying the claims of activism are concerns about judicial conservatives on the Rehnquist Court attempting to reach their own policy goals. Whittington argues that the "federalism offensive can best be understood as a product of the Court's taking advantage of a relatively favorable political environment to advance a constitutional agenda of particular concern to some individuals within the Court's conservative majority."[18] This claim adheres to the position that the Court uses more than legal reasoning in issuing opinions and that the justices' policy preferences come into play

[17] Noonan, 140.

[18] Whittington, 479.

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when the Court issues its decisions. However, this would be hypocritical of Rehnquist and his allies, who insisted on sticking to the text and acting merely as interpreters of the proper meaning of the document.

Following this logic, Fallon argues that this jurisprudence is more conservative than federalist. He explains that when "federalism and substantive conservatism come into conflict, substantive conservatism frequently dominates."[19] To support this claim he examines the cases and determines that the decisions fit "Duncan Kennedy's depiction of judges as motivated to test whether results that they find attractive on ideological grounds can be achieved within the medium of law."[20] It is important to note that critics do not claim that the Rehnquist Court federalism majority was pursuing its policy preferences as no prior Supreme Court ever has. There is a substantial body of literature in political science detailing the argument that the justices act according to policy preferences.[21] However, Rehnquist and his allies specifically eschewed this approach, insisting that the Court must issue decisions on the basis of law alone. If they put their policy preferences before the application of law, this jurisprudence notably failed to live up to the justices' own principles.

Some critics also argue that the Rehnquist Court's decisions actively aimed to harm policies that differed from the justices' own preferences, in addition to promoting those preferences. Mark Tushnet explains that many of the opinions in the federalism cases bolstered the particular justices' long-standing positions on policy matters. He

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[19] Fallon, 435.

[20] Fallon, 489.

[21] See, most prominently, Segal and Spaeth 2002.

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asserts that "Rehnquist didn't like one part of the Violence Against Women Act" and that he "had raised policy-based concerns about VAWA's civil remedy provision almost from the time it was proposed."[22] Additionally, he alleges that the Court's decision in *Morrison* primarily acted as a reflection of that policy preference, apparently endorsed by a majority of the justices. Tushnet also argues that much of the force of these decisions was motivated by the Rehnquist Court's distaste for Congress, explaining how this disdain is "almost palpable" in *Lopez* but "a bit below the surface" in *Morrison*.[23] This line of reasoning sees the Rehnquist Court as desiring to contradict Congress and correct national policy. Far from living up to the goal of adherence to the Constitution, the Court that Tushnet describes interfered with and obstructed the policy decisions made by the elected branches in order to advance its own policies.

Clayton and Pickerill provide context for the implementation of policy preferences, but situating the preferences cannot save the justices from the claims of hypocrisy. They explain that the justices' preferences "do not come about through spontaneous generation, but instead . . . have clear connections to large political structures and developments in the political regime."[24] This understanding of how the justices use their policy preferences might answer some of Tushnet's complaints, holding that the justices were not acting on their own in opposition to the clear will of the political branches. Instead, there was an exchange of policy ideas in which the Court was merely participating. However, this response does nothing to allay the broader concerns

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[22] Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W.W. Norton & Company, 2005), 263.

[23] Tushnet, 270.

[24] Clayton and Pickerill, 113.

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that the Rehnquist Court's federalism jurisprudence insisted upon one role for the Court and adopted an altogether different position when putting rulings into effect.

Rehnquist himself engaged this line of reasoning regarding activism and policy preferences. In a 1976 article entitled "The Notion of a Living Constitution," he presented a portion of his judicial philosophy. The article argues against a conception of the Constitution as "living" that would have courts substitute "some other set of values for those which may be derived from the language and intent of the framers."[25] Rehnquist cites Chief Justice John Marshall's opinion in *Marbury v. Madison* in arguing that judicial review is an indisputable authority of the courts but that it has important "outer limits."[26] He explains that through the Constitution, the people of the United States "have granted some authority to the federal government and have reserved authority not granted it to the states or to the people individually."[27] If the "popular branches of government—state legislatures, the Congress, and the Presidency—are operating within the authority granted to them by the Constitution, their judgment and not that of the Court must obviously prevail."[28]

Ultimately, this is the role of judicial review, according to Rehnquist: to determine whether the elected branches are operating within their constitutional spheres of authority. This line of reasoning leads Rehnquist to the conclusion in his article that a broad conception of a "living Constitution" is a "formula for an end run around popular

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[25] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54.4 (1976), 695.

[26] Rehnquist, 696.

[27] Rehnquist, 696.

[28] Rehnquist, 696.

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government" and is "genuinely corrosive of the fundamental values of our democratic society."[29] This outcome is the case because judges who invoke this form of the living Constitution set aside the Constitution in order to substitute their own conceptions of what the Constitution should say. While judicial review is a necessary aspect of government in the United States, it is bound by the text of the Constitution and the intentions of the Framers.

Rehnquist's reasoning, as applied to the later federalism decisions of the Court, would hold that policy preferences must not enter the equation. Instead, the Court should merely determine whether actors remain within their spheres of authority. The justices are not to prevent certain policies from coming into effect, nor may they advance their own policies. Instead, they must simply act as a check to ensure that the division of power, both at the national level and between the national government and the states, remains intact.

But what are the constitutional spheres of authority for the elected branches? Is the Rehnquist Court's federalism consistent with the delegation of power under the Constitution? If so, Rehnquist and his allies on the Court can be exonerated on the charge of activism. But, if not, this jurisprudence was inconsistent with the principles Rehnquist himself espoused. The Chief Justice provided us a method for the evaluation of the Court's federalism jurisprudence. As with the question of novelty, examining precedent and constitutional design is vital to answering the question of activism. These methods can help us ascertain whether the Rehnquist Court was correct from a constitutional

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[29] Rehnquist, 706.

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perspective and, thus, whether it could defend itself against the charges of activism and of pursuing the justices' policy preferences.

2.4 Structuralism

Critics also take issue with the Rehnquist Court's focus on institutional structures in its federalism jurisprudence. Whittington explains that "[c]ompared to its predecessors, the Rehnquist Court is particularly interested in issues of constitutional structure."[30] This approach is problematic for critics because, they say, the justices lose sight of the individuals who are affected by their decisions. Moreover, they claim that the textual arguments underlying the structural decisions issued by the Court have no basis in the text of the Constitution.

Critics claim that the Court's focus on institutional structure allowed the justices to ignore the fact that the text of specific constitutional provisions provides no support for their position on reserved powers and sovereign immunity. Tushnet argues that the "focus on the Constitution's overall structure rather than on the words of particular provisions" allowed the Court to appeal "to a perfectly defensible sense that in our system of government states had to amount to something" while avoiding explaining "what that something was or, even more, why anyone should care."[31] This complaint is consistent with the criticism that the Court's decisions reflected policy preferences above all else. The justices, unable to justify their preferences on the basis of the text or on the basis of what is clearly good for the nation, fell back on the weak defense that the states exist and that they must exist for some reason. From the critics' point of view, the Rehnquist

[30] Whittington, 508.

[31] Tushnet, 255.

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Court's approach allowed references to general structure to carry much greater weight than they otherwise could. As a result, the Rehnquist Court's decisions were able to empower the states far beyond the dictates of the constitutional text and without regard for the question of what the national government *should* be able to do.

Noonan argues that the Rehnquist Court's focus on structure resulted in harm both to Congress and to the individuals affected by the Court's decisions. He complains that what "resonated at the level of the Supreme Court was not the individual wrong, but echoes of the Marshall Court establishing the reach of the commerce power as the commerce of the nation expanded."[32] From this perspective the Rehnquist Court's federalism decisions used broad structural arguments to insulate the Court from concerns about real people. For Noonan and other critics, the Court's insulation from the people extended beyond the specific victims. He explains that "[a]lmost complete indifference to the individual plaintiffs has been accompanied in these cases by an absence of interest in the number of persons negatively affected by the court's rulings."[33] The individuals in the cases before the Court represented much broader groups of people, all of whom would feel the effect of the Court's decisions. Noonan argues that hiding behind structure allowed the Court to advance its preferences and interests at a cost to real people across the nation.

Moreover, Noonan repeats the common complaint that the Rehnquist Court "repudiated the amplitude of Marshall's interpretation of the [commerce] power."[34]

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[32] Noonan, 137.

[33] Noonan, 145.

[34] Noonan, 137.

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Sotirios Barber explains that the Marshall Court's decision in *Gibbons v. Ogden* (1824) had a "dominant thrust, which, by all accounts, was nationalist."[35] According to this position, the Rehnquist Court's focus on structural arguments in these federalism decisions allowed it to take the words of Chief Justice Marshall out of their context in *Gibbons*, which expanded congressional power. While it is true that Marshall recognizes a distinction between intrastate activity and activity that is purely intrastate, critics of the Rehnquist Court insist that the justices have blown that passage out of proportion. They argue that because the thrust of the decision in *Gibbons* is nationalist, we must understand even the interstate/intrastate distinction in this manner. Congress and other political actors should carefully consider whether a particular action is best executed at the national level, but the Court cannot hide behind structural arguments to inhibit congressional action in the broad area of commerce.

In the aggregate, these criticisms regarding structure aim primarily at the Court's lack of attention to what is appropriate under the Constitution and what is good for the people. The critics first argue that the claims on the basis of structure are unsupported by the text and that the justices resorted to references to general structure in order to make their claims. This approach is problematic, of course, because of the majority's consistent claim that the text of the Constitution itself must be the centerpiece of interpretation. Beyond this focus on the text of the Constitution, critics argue that the Rehnquist Court ignored what was good for the nation and fair for its people. They think that these decisions showed little regard for the individuals affected and that the justices did not explain why their insistence upon this particular structural approach was good for the

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[35] Sotirios A. Barber, *The Fallacies of States' Rights* (Cambridge, Massachusetts: Harvard University Press, 2013), 60.

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nation. Mere structure is insufficient for the Court's critics, who demand that the judiciary explain how their decisions benefit the people.

My tripartite approach to analyzing the Rehnquist Court's federalism jurisprudence is well suited to evaluating these particular criticisms. The first two substantive sections of this dissertation focus on precedent and constitutional structure and design. These sources provide insight into the way the text has been interpreted over time and the meaning given to the relevant clauses of the Constitution. If the Rehnquist Court strayed from past interpretations of the Constitution and from the meaning of the text, then it is highly vulnerable to the critics' claims. If, on the other hand, the Rehnquist Court's decisions adhered to precedent and the text, then serious problems emerge in the critics' claims that the Rehnquist Court used institutional structures structure as a shield to avoid interacting with an unsupportive textual approach.

But perhaps more importantly from the perspective of impact on individuals, the final section of this dissertation asks whether the Rehnquist Court's federalism jurisprudence can be justified as desirable, and particularly whether this body of work promotes the liberty of the people. Even if the justices were right that they were enforcing the constitutionally required structure, the structure is not necessarily in the best interest of the people today. By consulting theoretical sources and engaging in a normative analysis of the jurisprudence, I aim to answer the question of whether the federalist structure enforced by the Rehnquist Court serves the liberty of the people and the rule of law.

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2.5 Normative Concerns

When considering the normative value of the Rehnquist Court's federalism jurisprudence, it is vital to understand key arguments presented against the Court's approach. Sotirios Barber provides a detailed account of various normative issues that he perceives with the Rehnquist Court's approach. In particular, Barber disagrees with the argument that the system of federalism advanced by the Rehnquist Court enhances liberty. He argues that liberty must mean the same thing for all of us and that it is inherently a national concern to be addressed by the national government.[36] He explains that the "ambiguities of constitutional text and history, the discursive requirements of the national forum in which the states' rights debate takes place, and the requirements of practical reasonableness in an unpredictable world" defeat arguments that states' rights federalism is good for the citizens of the United States.[37]

Barber argues that states' rights federalism, a classification that he applies to the Rehnquist Court's federalism jurisprudence, fails to make sense of the Constitution's origins and basic normative character, leading to his argument in favor of what he calls Marshallian federalism. Marshallian federalism is a nationalist model that embodies a positive constitutionalist view. Barber quotes from Marshall's opinion for the Court in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are

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[36] Barber, 10-11.

[37] Barber, 121.

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constitutional."[38] This approach forms the core of Barber's argument about Marshallian federalism. The question hinges upon what the legitimate ends in question are.

He proceeds to address the claim that states' rights federalism secures more effectively the blessings of liberty for the entire nation, arguing that this approach to defending states' rights federalism eventually falls apart. In particular, he says that from "the nation's beginning a principal impetus for the advance of national power at the states' expense has been the vindication of personal rights against the abuses of the state governments."[39] Certainly, there will be different conceptions of liberty, but ultimately, true liberty is one thing for everyone. Because liberty is universal in this way, it makes no sense that reserving powers to the states will enhance liberty. Liberty must be the same thing for all, so it is inherently a national concern to be addressed by the national government.

By engaging earlier thinkers as well as contemporary ones such as Barber, I aim to provide a more complete analysis of the normative value of this jurisprudence. The challenges that Barber outlines are formidable. If independent levels of government with their own spheres of authority cannot serve the liberty of the people, the Rehnquist Court's structural approach in the federalism decisions may lack a normative justification. At the same time, the normative value of the rule of law must be considered. Is there a good in adhering to the law as written? As detailed above, assessing the normative value of this jurisprudence is key to evaluating the criticism that it does not serve the interests of the people.

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[38] Barber, 42.

[39] Barber, 98.

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2.6 Ultimate Impact

The final key criticism centers on whether the Rehnquist Court's federalism jurisprudence has had or will have a significant impact. Many argue that the Court's revolution was more symbolic than substantive, as Rehnquist and his allies never overturned the post-New Deal precedents with which they clearly disagreed. Banks and Blakeman explain that "many social science and legal commentators concede that the cases allegedly reviving dual federalism are significant, yet ultimately modest in practical impact or long-term effect."[40] In fact, many critics of this jurisprudence celebrate what they see as an absence of real impact. However, it is not clear that the Rehnquist Court's federalism decisions have had such a limited impact.

Some argue that the justices purposely chose to limit the scope of these decisions in order to maintain the stature of the Court, particularly in cases involving the commerce power. Whittington explains that although "the Rehnquist Court's federalism offensive is important, its importance should not be overstated. The Court has moved carefully to avoid antagonizing the interests of powerful actors who potentially could threaten the Court's legitimacy."[41] Other critics of the Rehnquist Court agree. For example, Fallon notes that the Rehnquist Court's Commerce Clause cases do not actually disturb existing case law, arguing that the Court "hesitates to take aggressive steps" that would threaten "entrenched regulatory regimes."[42]

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[40] Banks and Blakeman, 98.

[41] Whittington, 509.

[42] Fallon, 436.

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This position holds that the Rehnquist Court was well aware of its relatively weak position in the American system of government. The justices wanted to advance their own agendas, but to attempt to do so in an impactful manner would draw the ire of the elected branches. So, the justices carefully crafted decisions to avoid the pitfalls that would lead to issues for the Court's legitimacy. They made their points rhetorically, and happy with a limited impact but a strong platform, they restricted the scope of their jurisprudence. Fallon bolsters this point by arguing that if "the Supreme Court is implementing a federalism revolution, it is . . . distinctively a lawyers' revolution."[43] For Fallon and other critics of the Rehnquist Court, this was a beneficial approach by the Court. As long as the Court chose not to interfere extensively with the elected branches, there could be less concern about the scope of the decisions.

Critics of the Rehnquist Court also point to *Gonzales v. Raich* (2005) as evidence that a majority of the justices had no intention of implementing a scheme that would anger Congress. Eric R. Claeys argues that *Raich* "suggests that the New Federalism did not go very far at all"[44] and that the case "exposes a basic tension in how different kinds of judicial conservatives view the transformations wrote by American liberalism over the last century."[45] This argument holds that there was a split among the justices in the majority in the Rehnquist Court's federalism decisions. Ultimately, a majority on the Court declined to press the judicial offensive, in large part because of different underlying philosophies. While the conservative majority was cohesive enough to

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[43] Fallon, 494.

[44] Eric R. Claeys, "*Raich* and Judicial Conservatism at the Close of the Rehnquist Court," *Lewis & Clark Law Review* 9.4 (2005), 817.

[45] Claeys, 819.

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promote a strong rhetorical position on federalism, it could not hold together to make the logical push into truly restricting the scope of congressional power.

However, the issue of impact is not as clear as the critics make it out to be. It is certainly true that the Court only issued rulings striking down federal laws in a handful of situations, but a limited number of cases can still have a substantial impact. For example, a majority on the Roberts Court appears to have adopted at least part of this federalism revolution. The primary holding in *NFIB v. Sebelius* (2012) sustained the individual mandate under the Affordable Care Act, but it did so as a matter of taxation, declining to authorize the financial penalty as legitimate under the Commerce Clause. In addition, the decision struck down the mandatory expansion of Medicaid, insisting in the vein of *New York v. United States* (1992) that the requirement would coerce the states into participating. The Rehnquist and Roberts Courts have rarely struck down laws passed under the commerce power, but the decision to do so has repeatedly had a discernible impact.

Moreover, *Raich* may well not represent a major turning point, as George W. Bush's appointments to the Supreme Court appear to have joined the remaining members of the Rehnquist Court's federalism majority. As Claeys notes, Chief Justice Roberts and Justice Alito encouraged their circuits "to construe *Lopez* more broadly than" others preferred when they were circuit court judges.[46] Of course, Roberts upheld the individual mandate in the Affordable Care Act, but he also issued an opinion explaining why that mandate could not be justified under the commerce power. *Raich* may represent an

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[46] Claeys, 819.

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outlying case, rather than a turning point in the Court's approach to pushing for a substantial impact from its federalism decisions.

Perhaps more importantly, there exists a universe of possible cases never brought after the Rehnquist Court issued its decisions. The Court's opinions may well have prompted Congress to change the mechanisms in future laws so as not to run afoul of the Court again. This is particularly true if, as Clayton and Pickerill suggest, the Court's decisions reflected the reemergence of federalism concerns on the national political stage. Looking at the merits decisions of the Supreme Court cannot possibly measure the full impact that the Court's decisions have had. These cases impact the political process long before any party might even be able to appeal a case to the Court.

The issue of state sovereign immunity further complicates the picture of the Rehnquist Court's long-term impact. The Court could be embarrassed by congressional refusal to cooperate in matters related to the Commerce Clause. However, the issue of state immunity from lawsuits for financial damages rests much more firmly in the Court's bailiwick because the judiciary can simply free states from imposed fines or judgments. Fallon explains that the "path of sovereign immunity doctrine now appears to the Court as one along which it has so far progressed successfully and can travel without serious hazard."[47] He argues that as a result of this broader scope of action in sovereign immunity cases, the Court has "effected bold revisions in the doctrinal structure."[48]

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[47] Fallon, 437.

[48] Fallon, 433.

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The ability of the Court to enforce the changes in state sovereign immunity doctrine is clear, but the actual impact of that doctrine remains disputed. Tushnet explains that for

> "all the hoopla over the Rehnquist Court's immunity decisions, no one seems to have tried to find out how many state probation officers aren't getting the minimum wage or how many people with disabilities who are subjected to unlawful discrimination don't get any remedy at all. My guess is that the numbers are low."[49]

In other words, the states may be voluntarily complying with legislation such as the minimum wage and the Americans with Disabilities Act. While the Court has more direct power in this area, it may not need to use it frequently because the states do not want to anger Congress any more than the Court wants to anger Congress.

The question of long-term impact will likely remain unclear for years to come, but evaluations of its value according to precedent, constitutional design, and theory can help us understand whether it continues to be of worth to the Supreme Court and to the people. In addition, it is essential to keep in mind the breadth of the Rehnquist Court's federalism jurisprudence. Touching so many doctrinal issues, it covered a wide range of cases heard by the lower courts. The Rehnquist Court's federalism decisions remain the law of the land, to be enforced by the lower courts unless the Supreme Court overturns those decisions.

2.7 Conclusion

In the remainder of this dissertation I shall focus on precedent, constitutional structure and design, and normative arguments. Doing so will enable me to comprehensively address these key criticisms of the Rehnquist Court's federalism

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[49] Tushnet, 275.

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jurisprudence. The discussion of precedent will primarily address concerns about the novelty of this jurisprudence and whether the methods used by the Rehnquist Court are activist in nature. The section on constitutional structure and design will also speak to novelty and activism. An analysis of the normative value of these decisions will ask whether the jurisprudence can be defended as good or desirable and will address criticisms of the Rehnquist Court's structural approach to these cases. Finally, while my approach cannot tell us whether this jurisprudence will have a significant long-term impact, it will speak to the question of whether the jurisprudence *should* have such an impact. Evaluating the Rehnquist Court's federalism jurisprudence on these grounds will allow me adjudicate between the claims of the Rehnquist Court and the arguments of its critics.

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CHAPTER 3:

THE PRECEDENTIAL BASIS FOR THE REVOLUTION

3.1 Overview

The Supreme Court under Chief Justice William Rehnquist has often been accused of creating novel rights for the states in the guise of principles of federalism, but in fact, Rehnquist and the majority in the key federalism cases relied heavily upon a foundation of precedent in reaching their decisions. Their jurisprudence rejected the recent innovations of near-absolute discretion for Congress in matters related to federalism and looked instead to pre-New Deal precedents. Certainly, the decisions were often inconsistent with post-New Deal jurisprudence, but that does not mean they lacked a precedential basis. Rehnquist and his allies extensively adopted reasoning from earlier decisions, articulating a well-developed role for the Court in policing federal boundaries. In short, contrary to the critics' claims detailed in the preceding chapter, the Rehnquist Court's federalism decisions were neither novel nor activist. The cases reinforced the earlier constitutional principle that interference in state functions must be explicitly authorized by the Constitution. Inference is impermissible on such important issues. The Rehnquist Court's federalism jurisprudence represented a return to this principle, not a revolution.

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3.2 The Commerce Clause

The Rehnquist Court's decision in *United States v. Lopez* (1995) laid the groundwork for the justices' revised treatment of the Commerce Clause. As the majority made clear in *Lopez* and in *United States v. Morrison* (2000), Congress would no longer have the near-complete discretion it had enjoyed since the New Deal era. Writing for the Court in both cases, Chief Justice Rehnquist dealt extensively with the Commerce Clause precedents at the Court's disposal.

3.2.1 Rehnquist on Precedent and the Commerce Clause

In *Lopez* Rehnquist notes that early Supreme Court decisions on the matter "dealt but rarely with the extent of Congress' power, and almost entirely with the Commerce Clause as a limit on state legislation that discriminated against interstate commerce."[1] He cites the Court's 1824 decision in *Gibbons v. Ogden* favorably, setting it out as the ultimate statement of what the Commerce Clause encompasses. In doing so he asserts that the Court in *Lopez* is acting consistently with the decision in *Gibbons* and that the reasoning from *Gibbons* controls in this case. Quoting from *Gibbons*, the Court says, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[2]

This interpretation of commerce has been used to justify the expansion of the powers of Congress under the Commerce Clause, on the grounds that commerce is inherently an expansive term referring to a broad range of interactions. Rehnquist

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[1] *Lopez*, 553.

[2] *Lopez, 553.*

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certainly acknowledges that Chief Justice Marshall defined commerce broadly in *Gibbons*, but Rehnquist argues that the *Gibbons* Court recognized that "limitations on the commerce power are inherent in the very language of the Commerce Clause."[3] Specifically, the *Gibbons* Court explained in detail that the power over interstate commerce does not extend to purely intrastate matters. For Congress to legislate under the Commerce Clause, the action in question must be commerce, and it must affect multiple states.

Rehnquist then launches into an analysis of subsequent Commerce Clause decisions, providing a brief history from *Gibbons* all the way to the present. Of great importance to the inquiry regarding the Rehnquist Court's fidelity to precedent is his description of the commerce power cases in the 1800s. Rehnquist presents a pattern of the Court's recognition of an expansive, albeit limited, commerce power. For example, the Court held that traditional activities such as production, manufacturing, and mining did not fall under the definition of interstate commerce while also holding that "where the interstate and intrastate aspects of commerce were so mingled together that full regulation of interstate commerce required incidental regulation of intrastate commerce, the Commerce Clause authorized such regulation."[4] Rehnquist explains the Commerce Clause jurisprudence of this era as a balancing act of sorts, involving deference to Congress while still insisting, in line with the decision in *Gibbons*, that there are ultimately bounds upon the power of Congress to regulate under the Commerce Clause.

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[3] *Lopez*, 553.

[4] *Lopez*, 554.

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Bringing his history up to the New Deal, Rehnquist acknowledges a number of the key decisions of the Court during that era. Of particular importance are *United States v. Darby* (1941) and *Wickard v. Filburn* (1942). *Darby* upheld the Fair Labor Standards Act, stating in part that the commerce power

> "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make the regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."[5]

For its part, *Wickard* upheld amendments to the Agricultural Adjustment Act of 1938, holding that activity may "be reached by Congress if it exerts a substantial effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"[6] These decisions unquestionably tipped the balance in such cases toward displaying deference to the decisions made by Congress. Still, Rehnquist argues that "even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[7] Though *Wickard* was perhaps the most expansive of the New Deal cases, the Court still recognized that aggregate activity must have a "substantial effect" on interstate commerce if Congress wants to justify legislation under the Commerce Clause.

Rehnquist concludes that to "uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort

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[5] *United States v. Darby Lumber Co.*, 312 U.S. 100 (1941), 118.

[6] *Wickard v. Filburn*, 317 U.S. 111 (1942), 125.

[7] *Lopez*, 557.

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retained by the States."[8] He acknowledges that past decisions of the Court have taken "long steps down that road" in consistently deferring to Congress, but the Court here declined to proceed any further on the grounds that Congress must be held within the limits of its enumerated powers. The majority held that Congress must be limited because the existence of enumerated powers indicates that there are other powers that stand outside of the realm of permissible congressional action. The actions regulated under this law were outside that realm. Thus, the Court struck down the applicable portion of the Gun Free School Zones Act. In *Morrison* Rehnquist relied upon the extensive discussion of precedent in *Lopez*, again restricting Congress's sphere of action and striking down part of a federal law.

3.2.2 The Key Precedent: *Gibbons v. Ogden*

The case that Rehnquist cites most prominently in *Lopez* is *Gibbons v. Ogden*. Rehnquist's approach calls for a close examination of the case that he depends on for his precedential foothold. *Gibbons* considered a dispute over rights to operate a ferry from New York City to New Jersey. Thomas Gibbons had a license from Congress to operate a steamboat on this route, granted as part of a law dealing with coastal trade. Aaron Ogden had exclusive rights from the state of New York to operate a ferry between New York and New Jersey. Ogden sued Gibbons in the New York courts, winning a judgment that enjoined Gibbons from operating his congressionally authorized ferry within the waters of the State of New York. Gibbons appealed to the United States Supreme Court.

An early test of the scope of Congress's power under the Commerce Clause, *Gibbons* gave the Supreme Court the opportunity to provide a detailed analysis of the

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[8] *Lopez*, 567.

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commerce power. In deciding the case the Supreme Court had to determine (1.) what kinds of activity constitute commerce and (2.) how far regulation over such commerce "among the several States" may extend into activity within a particular state. The Court found in favor of Gibbons, holding that navigation is part of commerce and that congressional regulation of interstate activity may follow that activity into particular states.

Writing for the Court, Chief Justice Marshall deals first with the definition of Commerce. He notes that the Constitution is a document of "enumeration, and not of definition," so it is necessary for the Court to "settle the meaning of the word."[9] Ogden, wanting to maintain his monopoly under New York law, wished to limit the definition of commerce to "traffic, to buying and selling, or the interchange of commodities."[10] This definition would exclude navigation and, thereby, leave this dispute in the hands of the State of New York. However, Marshall holds that commerce must be construed broadly to encompass its natural use in the Constitution. He explains that commerce "describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."[11] One reason for the Court's embrace of this definition comes from another grant of power in the same clause, which gives Congress authority over commerce between the United States and other nations. If commerce did not include navigation, the federal government would be powerless to prescribe "what shall constitute American vessels" or to require "that they

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[9] *Gibbons v. Ogden*, 22 U.S. (1824), 189.

[10] *Gibbons*, 189.

[11] *Gibbons*, 189-190.

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shall be navigated by American seamen."[12] As Marshall notes, the government of the United States has exercised these powers since its inception, and it "has been understood by all to be a commercial regulation."[13] Navigation must be included in the definition of commerce for such a definition to be consistent with how the government of the United States has always operated.

Marshall then considers the scope of congressional power under the term "among the several States." He argues that it is commonly and naturally understood that no "sort of trade can be carried on between this country and any other, to which this power does not extend."[14] Because the definition must "carry the same meaning throughout the sentence," Congress may regulate any type of trade among the several states. Moreover, he explains that the "word 'among' means intermingled with," which naturally means that commerce among the states "cannot stop at the external boundary line of each State, but may be introduced into the interior."[15] As long as a commercial regulation deals with an activity that involves more than one state, Congress may continue to regulate associated activities as they enter or arise in particular states.

However, Marshall quickly draws a line. Congress cannot use the Commerce Clause to regulate all commercial activity within a state. He explains that these words do not "comprehend that commerce, which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which

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[12] *Gibbons*, 190.

[13] *Gibbons*, 190.

[14] *Gibbons*, 194.

[15] *Gibbons*, 194.

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does not extend to or affect other States."[16] Lest we think that this restriction on the regulation of intrastate activity amounts merely to semantics, Marshall goes on to make a critical point about the nature of enumerated powers. He explains that the "enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State."[17] The Constitution makes an explicit point of limiting congressional regulation over domestic commerce to the commercial activity that occurs among the several states. Congress may only use the Commerce Clause to regulate activity that is both commercial in nature and interstate in scope.

Controversy continues in today's jurisprudence over both aspects of the commerce power that the *Gibbons* Court addresses. First, what is the definition of Commerce? Second, what is the scope of the term "among the several States"? Despite critics' claims that the Rehnquist Court's federalism jurisprudence presents a narrow interpretation of the commerce power, those decisions embrace a definition of commerce that is at least as broad as Marshall's definition in *Gibbons*. In its commerce power cases the Rehnquist Court identifies three broad categories that fall under the purview of congressional power under the Commerce Clause. These categories are (1.) the channels of interstate commerce, (2.) the instrumentalities of interstate commerce, and (3.) activities that substantially affect interstate commerce.

At minimum, these categories encompass Marshall's conception of commercial intercourse, and it is likely that these modern categories extend beyond Marshall's

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[16] *Gibbons*, 194.

[17] *Gibbons*, 195.

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definition. In detailing why navigation falls under the definition of commerce, Marshall explains that laws that regulate navigation have been on the books since the birth of the republic and that this kind of regulation has "been understood by all to be a commercial regulation."[18] Navigation is a commercial activity because it was clearly understood as such "when the Constitution was framed," and the "convention must have used the word [commerce] in that sense."[19] As a result, we can see that commerce is a broad, yet not limitless, term. Marshall's standard for what qualifies as commerce assumes that the word must logically encompass more than mere transactions. However, he bounds his standard by the manner in which the broad concept of commercial regulation was understood at the time of the Convention. There must be kinds of regulation that are not commercial in nature, and Marshall considers as commercial those things that would have been understood as such the time of the Convention.

The Rehnquist Court's definition of commerce embraces the approach of defining commerce broadly while recognizing that some regulation is not commercial in nature. Some critics argue that Rehnquist and his allies on the Court falsely appropriated the legacy of *Gibbons*, adding more restrictions than Marshall would have put in place. For example, Barber argues that *Lopez* and *Morrison* break from the "dominant thrust [of *Gibbons*], which, by all accounts, was nationalist."[20] Justice Souter registers this objection in his dissenting opinion, arguing that *Gibbons* primarily registered the "Court's recognition of a broad commerce power."[21] But the three categories of interstate

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[18] *Gibbons*, 190.

[19] *Gibbons*, 190.

[20] Barber, *The Fallacies of States' Rights*, 60.

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commerce that the Rehnquist Court used were extremely broad. Congressional regulation may extend to all channels in which interstate commerce is conducted, to all persons and things involved in interstate commercial activity, and to all activities that "substantially affect" interstate commerce. The third category, that of substantial effects, is exceedingly broad. Regulation that is not directly commercial in nature may still be justified under the Commerce Clause, as long as the regulated activity has a substantial effect on interstate commerce.

If anything, these categories allow a broader understanding of congressional power under the Commerce Clause than Marshall advanced. Unlike Marshall, Rehnquist did not tie his definition of commerce to the understanding of commercial intercourse at the time of the Constitutional Convention. To the contrary, the Rehnquist Court accepted broad categories of activity as legitimately available for regulation under the Commerce Clause. Marshall notes that the word "commerce" in the Constitution is a "general term,"[22] but his explanation of why navigation is commerce shows that there must be boundaries to the concept and that activity outside those boundaries must be regulated by some other means. Similarly, the Rehnquist Court accepted that commerce is broad while insisting that, at some point, the effect that a noncommercial activity has on interstate commerce must be insufficient for the regulation to qualify as commercial in nature. The commerce power has boundaries, and it is the Court's job to find and enforce those boundaries.

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[21] *Lopez*, 604.

[22] *Gibbons*, 189.

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Moreover, Rehnquist and his allies acknowledged the breadth of the term "among the several States," but as Marshall did in *Gibbons*, they maintained that there must be some activities that lie outside these boundaries. Again, the Rehnquist Court's accepted category of substantial effects provided for regulation that is at least as broad as the scope of regulation that Marshall endorses. Rehnquist allowed that Congress may regulate intrastate activity that has a substantial effect on commerce in more than one state. As Marshall did, he insisted on the importance of the specifically enumerated power over commerce *among the several states*. The Constitution, by granting power in this manner, explicitly excludes regulation over an activity occurring exclusively in one state.

The Rehnquist Court insisted that the concept of outer bounds to the commerce power, as presented by Chief Justice Marshall in *Gibbons*, must have teeth. To fall under congressional purview under the Commerce Clause, an activity must meet the definition of commerce, and it must be part of activity among the several states. In relying heavily on *Gibbons* as the controlling precedent, Rehnquist employed definitions for "commerce" and "among the several States" that were at least as broad as the definitions used by Marshall in *Gibbons*. If an activity falls outside of these broad categories, Congress does not have the power to regulate it under the Commerce Clause. In *Lopez* Rehnquist established *Gibbons* as the commerce power's gold standard, and he carefully crafted a decision that respected the breadth of the *Gibbons* opinion as it embraced the importance of Marshall's comments on the outer bounds of congressional power.

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3.2.3 Dealing with the Court's Broader Commerce Clause Jurisprudence

Particularly in *Lopez*, Rehnquist goes to great lengths to acknowledge the New Deal-era holdings in *Wickard* and *Darby*. However, he does not commit to those holdings as controlling precedents. He explains how the Court's decision in *Lopez* should be interpreted in a manner that is consistent with the decisions in *Wickard* and *Darby*, but his argument shows that *Gibbons* is the controlling precedent that the Court must consider. To justify the decision in *Lopez* in relation to *Wickard*, Rehnquist explains that even "*Wickard*, which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not."[23] The Court explicitly makes a point of refusing to endorse the inferences that they could draw out of the New Deal-era precedents. Specifically, the Court declines to make the assumption that any activity with a potential impact on commerce can automatically be regulated under the Commerce Clause. While the majority provides a manner in which its decisions can be seen as consistent with those cases, the justices do not place any weight on *Wickard* and *Darby*. Instead, when it comes to precedent, Rehnquist and the majority depend upon the language used in *Gibbons v. Ogden* to make their case.

In *Gibbons* the Court emphasized the importance of the boundaries of the enumerated powers of Congress. There must be a substantive area of intrastate activity that is outside of congressional regulation because the Constitution only grants Congress power over commerce among the several states. *Wickard* and *Darby* acknowledged this holding, but the practical effect of these opinions obliterated any restrictions on

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[23] *Lopez*, 560.

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congressional regulation of intrastate activity. Boundaries were merely hypothetical for the Court in these two cases. The Rehnquist Court insisted that Marshall was right in *Gibbons*. The boundaries are real, and it is the Court's job to determine if Congress has stepped outside of those boundaries.

This understanding of the New Deal-era cases is important because it shows the calculations made by the majority in considering the available precedents. In *Lopez* Rehnquist cites *Darby* and *Wickard*. He discusses them in a fair amount of detail, and he considers the potential implications of those decisions. However, he ultimately uses only one aspect from those decisions as a controlling matter in *Lopez*, specifically the concept of outer bounds to the commerce power. The Court was committed to interpreting *Gibbons* and proceeding directly from that decision. The justices noted the relevant agreement in *Darby* and *Wickard*, and they then proceeded apace in avoiding the potential, and indeed logical, implications of the New Deal-era precedents. They found a solid line of reasoning from *Gibbons* to the present in the concept of outer bounds to congressional power under the Commerce Clause, and they built their arguments in *Lopez* and *Morrison* on that foundation.

In his dissent in *Lopez* Justice Breyer argues that upholding the law would "interpret the [Commerce] Clause as this Court has traditionally interpreted it" by "simply [recognizing] that Congress had a 'rational basis' for finding a significant connection between guns in or near schools" and interstate commerce.[24] But the beginning of his opinion contains an important caveat, as he argues that the law "falls well within the scope of the commerce power as this Court has understood that power

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[24] *Lopez*, 631.

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over the last half century."[25] Breyer and his fellow dissenters accuse Rehnquist of breaking with precedent, but they must acknowledge that they are writing about the Court's most recent precedents. Because those recent decisions departed from the Court's long-standing, pre-New Deal approach to the Commerce Clause, this line of criticism is heavily muted. The justices should adhere to the Court's best-reasoned decisions regarding constitutional authority. They do not have an obligation to accept the most recent rulings if those decisions broke from other precedents and applied a new interpretation. In relation to the commerce power, those best precedents are *Gibbons* and subsequent pre-New Deal opinions.

The Court's decision in *Morrison* to set aside the congressional record, which purported to establish a link between individual acts of violence against women and interstate commerce, provided fuel for those claiming that this federalism jurisprudence was novel and activist. After all, Congress provided an extensive explanation of its commercial justification for the Violence Against Women Act, and the Court essentially ignored that record. Without some basis for its actions, the Court is highly vulnerable to its critics. A careful examination of the citation of precedents in *Lopez* and *Morrison* explains how one can defend the Court against these charges. The congressional record is only secondarily relevant. If the legislation is outside of the scope of the Commerce Clause, then it does not matter what Congress says in defense of the law. In determining the scope of the provisions of the Constitution, the Court often leans upon precedents to see how those provisions have been applied over time. In this case, the line of reasoning involving outer bounds to the commerce power controlled.

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[25] *Lopez*, 615.

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Critics' assertions that the Rehnquist Court was forging new ground on the Commerce Clause cannot stand up a close examination of those cases. For example, Lens argues that the "Court [was] changing both the definition of commerce and who gets to delineate the scope of that definition."[26] Neither aspect of this criticism is accurate. The Court set aside the post-New Deal definition of commerce, which simply legitimized congressional opinion on the matter. In place of that relatively new approach, Rehnquist and his allies restored the Court's consistent pre-New Deal methods. They accurately declared that the Constitution only permits Congress to regulate interstate commerce, as well as foreign and Indian commerce, and that the Court's duty is to uphold the Constitution. To do so, the justices must actually examine the validity of the government's reasoning. It was not a new idea that the Court serves in this role. Instead, it was a return to the proper constitutional position, which the late twentieth century Court had set aside in favor of rubber-stamping Acts of Congress. The Rehnquist Court's Commerce Clause jurisprudence was solidly grounded in the precedents of the Court, and particularly in the powerful definition of the scope and breadth of the clause given by Chief Justice Marshall in *Gibbons v. Ogden*.

3.3 Section 5 of the Fourteenth Amendment

The Court's decisions in *City of Boerne v. Flores* (1997) and *United States v. Morrison* (2000) addressed the issue of congressional power under Section 5 of the Fourteenth Amendment. As with the Commerce Clause cases, the justices writing for the Court offered their own explanations of the relationship between key precedents and their

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[26] Vickie Lens, "The Supreme Court, Federalism, and Social Policy: The New Judicial Activism," *Social Service Review* 75.2 (2001): 327.

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decisions. A close examination of both the Rehnquist Court's opinions and those precedents shows that Rehnquist and his allies adhered to earlier precedents in these cases, as well.

3.3.1 Kennedy and Rehnquist on Section 5 Precedent

Writing for the majority in *Boerne*, Justice Kennedy explains that the "remedial and preventive nature of Congress' enforcement power, and the limitation inherent in the power, were confirmed in our earliest cases on the Fourteenth Amendment."[27] Specifically, Kennedy relies upon the *Civil Rights Cases*, which struck down sections of the Civil Rights Act of 1875 that made discriminatory action by private individuals a federal criminal offense. Quoting from the *Civil Rights Cases*, Kennedy explains that the Section 5 power does not permit Congress to pass

> "general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the amendment, they are prohibited from making or enforcing."[28]

Kennedy proceeds to argue that a number of recent cases such as *South Carolina v. Katzenbach* (1966) and *Oregon v. Mitchell* (1970) are consistent with the idea found in the *Civil Rights Cases* that the enforcement power of Congress under Section 5 of the Fourteenth Amendment is remedial in nature. Finally, Kennedy and the majority conclude that RFRA is not remedial in nature and that Congress has unduly intruded "into the States' traditional prerogatives and general authority to regulate for the health

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[27] *Boerne*, 521.

[28] *Boerne*, 525.

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and welfare of their citizens."[29] Because RFRA cannot be justified under the Section 5 power, the Court strikes it down as applied to the states.

Though Chief Justice Rehnquist's opinion in *United States v. Morrison* primarily addresses the Commerce Clause arguments put forth by the government, his opinion also contains a brief discussion of the government's claim that the Section 5 power provides another constitutional justification for the law. As in the *Civil Rights Cases*, the law in question in *Morrison* purports to bring individual activity under the purview of federal law. Rehnquist explains that foremost among the limitations of the Fourteenth Amendment "is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action."[30] Moreover, Rehnquist again confirms that the precedent insists that the Section 5 power is remedial in nature.

3.3.2 The Key Precedent: the *Civil Rights Cases*

In relying on the *Civil Rights Cases* the Rehnquist Court selected a foundation of some of the earliest judicial review of congressional power under the Fourteenth Amendment. The *Civil Rights Cases* involved appeals from individuals who were indicted or fined under the federal Civil Rights Act of 1875 for discriminating against African-Americans in various establishments or forms of transportation. In what became known as the "state action doctrine," the Court found that federal law claiming Section 5 as its basis can only directly address discrimination committed by state or local governments and that the Section 5 power does not reach actions committed by private individuals.

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[29] *Boerne*, 534.

[30] *Morrison*, 621.

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Considering the constitutionality of the relevant sections of the Civil Rights Act of 1875, Justice Bradley clearly and unequivocally argues that the language of the Fourteenth Amendment only allows Congress to regulate the states themselves. He explains that it "is State action of a particular character that is prohibited" and that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."[31] At the same time, he argues that this interpretation leaves a very broad scope of action for Congress under Section 5. Bradley makes the case that the amendment "has a deeper and broader scope" than mere regulation of individual actions.[32] He does so by explaining that the amendment

> "nullifies and makes void all State legislation, and State action of every kind, which impairs the privileges and immunities of citizens of the United States or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws."[33]

The Court in the *Civil Rights Cases* viewed laws regarding individual actions as petty compared to the force of a proper interpretation of the Fourteenth Amendment. Congress has great power under that amendment, in that it can stop the states themselves from discriminating against individuals. Private discrimination is a completely separate issue that the Fourteenth Amendment does not address because of its specific language, which only encompasses state action.

Morrison drew directly on this portion of the *Civil Rights Cases* to justify its decision that Section 5 does not authorize the relevant portions of the Violence Against Women Act. The lawsuit at issue in *Morrison* was an action against a private individual.

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[31] *Civil Rights Cases*, 109 U.S. 3 (1883), 11.

[32] *Civil Rights Cases*, 11.

[33] *Civil Rights Cases*, 11.

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The government claimed that Section 5 granted it the power to authorize such suits at the federal level. However, the Rehnquist Court embraced the state action doctrine presented in the *Civil Rights Cases*. If the state had passed a law or committed an action that harmed individuals, Section 5 could be used to strike against the states. However, the VAWA proscribed conduct by individuals. Thus, the law fell outside the bounds of the congressional authority under Section 5.

Bradley's opinion in the *Civil Rights Cases* also argues that Congress's power under Section 5 is corrective in nature. Bradley explains that laws of Congress must be tailored to "the mischief and wrong which the amendment was intended to provide against," specifically "State laws, or State action of some kind, adverse to the rights of the citizen secured by the amendment."[34] Congress must aim to correct illegal actions perpetrated by the states themselves. According to the Court, there is still plenty of room for anticipatory legislation to prevent expected violations of the amendment in the future. Bradley says that "legislation may, and should be, provided in advance to meet the exigency when it arises."[35] But Congress is not free to make laws covering any subject it wishes under the guise of Section 5.

Kennedy's decision in *Boerne* relied heavily on this logic when considering whether RFRA could be enforced against the states. Ultimately, he argued that the law is neither corrective nor appropriately preventive in nature. Kennedy explains that laws that "remedy or prevent unconstitutional actions and measures" are permitted under Section 5

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[34] *Civil Rights Cases*, 13.

[35] *Civil Rights Cases*, 13.

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but that "laws that 'make a substantive change in the governing law'" are not.[36] Congress may only aim to remedy constitutional violations that the state itself commits. It does not have the authority to make substantive changes to the scope of the rights protected by the Fourteenth Amendment.

While recognizing the Rehnquist Court's adherence to the state action doctrine in *Morrison*, it is also important to note that the opinion as a whole considers a potentially larger sphere of action, pointing to the breadth of the remedial powers of Congress under Section 5. Rehnquist explains that if the "allegations [against Morrison] are true, no civilized system of justice could fail to provide [his accuser] a remedy for [his] conduct" but that the "remedy must be provided by the Commonwealth of Virginia, and not by the United States."[37] This statement points to the possibility that the Court would consider the situation differently if Virginia were clearly failing to provide a "civilized system of justice." Such an abject failure by the state could give rise to a justification for congressional interference.[38] However, there was no evidence that Virginia had failed in such a manner, so Congress had stepped beyond its sphere of authority. The VAWA was not remedying a severe defect in state law or state action, and as such, the federal law in question was a proactive, substantive reform of rights that was not allowable under Section 5.

Bradley also established a standard for judicial review in the *Civil Rights Cases*, which would prove crucial to later interpretations of Section 5. He argues that it "is not

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[36] *Boerne*, 508.

[37] *Morrison*, 627.

[38] I discuss the "state failure" doctrine and its relationship to the Rehnquist Court's federalism jurisprudence in Chapter Four.

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necessary for us to state, if we could, what legislation would be proper for Congress to adopt" because it "is sufficient for us to examine whether the law in question is of that character."[39] The Court declined to make an attempt at defining the scope of legitimate legislation in general terms. Instead, Bradley promised that the justices would review challenged laws as they come before the Court and decide at that time whether the specific challenged law is within the scope of congressional power under Section 5.

Boerne and *Morrison* both accepted this standard of review. Kennedy and Rehnquist did not try to consider how to draw the line abstractly between remedial action and substantive action. They refused to deal in hypotheticals. Instead, they dealt exclusively with the application of the congressional statutes at issue in their cases. In *Boerne* Kennedy argues that the "distinction exists" between remedial and substantive action, and it "must be observed."[40] Because of the complexity involved in making this distinction, issues must be taken up as they arise in concrete cases and controversies.

The Court's split decisions in *Board of Trustees of the University of Alabama v. Garrett* (2001) and *Tennessee v. Lane* (2004) complicate the picture of the Rehnquist Court's Section 5 jurisprudence, but they also reinforce the importance and precedential value of this case-by-case interpretation standard. It is important to note that these cases have an extra level of complication because they implicate state sovereign immunity concerns in addition to Section 5 interpretation. The Rehnquist Court agreed that Section 5 allows the abrogation of state sovereign immunity when Congress pursues legitimate ends under the Fourteenth Amendment. The decision in *Garrett* struck down the

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[39] *Civil Rights Cases*, 14.

[40] *Boerne*, 508.

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provision in Title I of the Americans with Disabilities Act (ADA) that allowed private individuals to sue the states for money damages. The Court held that this provision made substantive changes to guaranteed rights, rather than acting as a corrective or remedial measure. In *Lane* Justice O'Connor joined the dissenters from *Garrett* in holding that Title II of the ADA constitutionally abridged the sovereign immunity of the states because that section of the law was appropriately remedial in nature.

Both cases adhered to the principle from the *Civil Rights Cases* that the Court must consider laws passed under the Section 5 power on a case-by-case basis. The Rehnquist Court did not attempt to draw bright-line distinctions for abstract or hypothetical situations. Instead, the justices considered the laws before them one at a time to determine whether they were remedial or substantive in effect.

3.3.3 Dealing with the Court's Broader Section 5 Jurisprudence

The Rehnquist Court relied heavily upon the *Civil Rights Cases* to support its interpretation of the Section 5 power. It did so, in part, because recent precedent on the matter was split. In *Boerne* Justice Kennedy cites *South Carolina v. Katzenbach* (1966) and *Oregon v. Mitchell* (1970), among other cases, to support his arguments. *South Carolina* confirmed the fact that Section 5 authorizes Congress to "enforce the prohibitions [of the Fourteenth Amendment] by appropriate legislation."[41] *Oregon v. Mitchell* declared that as "broad as the congressional enforcement power is, it is not unlimited."[42] Kennedy used his discussion of these precedents to establish the Court's

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[41] *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), 326.

[42] *Oregon v. Mitchell*, 400 U.S. 112 (1970), 128.

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historical acceptance of the idea that there are bounds to Congress's broad authority under Section 5.

However, in *Boerne* Kennedy also had to acknowledge countervailing contemporary cases, especially *Katzenbach v. Morgan* (1966). In *Morgan* the Court considered Section 4(e) of the Voting Rights Act of 1965, which stated that anyone who had completed sixth grade anywhere in the United States, including in Puerto Rico, could not be prevented from voting on the grounds that he could not pass an English literacy test. The State of New York sued, arguing that the Supreme Court had held in *Lassiter v. Northampton* (1959) that literacy tests could be constitutional. As a result, New York claimed that Congress had exceeded its powers under Section 5 of the Fourteenth Amendment. Additionally, New York claimed that because the action was not appropriate Section 5 legislation, it infringed upon the rights reserved to the states by the Tenth Amendment. The Court rejected the arguments advanced by New York.

Writing for the majority, Justice Brennan says that, properly viewed, Section 5 is "a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment."[43] The Court in *Morgan* was willing to give great deference to Congress when it is pursuing such a positive grant of power. Thus, Brennan argues that Section 4(e) may "be readily seen as 'plainly adapted' to furthering these aims of the Equal Protection Clause."[44] Having found a basis to conclude that the provisions of the law are adapted to the ends, Brennan argues that it is not the place of the Court to

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[43] *Katzenbach v. Morgan*, 384 U.S. 641 (1966), 651.

[44] *Morgan*, 652.

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question how Congress has resolved the questions around this law. The Court has found a legitimate justification for the congressional action in question, so the inquiry goes no further. Thus, Congress acted within its sphere of authority in expanding the Fourteenth Amendment's understanding of rights beyond what the Court had stated in the past.

At the very least, the Court's decision in *Boerne* seems inconsistent with *Morgan*. Kennedy explains how the majority chooses to interpret *Morgan* and, in doing so, implicitly asserts that the argument in *Morgan* does not carry the weight that the argument in the *Civil Rights Cases* carries. In *Boerne* Kennedy explains that there "is language in our opinion in *Katzenbach v. Morgan* . . . which could be interpreted as acknowledging a power in Congress to enact legislation that expands the rights contained in §1 of the Fourteenth Amendment."[45] Indeed, to the outside observer, it would appear that such a conclusion is one of the major thrusts of the opinion in *Morgan*. However, Kennedy asserts that this interpretation is "not a necessary interpretation . . . or even the best one."[46] He explains that the Court in *Morgan* determined that there was a factual basis that reasonably could have led Congress to think that New York's literacy requirement was unconstitutionally discriminatory. It found that there could be a legitimate basis for Section 4(e) of the Voting Rights Act and, thus, declined to subject Congress's reasoning to any further tests.

On the surface, the decision by the Court in *Morgan* certainly appears to allow Congress to expand upon the judicial determination of what is protected by the Fourteenth Amendment. However, Kennedy does not view it this way. He explains that if

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[45] *Boerne*, 527-528.

[46] *Boerne*, 528.

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“Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law, unchangeable by ordinary means.’”[47] In short, Kennedy chooses to interpret *Morgan* in a manner that is consistent with past precedent and with an understanding that the Section 5 power has outer bounds. He does not give to the opinion in *Morgan* what might be its apparent meaning because that meaning would run counter to the Court’s other precedents.

To a large extent, *Boerne* and *Morrison* deal with different sets of precedents. However, the argument that Rehnquist uses in *Morrison* parallels the reasoning Kennedy uses in *Boerne*. Recent precedents create a muddled picture of the Section 5 power. In some cases, interpretation of these decisions only further clouds the picture, as seen in Kennedy’s interpretation of *Morgan*. However, the *Civil Rights Cases* and subsequent, consistent decisions are still valid law. Thus, it is sensible for the Court to reason on its own from the *Civil Rights Cases* to determine whether a law is within the scope of the Section 5 power. In its Section 5 jurisprudence the Rehnquist Court leaned heavily upon precedent. In particular, it relied upon doctrines that declare that Section 5 is designed to deal with state actors and that congressional power under that section is remedial in nature. The Court did not simply abandon *Morgan* or other recent decisions to strike out on its own. Instead, as it did with the Commerce Clause and *Gibbons v. Ogden*, the Court returned to earlier precedent and reasoned for itself in an attempt to create a clearer picture of the bounds of the Section 5 power.

3.4 Anti-Commandeering Principles

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[47] *Boerne*, 529.

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The Court's opinions in *New York v. United States* (1992) and *Printz v. United States* (1997) addressed the question of congressional authority to compel action or participation from state governments. Earlier decisions issued by the Supreme Court clearly allowed Congress and the federal judiciary to compel cooperation from state courts. But the question of controlling state courts is different from the question of commandeering legislative and executive branches of a state government. The Rehnquist Court set out to provide guidelines under these different circumstances.

The Rehnquist Court's decisions indicate there are no directly applicable precedents and only a few concepts from other cases that can be applied directly to anti-commandeering issues. Because of the dearth of directly applicable precedents, Justice Scalia says in *Printz* that the justices must look to find answers "in historical understanding and practice, in the structure of the Constitution, and in the jurisprudence of this Court."[48] In *New York* O'Connor takes a similar approach, declaring that the Court's role "consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[49] Scalia goes on a fact-finding mission in *Printz*, presenting extensive reasoning in favor of his opinion, drawing from historical and jurisprudential sources. Scalia and O'Connor identify broad concepts, such as the importance of the federal system to the operation of government in the United States, and they identify particular rules in jurisprudence, such as a prohibition against Congress commandeering the "legislative processes of the States by directly

[48] *Printz*, 905.

[49] *New York*, 157.

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compelling them to enact and enforce a federal regulatory program."[50] Both justices cite extensively from the Court's jurisprudential history, but they do not present a precedent that clearly and directly applies to the issues before them in their respective cases.

Despite the Court's statements that there is not a case that speaks directly to this these principles, *Prigg v. Pennsylvania* (1842) presents an available precedent, and the Court's reasoning in *New York* and *Printz* follows the reasoning of the anti-commandeering section of *Prigg*. Of course, there is a compelling reason that the Court might not want to refer to *Prigg* in its decisions. The primary holding in that case was that the Fugitive Slave Act of 1793 was the law of the land, valid under the Fugitive Slave Clause, and that Pennsylvania laws to the contrary were unconstitutional. Despite this holding, there is still valid law in *Prigg* regarding the anti-commandeering aspect of federalism. This aspect of the decision was as anti-slavery as possible given the overall findings of the Court, and it increased the burden and difficulty that the federal government would face in enforcing the Fugitive Slave Act. This portion of the case presents a compelling precedent for the Court's decisions in *Printz* and *New York*.

In the majority opinion in *Prigg*, Justice Story argues that the states cannot "be compelled to enforce" the provisions of the Fugitive Slave Act and that it "might well be deemed an unconstitutional exercise of the power of interpretation, to insist that the states are bound to provide means to carry into effect the duties of the national government, nowhere delegated or entrusted to them by the constitution."[51] Story explains that the Fugitive Slave Clause imparted a duty upon the federal government. Certainly, that

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[50] *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*, 452 U.S. 264 (1981), 288.

[51] *Prigg v. Pennsylvania*, 41 U.S. 439 (1842), 541.

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clause forbade the state governments from interfering with those attempting to capture and return a fugitive slave. However, the position of the Court was that the actual duty to assist in the return of the slave belonged to the federal government, as the clause did not indicate that it is a duty assigned to the state governments.

In fact, the duty of enforcement under the Fugitive Slave Clause rested entirely with the national government, according to the decision in *Prigg*. Story explains that the natural conclusion of the structure of the Constitution is that

> "the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."[52]

To the extent that the Constitution imposes duties upon a government, it always imposes them upon the federal government unless it clearly places a positive duty upon the states.

In essence, Story provides a clear-statement rule. Barring a clear statement by the Constitution that the states have a duty, all action based upon duties or rights granted by the Constitution falls to the federal government. The Fugitive Slave Clause placed a duty upon the states not to interfere with the recovery of slaves. However, it did not clearly obligate them to participate in the return of slaves. State officials may have participated in such actions if the state permitted them to do so, but the federal government could not require them to do so. Though the decision finds the Fugitive Slave Act to be constitutional, the anti-commandeering section of *Prigg* makes it much harder to enforce the terms of the law. Story's insistence on the responsibility of the federal government to enforce its own laws created a more difficult barrier to overcome for those attempting to capture and return escaped slaves.

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[52] *Prigg*, 541.

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The slavery-tinged nature of this case makes it clear why the Rehnquist Court would not want to invoke *Prigg*, but the anti-commandeering principles found in the case provide a solid basis in precedent for the decisions in *New York* and *Printz*. The circumstances of *Prigg* and *Printz* were similar with regard to anti-commandeering principles. In both cases, Congress devised a system of enforcement based upon its authority under the Constitution and ordered state officials to take some part in that system. Thus, Story's opinion in *Prigg* is directly relevant to *Printz*. Story says that both the duties and rights imposed by the Constitution upon the federal government require it to enforce its own laws without using officials of the states. While a state may choose to allow its officials to participate, the federal government cannot compel such participation. The Court in *Printz* did not dispute that Congress was generally legislating within an area in which it has legitimate authority. However, this right to legislate requires Congress to devise its own system of enforcement. It cannot commandeer the executive officials of the states.

This reasoning is also applicable to the Court's decision in *New York*. The provisions found in the Low-Level Radioactive Waste Policy Amendments Act of 1985 generally pursued the commerce and spending powers of Congress. However, Congress must pursue this regulation through the various vehicles of the federal government. The fact that Congress has a right to legislate upon these matters does not give it the authority to require the states to regulate according to the directives of Congress or to take title to radioactive waste. Even with the much smaller federal government at the time of *Prigg*, Story notes that the different departments of the government can be used as necessary to enforce the law in an area where Congress has a right or duty to legislate. Any duty of

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enforcement imposed by Congress must fall upon the federal government unless the states desire to participate.

Against the majority's decision in *New York*, Justice Stevens writes,

> "The Tenth Amendment surely does not impose any limit on Congress' exercise of the powers delegated to it by Article I. To the contrary, the Federal Government directs state governments in many realms. The Government regulates state-operated railroads, state school systems, state prisons, state elections, and a host of other state functions."[53]

The Court's precedents do, indeed, uphold the congressional regulations that Stevens mentions. But none of the specific regulations that he lists are similar to the commerce power claimed by the government in *New York*. State-operated railroads directly participate in interstate commerce and thus clearly qualify for regulation under the Commerce Clause. The federal government generally regulates state school systems through grants, giving states the option to gain federal funding by complying with regulations, an option the states can freely reject even though they all choose to take advantage of the arrangement. Additional school-related regulations implicate civil rights enforceable against the states under the Fourteenth Amendment. Similarly, state prisons are generally regulated under civil-rights principles. Finally, the federal government regulates state elections either under specific constitutional provisions related to the election of federal officials or any of the subsequent amendments that guarantee suffrage rights.

The notable difference between all of these regulations and the questions in *New York* and *Printz* is that Stevens's list ties to distinct, much clearer grants of authority. It is simple to find precedential support for his list, but it is not simple to apply those

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[53] *New York*, 211.

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decisions to the Rehnquist Court's cases. The precedents that Stevens lists do not involve an attempt to commandeer state governments through the "substantial effects" standard of commerce power evaluation. The fact that Congress may legitimately direct state action in a few specific scenarios does not mean that standard applies to other situations. Contrary to Stevens's claim, the Tenth Amendment does, in fact, prohibit this generalized assumption. Authority remains in the states unless the Constitution positively provides that authority to the federal government. Moreover, directing state action in particular circumstances is not the same as granting Congress the power simply to force the states to carry out its regulatory programs.

Even though the Rehnquist Court does not cite *Prigg*, its decisions in *New York* and *Printz* proceed from the same logic used in the anti-commandeering section of that decision. The Rehnquist Court reinvigorated the Tenth Amendment in these cases, as Kelty observes in arguing that under the Rehnquist Court "the Supreme Court [would] continue to recognize the Tenth Amendment as the rule against which Congress must first test the scope of its power."[54] But *New York* and *Printz* did not create new exemptions for the states. Instead, they recognized that the constitutional structure of enumerating powers and reserving residual authority to the states means that Congress must have clear constitutional grounds if it wishes to employ the states in a federal regulatory regime.

The federal government has the authority to pursue the duties and rights granted to it by the Constitution. The states may not interfere in such federal actions because laws made in pursuit of the grants of power in the Constitution are the supreme law of the land

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[54] Thomas W. Kelty, "While the Stewards Slept . . . *New York v. United States*," *The Urban Lawyer* 29.3 (1997): 566.

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and overrule any state law or state constitutional provision to the contrary. However, these facts do not give the federal government the authority to commandeer state officials. Unless the Constitution specifically declares otherwise, operation of the state governments is left entirely to the states. To pursue its own grants of power, Congress must use the means at its disposal within the federal government.

3.5 State Sovereign Immunity

In *Seminole Tribe of Florida v. Florida* (1996) and subsequent cases, the Rehnquist Court dealt with congressional authority and state sovereign immunity. The Court agreed that the Fourteenth Amendment allowed Congress to abrogate state sovereign immunity when it was legislating within its realm of authority under that amendment. However, the justices argued that Article I of the Constitution does not include such a grant of congressional authority over state sovereign immunity and that a proper understanding of the Eleventh Amendment forbids such interference. Nothing in Article I or Article III explicitly grants the power to abrogate the states' sovereign immunity, and sovereign immunity is too important to allow abrogation by implication. Contrary to the perception of its critics, the Rehnquist Court adhered closely to precedent in its state sovereign immunity cases. As in other areas of federalism, Rehnquist and his allies reasoned directly from earlier precedents in their sovereign immunity jurisprudence, choosing the historical approach of the Court over more recent departures from those early precedents.

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3.5.1 Rehnquist on State Sovereign Immunity Precedents

Writing for the Court in *Seminole Tribe*, Rehnquist embraces a broad scope for state sovereign immunity, holding that the Seminole Tribe cannot sue the State of Florida in federal court for refusing to negotiate a gambling agreement. In doing so he explicitly claims an earlier precedent, *Hans v. Louisiana* (1890), and explicitly overrules a more recent precedent, *Pennsylvania v. Union Gas Company* (1989). He quotes from a previous case to summarize the Court's view on the interpretation of the Eleventh Amendment, "[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms."[55] Noting that this interpretation traces back to *Hans*, Rehnquist argues that (1.) "each State is a sovereign entity in our federal system" and (2.) it "is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent."[56] Quoting in part from *Hans*, Rehnquist explains that for "over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[57]

Rehnquist justifies these presuppositions by looking at the relevant portions of the Constitution and subsequent interpretation, starting with *Hans*. The Eleventh Amendment specifies that the judicial power of the United States does not extend to cover suits brought against one state by a citizen of another state. Citing *Hans*, Rehnquist notes that the Eleventh Amendment was conceived in order to rectify a specific, incorrect

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[55] *Blatchford v. Native Village of Noatak*, 551 U.S. 775 (1991), 779.

[56] *Seminole Tribe*, 54.

[57] *Seminole Tribe*, 54.

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interpretation of the power of the federal judiciary in *Chisholm v. Georgia* (1793). That incorrect interpretation allowed a citizen of one state to sue another state in federal court without its consent, but it never went so far as to allow that the federal courts could provide recourse for citizens against their own states. The amendment makes it clear that a citizen of another state cannot sue an unconsenting state for money damages. In doing so, it also implicitly reconfirms that a citizen may not sue his own state in federal court, according to Rehnquist.

In response to the dissenters' claim that the Eleventh Amendment has no bearing here because the issue involves citizens suing their own state, Rehnquist argues that the "dissent's lengthy analysis of the text of the Eleventh Amendment is directed at a straw man" because the Court has long "recognized that blind reliance upon the text of the Eleventh Amendment is 'to strain the Constitution and the law to a construction never imagined or dreamed of.'"[58] He further explains that the text of the amendment deals "only with the problem presented by the decision in *Chisholm*."[59] Neither the Constitution nor the Eleventh Amendment entertains the possibility that a citizen may use the federal courts to sue his own state.

In adopting the findings and reasoning from *Hans*, the decision in *Seminole Tribe* runs counter to *Pennsylvania v. Union Gas Co.* (1989). Rehnquist notes that the Court has allowed congressional abrogation of state sovereign immunity only rarely. Specifically, abrogation of state sovereign immunity is allowable in some circumstances under the Fourteenth Amendment. Aside from that constitutional rule, Rehnquist finds

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[58] *Seminole Tribe*, 69.

[59] *Seminole Tribe*, 69.

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that in "only one other case has congressional abrogation of the States' Eleventh Amendment immunity been upheld."[60] The plurality opinion in *Union Gas* held that because the Interstate Commerce Clause grants authority to the federal government at the expense of the states, Congress may use that clause to abrogate the sovereign immunity of the states. Rehnquist explains that under

> "the rationale of *Union Gas*, if the States' partial cession of authority over a particular area [through the Interstate Commerce Clause] includes cession of the immunity from suit, then their virtually total cession of authority over a different area [through the Indian Commerce Clause] must also include cession of the immunity from suit."[61]

The reasoning in *Union Gas* required the Court to allow abrogation of state sovereign immunity in *Seminole Tribe* because congressional power under the Indian Commerce Clause provides an even firmer foundation for abrogation than the Interstate Commerce Clause does.

However, Rehnquist notes that *Union Gas* lacked a majority opinion, and he argues that the plurality opinion is weak and without support from the Court's precedents. He explains that the reasoning of the plurality "deviated sharply from our established federalism jurisprudence and essentially eviscerated our decision in *Hans*."[62] Quoting from the dissent in *Union Gas*, Rehnquist argues that the decision "contradict[ed] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction."[63] The only additional power that Congress has since received in the area of state sovereign immunity comes through the Fourteenth Amendment, which

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[60] *Seminole Tribe*, 59.

[61] *Seminole Tribe*, 62.

[62] *Seminole Tribe*, 64.

[63] *Seminole Tribe*, 65.

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has no application in *Seminole Tribe* and had no application in *Union Gas*. Therefore, the Court held that *Union Gas* was wrongly decided, and the justices overruled that decision in *Seminole Tribe*.

3.5.2 The Key Precedent: *Hans v. Louisiana*

Hans v. Louisiana (1890) marked the first time the Supreme Court heard a case involving a citizen suing his own state for money damages. The petitioner, Hans, was a citizen of Louisiana. He anticipated that changes to the state constitution would result in the state-issued bonds he held becoming worthless. So, he filed suit against Louisiana in a federal district court, arguing that the state was impairing the obligations of a contract, in violation of the Constitution. The Supreme Court held that Hans did not have the right to make this claim in federal court because the states retain sovereign immunity from lawsuits for money damages.

Justice Bradley, writing for the Court, addresses the petitioner's argument that no text in the Constitution or the Eleventh Amendment forbids his suit and that, because the suit claims a constitutional violation, the district court is obligated to hear it. He explains that by using this logic the Court would have to find that the federal judiciary could consider suits for money damages brought against a state by its own citizens, while being unable to hear such suits brought by citizens of other states or of a foreign nation. For Bradley this hypothetical result "is no less startling and unexpected than was the original decision of this court" in *Chisholm*, which "created such a shock of surprise throughout the country that, at the first meeting of Congress thereafter, the Eleventh Amendment was almost unanimously proposed, and was in due course adopted by the legislatures of the

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States."[64] Hans asked the Court to go even further than the decision in *Chisholm* went. The Court declined.

To substantiate the Court's decision Bradley first explains how *Chisholm* went awry. He argues that the Court in that case was "swayed by a close observance of the letter of the constitution, without regard to former experience and usage."[65] As a result, the justices "felt constrained to see in this language a power to enable the individual citizens of one State, or of a foreign state, to sue another State of the Union in federal courts."[66] Bradley asserts that the justices should have realized that such lawsuits were never to be placed in the jurisdiction of the federal courts in the first place.

He proceeds to cite multiple individuals from the Founding Era who considered the possibility of abrogation of state sovereign immunity and dismissed the idea as unfounded because Article III does not fathom the federal courts abrogating sovereign immunity. Article III provides no jurisdiction for federal courts to hear lawsuits for money damages brought against the states by their own citizens. Bradley quotes from Alexander Hamilton in *Federalist* No. 81 and the speeches of James Madison and John Marshall at Virginia's ratifying convention. All three men expressed the sentiment that, in the words of Madison, "It is not in the power of individuals to call any State into court."[67] So, Bradley explains that appeals simply to the text cannot be supported in this

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[64] *Hans v. Louisiana*, 134 U.S. 1 (1890), 11.

[65] *Hans*, 12.

[66] *Hans*, 12.

[67] *Hans*, 14.

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case because they would "strain the Constitution and the law to a construction never imagined or dreamed of."[68]

Finally, Bradley argues that "the cognizance of suits and actions unknown to the law, and forbidden by the law, was not contemplated by the Constitution when establishing the judicial power of the United States."[69] As shown by his references to Hamilton, Madison, and Marshall, lawsuits such as the one Hans filed are completely outside the scope of power of any judiciary. Any lawsuit for money damages against a state may only proceed with the state's express consent. Bradley argues that the "suability of a State, without its consent, was a thing unknown to the law" at the time of the Founding.[70] As a result, the Constitution would have to explicitly allow the abrogation of state sovereign immunity for the federal judiciary to have the power to hear these lawsuits. Otherwise, the prospect of the judiciary hearing such cases is implausible and outside the law.

Rehnquist's decision in *Seminole Tribe* adheres closely to both the outcome and the reasoning in *Hans*. He confirms that "the background principle of state sovereign immunity embodied in the Eleventh Amendment is not so ephemeral as to dissipate when the subject of the suit is an area . . . that is under the exclusive control of the Federal Government."[71] The federal government has the authority to enforce the Indian Commerce Clause, just as the federal government had the authority to enforce the Contracts Clause at issue in *Hans*. But in doing so Congress cannot authorize lawsuits

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[68] *Hans*, 15.

[69] *Hans*, 15.

[70] *Hans*, 16.

[71] *Seminole Tribe*, 72.

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"by private parties against unconsenting states."[72] Such an action would have to come through the process of amending the Constitution. Key voices at the time of the Convention made it clear that the states retained their sovereign immunity against private suits. The swift introduction and ratification of the Eleventh Amendment reconfirmed the people's commitment to state sovereign immunity. As a result, Congress may not use its Article I authority to abrogate the sovereign immunity of the states.

3.5.3 A Closer Look at Other State Sovereign Immunity Precedents

The Supreme Court's 1989 decision in *Pennsylvania v. Union Gas Co.* countered the *Hans* opinion in a number of ways. *Union Gas* came before the Court during the earliest years of Rehnquist's tenure as Chief Justice, before Justice Thomas was appointed to the Court. When the Court ruled in *Union Gas* that citizens could, under particular circumstances, sue their own states in federal court for money damages, four of the five justices in the Rehnquist Court's federalism majority dissented strongly. But without Thomas they did not have the votes needed to win the debate in conference. The Court did not issue a majority opinion in *Union Gas*, as Justice Brennan was only able to garner three other votes in favor of his reasoning. Justice White concurred in the judgment that the Eleventh Amendment allowed the abrogation of state sovereign immunity while explicitly distancing himself from the reasoning of the plurality opinion. Without a majority opinion, *Union Gas* created a weak precedential standard that broke with the Court's historical approach to state sovereign immunity.

In his opinion Justice Brennan argues that a proper understanding of associated cases indicates that Congress may abrogate state sovereign immunity through legislation

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[72] *Seminole Tribe*, 72.

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authorized under the Commerce Clause. He makes the case that though the Court has "never squarely resolved this issue of congressional power, our decisions mark a trail unmistakably leading to the conclusion that Congress may permit suits against the States for money damages."[73] Specifically, such abrogation is permissible pursuant to "the plenary powers granted [to Congress] by the Constitution."[74] According to Brennan Article III authorizes such lawsuits, as long as Congress is legitimately acting according to its authority under the Commerce Clause, or presumably any other portion of its Article I powers.

Justice Stevens's concurring opinion in *Union Gas* proceeds to eviscerate the precedential value of *Hans*, shedding further light on the plurality's view of that case. He argues that in *Hans* the "Court departed from the plain language, purpose, and history of the Eleventh Amendment."[75] If the Eleventh Amendment intended to maintain the states' sovereign immunity against lawsuits from their own citizens, it would say so according to Stevens. Moreover, he argues that "[l]ater adjustments to this rule . . . make clear that this expansion of state immunity is not a matter of Eleventh Amendment law at all, but rather is based on a prudential interest in federal-state comity and a concern for 'Our Federalism.'"[76] In other words, when *Hans* was decided there were practical concerns at work that had nothing to do with whether Congress really has authority to abrogate the sovereign immunity of the states. Stevens argues that the court should not try to find lasting Eleventh Amendment principles in *Hans*.

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[73] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), 14.

[74] *Union Gas*, 15.

[75] *Union Gas*, 25.

[76] *Union Gas*, 25.

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As a result of both the language used by the justices in *Union Gas* and the outcome of that case, it is clear that the plurality opinion in *Union Gas* is thoroughly inconsistent with the Court's earlier decision in *Hans*. When the justices had to decide *Seminole Tribe*, they could not possibly adhere to both cases. Rehnquist clearly disagreed with Stevens's opinion about the prudential, rather than constitutional, issues supposedly at work behind the opinion in *Hans.* Instead, Rehnquist argued that the justices on the Court that decided *Hans* presented superior evidence of the understanding of sovereign immunity when the Constitution was written and ratified. He asserted that the states, having a genuine claim to sovereign immunity, cannot be forced to give up that immunity, even when Congress is acting in an otherwise legitimate fashion under Article I. Rehnquist and the majority in *Seminole Tribe* resolved the clear conflict between *Hans* and *Union Gas* by explicitly overruling *Union Gas*.

It is important to note, as the Rehnquist Court did, that Congress may legitimately abrogate state sovereign immunity by using its powers under Section 5 of the Fourteenth Amendment. The contrast between the Fourteenth Amendment and Article I is vitally important to understanding the Rehnquist Court's reasoning on this issue. The Fourteenth Amendment explicitly takes up the issue of the responsibilities of state governments, and it commands that they perform various tasks and avoid others. Section 5 then gives Congress the authority to "enforce, by appropriate legislation, the provisions of this article." In passing the amendment, Congress clearly intended to place a burden on the states, and the amendment's authors chose not to place a restriction on the manner in which Congress could enforce the provisions of the amendment. By contrast, key individuals at the time of the founding made it clear that nothing in the Constitution

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allowed private lawsuits for money damages against the states, as both *Hans* and *Seminole Tribe* note. Nothing in Article I or Article III grants such powers against the states explicitly, and sovereign immunity is too important to allow abrogation by implication.

Rehnquist adopts much of his reasoning from the Court's opinion in *Hans v. Louisiana*. In doing so, he commits to reasoning directly from *Hans* when it comes to considering available precedents. When dealing with the Commerce Clause and Section 5 precedents, the Rehnquist Court's pro-federalism majority chose to provide a plausible link from twentieth century cases to their decisions. With its state sovereign immunity jurisprudence the Rehnquist Court very clearly repudiated the key relevant twentieth century case. Yet, the justices likely only provided this explicit denunciation of *Union Gas* because that case could not be reconciled with *Hans* in any plausible way. Here with state sovereign immunity, as they did with other issues in federalism jurisprudence, Rehnquist and his allies viewed an earlier case as superior and reasoned directly from it, circumventing more recent precedential options.

3.6 Conclusion

The Rehnquist Court's federalism decisions are often regarded as novel and out of line with precedent.[77] However, in these cases the Court simply did what it often has to do. Faced with a set of conflicting or confusing precedents from throughout the history of the United States, Rehnquist and his allies on the Court reasoned from what they thought to be the most applicable precedents that were still good law. In this case, they thought

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[77] See, for example, Noonan 2002, Fallon 2002, and Whittington 2001.

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precedents from the Court's earlier years were superior to more recent decisions. I will detail the constitutional rationale for this judgment in the next chapter.

Perhaps the Court's federalism jurisprudence drew more attention as "revolutionary" because it had been so long since the Court had restricted the authority of Congress and expanded the authority of the states. Nevertheless, this kind of determination with regard to precedent is often required of the Court across its various areas of case law. The Rehnquist Court's federalism jurisprudence represented a return, not a revolution.

These decisions returned to the Court's long-standing principle that interference in state functions must be directly authorized by the Constitution. The twentieth-century jurisprudence of the Court had largely abandoned this position. During and after the New Deal, the Court allowed Congress to regulate within the traditional purview of the states unless the states could identify a clear provision that prohibited such interference. Those decisions represented a sharp break from the traditions of the Court. The Rehnquist Court's federalism jurisprudence restored the Court's historical treatment of federal-state conflict. Rehnquist and his allies insisted that Congress must clearly relate regulations to specific constitutional provisions. Basing regulations upon inferences drawn from the Constitution is impermissible. The role of the states in our federal system is too important to be overridden by arguments that "pile inference upon inference."[78]

In addition, the standards drawn from precedent indicate the maximum level of restriction the Court was willing to impose on Congress. Generally, the decisions of the Rehnquist Court indicated that the justices were willing to allow a broader scope of

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[78] *Lopez*, 567.

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congressional power than the forbearers they cited favorably. The Commerce Clause decisions embraced the three modern categories that Congress could regulate, and these categories are broader than the definition of commerce given by Chief Justice Marshall in *Gibbons*. The Rehnquist Court's Section 5 cases relied upon the *Civil Rights Cases*, but in *Morrison* Rehnquist indicated that the Court would be willing to consider the case differently if there were evidence that the state had failed to provide a fair, legitimate justice system. This allowance went beyond the standard of the *Civil Rights Cases*, which would always forbid congressional regulation under Section 5 if such regulation did not deal directly with state actors. The Rehnquist Court's decisions in *New York* and *Printz* set the standard that Congress cannot commandeer the executive and legislative branches of state governments. But they also allowed for a broad spectrum of action under which Congress could employ the aid of these branches of state governments, as long as Congress did not reach the standard of coercion. Finally, Rehnquist and his allies embraced the interpretation of the Constitution and the Eleventh Amendment given in *Hans*, but they respected and maintained the Court's jurisprudence on abrogation of sovereign immunity under the Fourteenth Amendment.

Therefore, this jurisprudence was not activist by the historical standards of the Court. An activist court would step outside of the bounds of the judicial role, as previously understood. If anything, the Rehnquist Court's federalism jurisprudence was more deferential to Congress than the standards upon which it relied. The Court's majority in these cases embraced a role for the Court that was rooted in earlier justices' understandings of the operation of government and the appropriate sphere of action for the judiciary.

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CHAPTER 4:

THE IMPORTANCE OF THE CONSTITUTION'S STRUCTURE AND DESIGN

4.1 Understanding Federalism in the Structure of the Constitution

If we want to determine whether the Rehnquist Court's federalism jurisprudence was consistent with the structure of the Constitution, we must first understand what the Constitution has to say about the powers of the state national governments. It is, therefore, valuable to examine the debates over federalism at the Philadelphia Convention to see how the delegates treated this issue and how that treatment affected the final version of the Constitution. It is clear that the delegates explicitly rejected both purely federal and purely nationalist approaches at the Convention. The resulting compromise dramatically expanded national power, while emphatically preserved spheres of action for the states.

Sotirios Barber, in the voice of a nationalist interlocutor in the debate over federalism, argues that the Constitution represents "a revolution of one united people against their several governments and the old confederation of their governments."[1] Indeed, the Constitution was at least a revolution against the old confederation of the state governments. The Articles of Confederation had proved wholly inadequate for the needs of the people. Attempts to retain the Articles or amend them slightly were soundly

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[1] Barber, *The Fallacies of States' Rights*, 67.

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rejected at the Convention. However, this fact does not automatically lead to the conclusion proposed by Barber's nationalist interlocutor.

He argues that the national community is the "paramount community," and therefore we must "refuse to allow governments representing lesser needs to burden or veto the nation's pursuit of paramount needs."[2] But the delegates to the Convention certainly did not accept the argument that the national government could best tend to the fundamental needs of the people. In fact, they rejected multiple plans that would have invested this kind of power in Congress. Understanding the rejected plans on both ends of the spectrum helps us to understand the precise middle ground that the Constitution occupies. The supporters of the Articles and the supporters of absolute national power both lost at the Convention. The Constitution represents a different division of powers, and it is essential to understand this division when attempting to evaluate the Rehnquist Court's federalism jurisprudence according to the requirements of the Constitution itself.

Michael Zuckert provides a detailed account of the various federalism plans proposed at the Convention, helping us gain an understanding of where the Constitution is located on the federalism/nationalism spectrum. He describes the embodiments of federalism considered at the Convention, ranging from "traditional federalism," of by the Articles of Confederation, to "Hamilton federalism."[3] Two of the plans on this spectrum fall under what Zuckert classifies as "purely federal forms." Those who would maintain the Articles adhered to the idea of making minor changes to the construction of the confederation. The New Jersey Plan would have granted substantial new powers to

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[2] Barber, 57.

[3] Michael P. Zuckert, "Federalism and the Founding," *The Review of Politics* 48(2) (1986): 167.

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Congress, but it also would have retained the skeleton of the Articles, proposing "no change whatsoever in the source or mode of operation" of Congress.[4]

The Virginia Plan, drawn up by James Madison but proposed at the Convention by Governor Edmund Randolph, would have granted far more powers to the national government while retaining the federal structure. As Zuckert explains, even as "broad and important as the general government's powers would have been under the Virginia Plan, they were clearly meant to supplement state legislation which was, as a matter of course, assumed to continue being the primary kind of legislation."[5] This approach "adopts national means to federal ends."[6]

Finally, the Convention considered two "national compounds." While the more federal plans would have left the vast majority of decisions to the states, the national compounds would centralize much more of the ultimate decision-making without completely eliminating state governments. The first national compound was Madison's own plan. The key difference between this plan and the Virginia plan was Madison's proposed universal negative. The Virginia plan would have allowed Congress to veto all state laws that Congress found to be in violation of the Constitution. Madison proposed allowing Congress to veto state legislation—with no restrictions. This represented a significant increase in the power of Congress. While the states would still conduct most legislative business, Congress would have the ultimate authority through its veto power. Alexander Hamilton's federalism was a much more nationalist plan. He proposed

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[4] Zuckert, "Federalism and the Founding," 170.

[5] Zuckert, "Federalism and the Founding," 177.

[6] Zuckert, "Federalism and the Founding," 180.

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consolidating governmental powers into the national government, minimizing the role of the states, and having state governors appointed by the national governor (President).[7]

The extremes considered at the Convention stand in contrast to both the ultimate outcome in 1787 and the Rehnquist Court's federalism jurisprudence. On one end of the spectrum, the Articles of Confederation and the New Jersey Plan represented state-centered plans. The Rehnquist Court did not try to move federalism in this direction. In each area that I examine, the Court acknowledged a wide sphere of authority for the federal government. The question posed is whether and where the broad powers of Congress end. The Rehnquist Court never attempted to return to a situation that would impose broad restrictions on the power of the national government. At the same time, the Court clearly did not go toward the other extreme of Hamilton's plan or even a system of powers that would include Madison's veto over state laws. The outer bounds described in the Court's Commerce Clause jurisprudence and expanded upon in the Section 5 cases would be unthinkable under a system of consolidation such as the one proposed by Hamilton (and endorsed by Barber's nationalist interlocutor).

Instead of issuing decisions consistent with the extreme plans proposed at the Convention, the Rehnquist Court's federalism jurisprudence reflected the system that the delegates chose. We can say that this approach employs the Virginia Plan at its core, with ideas taken from Madison's own plan and Dickenson's plan.[8] The Rehnquist Court's decisions recognized a strong national government and started with the assumption that Congress did have the power to do what it was doing. This deference is typical of the

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[7] Zuckert, "Federalism and the Founding," 198.

[8] Zuckert, "Federalism and the Founding," 207-208.

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Court's approach, but it is important to note in light of other options. The general position of deferring to Congress recognizes that our federal system empowers the national government extensively. There are exceptions to national power, but those exceptions are not the rule. At the same time, the exceptions are important. States have spheres of authority and certain structural rights. Though the national government's powers are broad, they are not limitless. The Rehnquist Court's jurisprudence insists on outer bounds to congressional power and truly independent spheres of authority for the states. This approach reflects the structure proposed in the Virginia Plan, combined with parts of Madison's emphasis on the importance of a stronger national government and Dickenson's emphasis on the importance of state agency.

LaCroix, who examines American federalism by looking at its ideological origins, confirms that the Constitution's federalism represents a middle way between federation and consolidation. She argues that the meaning of federal in our system "shifted from denoting the federal union of the Anglo-Scottish debates to something more like a hybrid between a federal and an incorporating union."[9] We do not have an old style of federation because the Constitution "created a new general government with some amount of sovereignty."[10] At the same time, that new general government is not "an incorporating union in the old sense because . . . it created a new level of government rather than merging one entity into another, preexisting one."[11] The Rehnquist Court was in line with this balance when it insisted on acknowledging outer bounds to congressional power

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[9] Allison L. LaCroix, *The Ideological Origins of American Federalism* (Cambridge, Massachusetts: Harvard University Press, 2010): 217.

[10] LaCroix, 218.

[11] LaCroix, 218.

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while also noting that the Court's default orientation toward Congress must be one of deference. The justices are bound to consider carefully whether Congress is acting within its own powerful, but limited, sphere of authority.

Barber and his nationalist interlocutor are clearly mistaken regarding the nature of the Convention's treatment of federalism. They suggest that the delegates to the Convention were reacting against the poor operation of state governments and proposing that the national government be given carte blanche to pursue the needs of the people. This was, in large part, the argument that Hamilton made, and the delegates rebuffed him quickly. His plan garnered no visible support at the Convention. Similarly, the delegates rejected the arguments by those who wanted to preserve the Articles with few changes. They accepted that the Articles government was a failure, but they rejected the argument that state governments were also failures or that the general government would be better as a fully national government. The final version emerging from the Convention was a middle road, increasing national power but leaving in place large, exclusive spheres of operation for the states.

4.2 The Commerce Clause

The doctrine of outer bounds is the central point that arose out of the Rehnquist Court's Commerce Clause jurisprudence. In those cases the justices held that the presence of explicitly enumerated powers in Article I, Section 8 necessarily means that each of those powers has outer bounds. Even with the expanding influence of the Necessary and Proper Clause, Congress remains restricted to its set of specific powers. Anything beyond those powers does not fall under the purview of the federal government. An examination of the structure of the Constitution's grant of power to

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Congress and the plans considered and rejected at the Convention confirms that these powers, including the power to regulate commerce among the several states, have limits.

If he could have had his way, Hamilton would have dramatically limited the role of the state governments. He thought that the best, most "efficacious" plan would be a "national one."[12] As Zuckert notes, Hamilton "was never one of those who mistook the Virginia Plan for a simply national system."[13] As appallingly unworkable as Hamilton thought the New Jersey Plan was, he also opposed the Virginia Plan for retaining too much power in the states. He explained that the evils of federalism could be completely avoided "only by such a compleat sovereignty in the General Government as will turn all the strong principles & passions . . . on its side."[14] Any attempt to leave a portion of sovereignty in the hands of the states was dangerous, according to Hamilton.

Knowing that he would never generate support for his plan for a truly national system, Hamilton proposed a somewhat federal system, weighted heavily toward the national government. The national legislature, in particular, would have immense power. As Zuckert explains, Hamilton thought that a "division of legislative authority, a restriction of the general government to certain specified objects (or worse, powers) was an impossible provision, even in Hamilton's federal model."[15] So, the first provision of his proposed plan established a national legislature that would be the "Supreme

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[12] James Madison, *Notes of Debates in the Federal Convention of 1787* (New York: W.W. Norton & Company, 1987): 130.

[13] Zuckert, "Federalism and the Founding," 198.

[14] Madison, *Notes*, 132.

[15] Zuckert, "Federalism and the Founding," 198.

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Legislative Power," possessing the "power to pass all laws whatsoever."[16] The national legislature under this plan could simply do as it wished, subject to the veto of a governor (President) who would wield the "supreme Executive authority of the United States."[17] As a result, any "laws of the particular States contrary to the Constitution or laws of the United States" would be considered "utterly void."[18]

But the Convention resoundingly rejected this plan. In fact, the delegates ultimately did what Hamilton thought would be worst. They restricted the national legislature to powers. Article I, Section 8 explicitly lays out the powers of Congress. It also allows that body to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers." Hamilton's proposed universal authority for the national government stands in stark contrast to this outcome. Hamilton desperately wanted to ensure that the national legislature was not restricted to objects, and he thought that restricting that body to a list of powers would be disastrous. But even with the Necessary and Proper Clause, the Constitution clearly embraces what Hamilton considered calamitous. The Tenth Amendment drives this point home by explicitly saying that the "powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." Hamilton wanted a purely national system, or, if that was unachievable, at least a federal system in which the states were definitively subordinate to the national government.

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[16] Madison, *Notes*, 138.

[17] Madison, *Notes*, 138.

[18] Madison, *Notes*, 139.

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Instead, the country received and ratified a system that restricted the national legislature to a certain set of powers.

One of Barber's primary contentions against states' rights federalism is that it cannot make sense of the Constitution because it would be illogical for the Constitution to establish a government for the principal purpose of restraining it.[19] However, this view fails to take into account the fact that the Constitution did not create a national government in a vacuum. Instead, the Constitution created a national government within a federal system that was altered from the system that had existed under the Articles of Confederation. Undoubtedly, the Framers meant to increase national power. This is visible perhaps most obviously in the Supremacy Clause. But the Supremacy Clause also acknowledges the federal system in which the national government is created. Laws of the United States are supreme over state laws and state constitutions only if they are made in pursuance of the Constitution. The implication found in the Supremacy Clause is that Congress might make laws not in pursuance of the Constitution. Those laws would not be supreme.

The Constitution creates a national government within a federal system that still contains real and effective reservations of power to the states. First, it is important to note the formal inclusion of state agency in the national government. Zuckert explains that one can see elements of the system proposed by John Dickenson "in some of the state agency built into the general government, in the Senate and to a lesser extent in the electoral college."[20] This inclusion of state agency was a part of the Great Compromise. But

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[19] Barber, 36.

[20] Zuckert, "Federalism and the Founding," 208.

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Zuckert works from Dickenson's own letters and the debates of the convention to explain that, as Dickenson says, "The equal representation of each state in one branch of the legislature, was an original substantive proposition made in convention, very soon after the draft offered by Virginia."[21] The state agency of equal representation in the Senate was certainly a part of the compromise, but it did not emerge there.

Starting early in the convention, Dickenson and others insisted upon equal representation for the states, and Dickenson expressed his belief that it was "expedient" for the Senate to be "chosen by the Legislatures of the States."[22] Others saw selection of Senators in this manner as an essential matter. In any event, the Seventeenth Amendment has now done away with that provision of the Constitution. But equal representation of the states continues. It was not simply the result of compromise. Instead, the structure of the Senate was part of the system that the delegates to the Convention selected upon reasoned reflection. The inclusion of state agency in the national government is telling. The states under the Constitution are not mere electoral districts for the national government. Instead, the states are left with a real role that points toward their genuine participation in the federal system. While instituting a national government, the Convention continued to recognize states as maintaining genuine authority in the process of governance in the United States.

There was an extensive and wide-ranging debate in the Convention over which powers to include in the list of enumerated powers for Congress in Article I, Section 8. This debate is of great importance because it points to the national government being

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[21] Zuckert, "Federalism and the Founding," 199.

[22] Madison, *Notes*, 77.

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restricted to the explicit powers granted. If the delegates to the Convention had in mind broad concepts such as national security and national prosperity, as Barber suggests,[23] they did not define the powers of Congress in such a manner. Certainly, if they intended to give the national government authority over all matters related to national security and national prosperity, they could have said so. Doing so undoubtedly would have reduced the time spent debating the inclusion of particular matters within Article I, Section 8. There is no question that the delegates to the Convention aimed at the welfare and happiness of the people. Hamilton said as much when proposing his plan. He agreed with Governor Randolph from Virginia that the delegates "owed it to our Country, to do on this emergency whatever we should deem essential to its happiness."[24] Hamilton proposed a plan he thought conducive to the happiness of the people, but that plan was not adopted. Instead, the delegates to the Convention chose to enumerate the powers of Congress explicitly and not simply to reference general goals of government. The structure of the Constitution makes it clear that there are outer bounds to the enumerated powers of Congress.

The text of the Necessary and Proper Clause is also important in relation to the Court's federalism jurisprudence. Though Rehnquist and his allies did not discuss the clause at length, it is the force behind the substantial-effects test and other provisions that allow Congress to regulate activities connected to commerce. The Necessary and Proper Clause follows the enumerated powers in Article I, Section 8 and says that Congress shall have the power to "make all Laws which shall be necessary and proper for carrying into

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[23] Barber, 192.

[24] Madison, *Notes*, 130.

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Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Soon after the Constitution was ratified, a disagreement flared over the scope of this clause during debates over Hamilton's proposed national bank. Hamilton argued that necessary simply meant that the means must be useful or convenient to an end of the national government under the Constitution. Pratt explains that, from Hamilton's perspective, particular means are only forbidden "when there is an explicit restriction stated in the constitution."[25] Otherwise, Congress is free to use any means to reach its legitimate constitutional end. Madison, by this point, disagreed. He did not go as far as to adopt Jefferson's demand that the means be absolutely essential to carrying out a legitimate constitutional power. However, he did insist that Hamilton's logical path was incorrect. According to Madison, it is not legitimate to reason about the object sought by a constitutional power, then authorize any means to get to that object. Instead, as Zuckert explains, it would be appropriate "to reason down from the power granted to power not granted."[26] There must be a direct connection between the enumerated power and the means Congress wishes to employ.

Ultimately, the early Supreme Court established a broad reading of the Necessary and Proper Clause in our constitutional law. Chief Justice Marshall presented the Court's position in *McCulloch v. Maryland* (1819): "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted

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[25] Ronald L. Pratt, "Alexander Hamilton: The Separation of Powers," *Public Affairs Quarterly* 5.1 (1991), 109.

[26] Michael Zuckert, "James Madison in *The Federalist*: Elucidating 'The Particular Structure of This Government,'" in *Wiley Blackwell Companions to American History: Companion to James Madison and James Monroe*, ed. Stuart Leibiger (Malden, Massachusetts: John Wiley & Sons, 2013), 101.

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to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are Constitutional."[27] This approach persists through to the Court's jurisprudence today, and it is present in the Rehnquist Court's federalism jurisprudence. Rehnquist and his allies did not dismiss the substantial-effects test and a general understanding of a broad commerce power. In line with *McCulloch* and the Court's history regarding the Necessary and Proper Clause, they gave Congress significant deference. Still, the Rehnquist Court was unwilling to embrace the full Hamiltonian assessment involving reasoning about the objects of constitutional powers. Instead, they insisted along with Madison that congressional actions under the Necessary and Proper Clause must have a clear relationship to the specifically enumerated constitutional power.

The Constitution is meant to empower the national government, but it is also meant to restrain it. This is not contradictory because the government is meant to be limited. Instead, it is established within a federal system that the document itself recognizes. The welfare and happiness of the people are the goals pursued by the Constitution, but those who wrote the document chose to institute a federal system with spheres of authority for the national government and the states. They considered other options, including Hamilton's highly nationalist plan, but they ultimately rejected those systems. This conclusion does not mean that the system in place is necessarily the best one. I will address that question in the next chapter. However, both the structure of Article I and the knowledge of plans rejected at the Convention show us that the Rehnquist Court was correct on the question of outer bounds to the powers of Congress, including the power to regulate interstate commerce.

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[27] *McCulloch v. Maryland*, 17 U.S. 316 (1819), 421.

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4.3 Congressional Power under Section 5

The Fourteenth Amendment dramatically expanded the power of the national government at the expense of the states. Congress, in particular, gained new abilities to secure rights for citizens against the states. From the beginning, interpretation of the Fourteenth Amendment has been plagued by uncertainty. I will consider three key approaches to interpretation: (1.) the state action doctrine, (2.) the national powers doctrine, and (3.) the state failure doctrine. The state action doctrine, formalized by the Supreme Court in the *Civil Rights Cases* in 1883, holds that the Fourteenth Amendment gives Congress the authority to regulate state action under certain circumstances but does not give Congress the authority to compel private actors to observe rights protected by the Fourteenth Amendment. The state failure doctrine argues that the Fourteenth Amendment allows the federal government to step in and protect individual, constitutional rights when the states fail to do so. The doctrine of national powers goes a step further by holding that the Fourteenth Amendment grants the federal government the authority to use its powers to protect constitutional rights in the states, regardless of whether the states have such protections in place on their own terms.

Section 5 provides that the "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." The provisions that Congress has claimed to enforce come primarily in Section 1:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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The power to enforce these provisions confers upon Congress a tremendous amount of authority that it previously lacked. However, interpretation proved problematic from the start. Does Section 5 give Congress the power to ensure that these rights are protected under all circumstances? Or may Congress step in only if the states, specifically, are abridging rights?

The Supreme Court's first response to this question formed the basis for what has become known as the state action doctrine. In the *Civil Rights Cases* (1883) Justice Bradley argues that it "is State action of a particular character that is prohibited" and that "[i]ndividual invasion of individual rights is not the subject-matter of the amendment."[28] Under the logic that developed from this decision, Congress can only aim its power under Section 5 at state actors. If the state or one of its officials is in violation of Section 1, Congress may step in. However, actions by private individuals cannot run afoul of Section 1, which explicitly says that "[n]o state shall" violate the provisions of the amendment. The state action doctrine embraces a plain reading of the text. The amendment explicitly prohibits discrimination by the states, and it says nothing about private individuals. Therefore, congressional power under Section 5 of the amendment can extend only to state actors.

This conclusion was controversial from the start, with many arguing that the amendment clearly intended to grant national powers to ensure the protection of individual rights within all states, not just from the states. Dissenting in the *Civil Rights Cases*, Justice Harlan argues against the state action doctrine. He explains that these constitutional provisions were "adopted in the interest of liberty and for the purpose of

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[28] *Civil Rights Cases*, 11.

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securing, through national legislation, if need be, rights inhering in a state of freedom and belonging to American citizenship."[29] The national powers position holds that Congress clearly intended to use the Fourteenth Amendment to secure individual rights. Because much of the discrimination against African Americans was perpetrated by private actors, congressional power under Section 5 must reach to those actors. To restrict congressional power to mere regulation of state actions and official actors is to neuter the amendment. Under the state action doctrine Congress cannot actually stop discrimination altogether. It can only stop discrimination by the states themselves. This conclusion leaves individuals suffering restrictions on their freedoms, and they have no constitutional recourse.

Opponents of the state action doctrine argue that it cannot survive a simple analysis of the Fourteenth Amendment's background and purpose. Michael Zuckert explains that, when understood in "broader context," the Fourteenth Amendment implies "the assignment of custody over fundamental natural and civil rights to the government of the United States" and "the grant of plenary power to the Congress to do whatever is needed to protect rights."[30] Taken from the view of a proponent of national powers, these conclusions end the debate. Congress is to be the arbiter and protector of natural and constitutional rights under the Fourteenth Amendment. When it is pursuing the protection of these rights, Congress can take whatever action it deems necessary. The state action doctrine makes the fundamental mistake of reading the Fourteenth Amendment too narrowly, from this point of view.

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[29] *Civil Rights Cases*, 26.

[30] Michael P. Zuckert, "Completing the Constitution: The Fourteenth Amendment and Constitutional Rights," *Publius* 22.2 (1992): 80.

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Zuckert argues that the state action doctrine is inexorably linked to the view that the Fourteenth Amendment was merely intended to constitutionalize the Civil Rights Act of 1866.[31] Because the act's clear purpose was to strike down the Black Codes in the states, early supporters of the state action doctrine understood the amendment to aim at this specific goal. But the "language of the Fourteenth Amendment is much broader and more general than the provisions of the Civil Rights Act." Those who favor the national powers approach see a false link between the act and the amendment, and they argue that the broader language in the amendment aims at the active protection of constitutional rights from all threats, as opposed to narrow protection of those rights from state actors exclusively.

The third interpretation of congressional power under Section 5 is a kind of middle way, embracing the national powers approach to understanding the intent of the Fourteenth Amendment while recognizing that police powers should generally be exercised by the states. Zuckert explains that as long as "Congress wait[s] to see that there [is] a real failure by the state to do its duty" to protect individual rights, Congress may "interven[e] to provide protection" for individual rights.[32] The debates and actions surrounding the amendment make it clear that the preservation of constitutional rights is the overriding purpose of the amendment. Limiting congressional regulation to state actors dramatically limits the ability of Congress to protect and preserve these rights, in clear contrast with the liberty-protecting intent of the amendment. The state failure doctrine is a reasonable inference about the intention of the Fourteenth Amendment to

[31] Zuckert, "Completing the Constitution," 78.

[32] Zuckert, "Completing the Constitution," 87.

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protect constitutional rights for all individuals. The amendment does not give Congress the authority to provide a first line of defense of those rights. Instead, it obligates the states to use their police powers to protect individual rights. If the states fail to do so, Section 5 gives Congress the authority to step in and correct the error.

The Fourteenth Amendment represented a dramatic change in the relationship between the state governments and the national government, but it did not obliterate the foundational principles of American federalism. On the contrary, the amendment reinforced that federalist system. As Zuckert notes, the "caution and moderation" of the framers of the amendment "must be noted."[33] They "sought to complete the [existing constitutional] system by affirming constitutional protection for rights already possessed in some sense, but theretofore unprotected in the old constitution."[34] The amendment clarifies that the states have an affirmative duty to protect constitutional rights. If a state is successfully securing these rights for its citizens, the national government has no authority to intervene and impose additional requirements on individual actors. However, if the states have failed to secure constitutional rights, then they have failed to perform one of their primary duties under the Constitution as amended. In the case of such a failure, Section 5 acts as a stopgap. Congress may step in when the states fail to ensure that individuals retain and may exercise their constitutional rights.

Though the state failure doctrine is a reasonable approach that balances the text of the amendment with the clear intentions of its framers, it leaves us with a significant problem. Who will determine whether the states have failed in their duty to protect the

[33] Zuckert, "Completing the Constitution," 91.

[34] Zuckert, "Completing the Constitution," 91.

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constitutional rights of citizens? Does Congress have sole authority on that matter, or do the courts retain a right to examine and rule on the congressional determination? Under our system of judicial review, a two-step process seems unavoidable. For there to be a case or controversy for the judiciary to consider, Congress must take action. Therefore, any Section 5 dispute must start with a congressional determination that the states have failed to secure individual rights. It then becomes the duty of the judiciary to decide whether Congress is right. Congress may invoke its Section 5 power in cases of a genuine failure by the states to secure constitutional rights, but Section 5 is restricted to these circumstances.

The Rehnquist Court seemed to observe this conflict and accept a middle-way resolution. Though Rehnquist and Kennedy explicitly embraced the state action doctrine in their decisions in *Morrison* and *Boerne*, both decisions left the door open for something resembling the state failure doctrine. This is a key reason why the opinion in each case insists that the Court will not deal in hypotheticals. Understanding the Rehnquist Court's acceptance of a form of the state failure doctrine requires understanding the justices' insistence on a distinction between remedial and substantive action that "must be observed."[35] Congressional power under Section 5 is remedial. If the states are clearly failing to secure constitutional rights, Congress has the authority to take action to remedy that failure. However, if the states have not clearly failed to secure some specific constitutional right, Congress cannot take independent (substantive) action. As a result, the Court must examine the facts in an individual case to determine whether Congress has identified an instance of state failure. If it has, congressional action is

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[35] *Boerne*, 508.

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remedial and permissible. However, if there is no state failure, the Court must strike the congressional action because it makes changes to the substance of those rights, a power not permissible under Section 5.

This focus on action to remedy a state failure helps to explain the Rehnquist Court's discussion of rights in *Boerne*. The Court must ultimately judge whether a state has failed to protect the constitutional rights of individuals. A substantive expansion of rights by Congress cannot stand up to the Court's scrutiny, according to Kennedy in *Boerne*. The justices have determined how far states may go in limiting claims based on the free exercise of religion.[36] Congress may not unilaterally expand the substantive understanding of the right to the free exercise of religion. If the Court agreed that Congress was acting to remedy a failure to protect the right to free exercise, then RFRA would be constitutional under Section 5. The Court held that Congress does not have the authority to expand the rights protected by the Fourteenth Amendment. This shows that, though the Court went beyond its explicit embrace of the state action doctrine, the justices declined to proceed to the national powers approach. Congress may remedy a failure to protect constitutional rights in the states, but it may not create new rights to which individuals are entitled.

Boerne dealt with state actors, but the principles employed in Kennedy's opinion for the Court set a standard for review of congressional action intended to protect rights from harm by any actors. This point was reemphasized in *Morrison* when, even though Rehnquist explicitly employed the state action doctrine, his majority opinion considered

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[36] The Court's decision in *Employment Division v. Smith* (1990), which made this determination, was controversial in the Rehnquist Court's conservative bloc. Partially as a result of this disagreement, Justice O'Connor dissented in *Boerne*. Justices Stevens and Ginsburg joined Kennedy, Rehnquist, Scalia, and Thomas in the majority in *Boerne*.

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whether the state of Virginia had failed to protect the constitutional rights of rape victims and determined that there is no evidence to that effect. The Rehnquist Court appeared to embrace the state action doctrine in order to distance itself from the approach that would leave all protection of rights in the hands of the national government. However, the remainder of the Court's opinions with regard to Section 5 dealt with remedial versus substantive powers and, in doing so, showed the Court's broader embrace of something like the state failure doctrine.

4.4 State Sovereign Immunity

The question of state sovereign immunity also requires interpretation of an amendment that changed the structural powers of the federal government. In this case, that is the Eleventh Amendment, which prohibits federal courts from hearing lawsuits brought by citizens of one state or of a foreign country against another state. The Supreme Court interpreted its Article III powers literally in *Chisholm v. Georgia* (1793). The backlash against that decision and the quick passage of the Eleventh Amendment restricted the federal judiciary's power in cases where a state was the defendant in a suit seeking money damages. The precise scope of that power remains in question today, but we can shed light on these cases through a structural examination of Article III and the Eleventh Amendment, as well as a careful consideration of the specific reasons for the passage of that amendment.

Article III, Section 2 sets forth the jurisdiction of the federal judiciary:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies

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> between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

For the purposes of state sovereign immunity, jurisdiction over suits "between a State and Citizens of another State" and "between a State, or the Citizens thereof, and foreign States, Citizens or Subjects" are relevant. Those clauses clearly allow the states to use the federal courts to file lawsuits against citizens of other states and foreign nations. However, it is less clear whether this is a one-way street. Can those citizens then also sue the states in federal court? The text of Article III does not provide an obvious answer to this question. In both clauses, the states come first, which could potentially imply that the states can only be plaintiffs in federal courts. On the other hand, nothing in Article III says that explicitly. It names the circumstances under which parties may be subject to the jurisdiction of federal courts, but these clauses do not limit which party may file a lawsuit. Thus, the text as written appears to allow lawsuits for money damages against the states when they are filed by citizens of another state or citizens of another nation.

There are compelling reasons to think that the Constitution was not designed to force the states to be defendants in such cases. At Virginia's ratifying convention, James Madison declared that under the Constitution it "is not in the power of individuals to call any State into court."[37] John Marshall, the future Chief Justice, followed this pronouncement by saying, "I hope no gentleman will think that a state will be called at the bar of the federal court."[38] Still, the text itself does not limit the federal courts in this

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[37] Commonwealth of Virginia, *Journal of the Senate of the Commonwealth of Virginia* (Richmond: Commonwealth of Virginia, 1877), 732.

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manner. Patrick Henry replied to Madison and Marshall by, “charg[ing] that the construction claimed by the friends of the constitution, was in plain violation of its clear and undoubted language and intent.”[39] In particular, Henry pointed out that the document itself says that a federal court “shall have cognizance of all controversies between a state and citizens of another state, without discriminating between plaintiff and defendant.”[40] Henry insisted that a plain reading of the text of Article III showed that the state could be called at the bar of a federal court and that no other reading of Article III could be justified according to the text.

Chisholm quickly put this question of jurisdiction to the test. In 1792 Alexander Chisholm, a citizen of South Carolina, filed suit against the state of Georgia for failing to pay a debt from the Revolutionary War. When the Supreme Court heard the case, Georgia refused to appear. The state cited its sovereign immunity from such lawsuits, as it had not consented to the suit. In a 4-1 opinion, the Supreme Court held that Article III, Section 2 abrogated the sovereign immunity of the states and allowed citizens of other states or other nations to sue the states in federal courts.

Writing seriatim, the four justices in the majority adhered to a basic reading of the text, declining to make any assumptions about the intent behind the words. Chief Justice John Jay explains that the Court must decide how to interpret Article III based on “ordinary rules of construction,” which he says will “easily decide whether those words are to be understood in [a] limited sense.”[41] He determines that the “extension of power is

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[38] Commonwealth of Virginia, *Journal*, 732.

[39] Commonwealth of Virginia, *Journal*, 732.

[40] Commonwealth of Virginia, *Journal*, 732.

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remedial, because it is to settle controversies," and therefore the federal judiciary's jurisdiction under these circumstances is "to be construed liberally."[42]

Justice William Cushing affirms this reading of the Constitution, and he provides further explanation of the source of authority for the Court's decision. He rejects the line of reasoning that would have the Court hold that the sovereign immunity of the states cannot be abrogated because it is based in something even more foundational than the Constitution. He argues that the "point turns not upon the law or practice of *England* . . . but upon the Constitution established by the people of the *United States*."[43] A plain reading of the text is all that the Court needs to provide, as the Constitution is the fundamental law in this country—held above common law practices. Justice John Blair, Jr. sustains this reasoning in his opinion, explaining that the "Constitution of the *United States* is the only fountain from which I shall draw; the only authority to which I shall appeal."[44]

The common theme running through the opinions of the four justices in the majority is the importance of constitutional interpretation in this new nation with a written constitution. The Court cannot divert to reasoning according to the common law or looking at English practices. The United States has broken with that practice and substituted a written constitution. Common law will still be relevant in some cases, but this is not such a case. Instead, Article III of the Constitution explicitly sets out the jurisdiction of the federal judiciary, and a plain reading of the text allows states to be

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[41] *Chisholm v. Georgia*, 2 U.S. 419 (1793), 476.

[42] *Chisholm*, 476.

[43] *Chisholm*, 466.

[44] *Chisholm*, 450.

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called to the bar in those courts when they are sued by citizens of another state or another nation. While dissenting Justice James Iredell would have required "express words" or an "insurmountable implication" to abrogate state sovereign immunity,[45] the justices in the majority acknowledged the supremacy of the Constitution and the principle of interpreting the text by itself.

Despite the confidence of the Court in its decision, the backlash from the states was immediate and furious. Georgia refused to recognize the validity of the decision. Representatives introduced bills in Congress, and the eventual outcome was the Eleventh Amendment. Passed by Congress in 1794 and ratified by the states in 1795, it reads: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

This amendment overturned *Chisholm* and provided the final word on suits brought against the states by citizens of another state or nation (although debate continued on the matter of citizen-state diversity cases that also "arise under" federal law). As detailed in the previous chapter, the Eleventh Amendment was interpreted in *Hans v. Louisiana* (1890) as shedding light on the question of whether citizens can sue their own states in federal court for money damages. The Court's decision in *Hans* examined the history of sovereign immunity and the text of the Eleventh Amendment and concluded that such suits are wholly outside the jurisdiction of federal courts. Justice Bradley explains that the Court's decision in *Chisholm* "created such a shock of surprise throughout the country" that it led to the Eleventh Amendment, which expresses "the will

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[45] *Chisholm*, 450.

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of the ultimate sovereignty of the whole country, superior to all legislatures and all courts."[46] With this in mind, if the people of the United States soundly rejected the idea that citizens of other states and nations could sue a state in federal court, how could they possibly support the idea of a citizen suing his own state in federal court? This reasoning leads to Bradley's conclusion that "the cognizance of suits and actions unknown to the law and forbidden by the law was not contemplated by the Constitution when establishing the judicial power of the United States."[47] This kind of lawsuit is simply out of bounds altogether.

The Rehnquist Court's adoption of the logic from *Hans* is consistent with the structure of the Constitution, particularly as amended. The text of the original Constitution may have allowed, at least in one way of reading it, for citizens of other states and nations to file suit against the states in federal court. But the text says absolutely nothing about citizens being allowed to sue their own states. This is because such a case is outside of the jurisdiction of the federal courts. It is crucial to recall that the Constitution establishes a federal government of limited powers, as the Tenth Amendment confirms. If the document does not grant a power to the federal government, that power resides either with the states or with the people themselves.

The Constitution does not give authority to the federal judiciary to hear lawsuits filed by citizens against their own states. So, such a power is outside of the jurisdiction of the federal judiciary unless the document is amended to grant the courts such authority. The Eleventh Amendment does not need to specify that citizens cannot sue their own

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[46] *Hans*, 11.

[47] *Hans*, 15.

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states in federal courts. The text of that amendment simply rectifies the specific wording that gave rise to *Chisholm*. Apparently, the people and the states never intended to give the federal judiciary power over suits brought against the states by non-citizens. But the text of the Constitution gave the courts such authority, so the problem had to be fixed. There is no such problem in the case of citizens suing their own states. Article III never gives the federal courts jurisdiction in such cases. The Eleventh Amendment helps to confirm that design, but the text of the Eleventh Amendment is largely irrelevant to this question. The important fact is that the Constitution never grants this power in the first place.

The Rehnquist Court's federalism jurisprudence fits perfectly into this line of reasoning, but it leaves plenty of room for suits authorized under Congress's Section 5 power. The Fourteenth Amendment changed the relationship between the states and the federal government, and it clearly allows the abrogation of state sovereign immunity under particular circumstances. Beyond that, as the Rehnquist Court affirmed, the federal courts have no authority in suits brought by individuals against their own states. This rule arises from the simple fact that nothing in the Constitution ever grants such authority to the federal judiciary. Similarly, the document never allows for congressional abrogation of state sovereign immunity, except in the Fourteenth Amendment. The Eleventh Amendment fixed the undesired plain reading of the Constitution in *Chisholm*. But no amendment has been ratified to fix the equally plain reading of the Constitution in *Hans* and the Rehnquist Court's state sovereign immunity cases. Therefore, the principle of sovereign immunity from suits brought by citizens remains intact.

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4.5 Anti-Commandeering Principles

The anti-commandeering cases involved congressional attempts to exert some level of control over the legislative and executive branches of state governments. The dissenters in the key Rehnquist Court anti-commandeering cases objected to the rulings, saying that Congress had taken limited measures in support of legitimate national ends. But the structure of the Constitution and the knowledge of proposed plans at the Philadelphia Convention weaken the dissenters' arguments immensely. The legal provisions in question in *New York* and *Printz* involve the national government issuing direct orders to state legislatures and executive officials. The Constitution created a fully functioning national government, as discussed in the preceding chapter, capable of creating and executing its own laws without the involvement of the states. Moreover, delegates to the Convention considered plans that would have given Congress the power to exert direct control over the state governments. They rejected outright Hamilton's nationalist proposal, Madison's negative, and the weaker negative in the Virginia Plan. Instead, the resulting document keeps the legislative and executive branches of the states separate from the national government.

As discussed at length above, Alexander Hamilton desired a purely national system, and he proposed as a practical alternative a compound in which the national legislature would have centralized power. He considered it dangerous to restrict the national legislature to a certain set of objects, and he thought it would be even worse to restrict that body to specific powers. But the Constitution that emerged from the Convention did limit Congress to a certain set of enumerated powers. The delegates debated the proposals at length and ultimately decided that retaining significant agency in

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the states was necessary to protect individual rights from centralized power and to prevent the national government from following a tendency toward tyranny.

James Madison "was of the opinion that there was (1.) less danger of encroachment from the General Government than from the State Governments (2.) that the mischief from encroachments would be less fatal if made by the former, than if made by the latter."[48] In part because of this conviction, he proposed his own, universal negative. As Zuckert explains, the negative was designed to guard "against the potential failure of republican safety features in the extended sphere."[49] Madison did not have a great deal of confidence that the state governments would always protect the rights of the people. Unlike Hamilton, he did not think it was reasonable to centralize legislative power in the hands of the national government, either. He explained in *Federalist* No. 14 the wisdom of limiting the jurisdiction of the general government "to certain enumerated objects, which concern all the members of the republic, but which are not to be attained by the separate provisions of any."[50]

Thinking that the national government needed to have a limited purview while also possessing the power to protect individual rights from state overreach, Madison proposed the universal negative. Under his plan, Congress would have the authority to veto any legislation passed by the states. Hamilton, for his part, proposed a negative that would have been even more powerful. He would have chosen to allow the appointed state governors, discussed below, to veto state laws. This negative would have been even more

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[48] Madison, *Notes*, 164.

[49] Zuckert, "Federalism and the Founding," 196.

[50] Alexander Hamilton, James Madison, and John Jay, *The Federalist* (New York: Penguin, 1961), 97.

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powerful than Madison's because, as "each state will have a separate Governour to wield the negative," that veto "will surely be more extensively used than under Madison's plan wherein one body must exercise the negative for all the states."[51]

These facts about the rejected, more national plans at the Convention are particularly relevant to the Rehnquist Court's decision in *New York v. United States*. The take title provision of the law in question in that case required the state legislatures to institute a particular set of laws regarding the disposal of nuclear waste. If the state legislatures refused to cooperate, the national government would then have the power to force the states to take title to that waste. This provision represented a sweeping attempt to override the legislation of the particular states, and it had no basis in the document that actually emerged from the Constitutional Convention. The provision envisioned a Congress with an almost limitless purview and the ability to override the particular laws of the states. But the Congress that actually exists has neither of these powers, which were considered and explicitly rejected at the Convention. The delegates decided that state agency was important both to protecting individual rights and to limiting the potentially dangerous power of the national government.

First, Congress possesses a very limited set of powers, which are enumerated in Article I, Section 8. Issuing orders to the state legislatures is not among these powers. The Necessary and Proper Clause certainly allows a broader spectrum of authority for Congress than would exist without it. But it only expands the purview of Congress as far as is necessary to execute the enumerated powers. From the start, there has been a vigorous debate about the precise scope of the Necessary and Proper Clause. However,

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[51] Zuckert, "Federalism and the Founding," 198.

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the powers envisioned in the law in question in *New York* have no limit. The principles would allow Congress to regulate anything, up to and including the actions of the state legislature, as long as Congress certified that such action was “necessary and proper” to the pursuit of an enumerated power. This interpretation of the Necessary and Proper Clause would have the effect of doing away with the enumerated powers and replacing them with a power for Congress to do anything it thinks necessary.

The structure of the Constitution simply does not allow this. The delegates to the Convention were not unaware of the idea that Congress should have complete authority. Alexander Hamilton presented, at length, the virtues of that very idea. According to Madison’s *Notes*, this idea did not even receive a vote at the Convention. The delegates adjourned for the day after Hamilton finished his address, and they proceeded to discuss another plan on the following day.[52] The resultant Constitution reflects this rejection of Hamilton’s plan for an unlimited national legislature by enumerating the specific powers that Congress possesses and by retaining all other governmental powers in the states, as noted in the Tenth Amendment. Congress cannot claim to possess the unlimited scope of Hamilton’s legislature.

Secondly, Congress cannot veto state laws. Through the threat of the take title provision at issue in *New York*, Congress essentially claimed the power to reject state laws. Because the take title provision would impose such an onerous burden on the states, Justice O’Connor explains in her opinion for the Court, it “offers a state government no option other than that of implementing legislation enacted by Congress.”[53] This means

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[52] Madison, *Notes*, 139-140.

[53] *New York*, 177.

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that the act of Congress functionally nullifies any state law regarding the disposal of nuclear waste that is inconsistent with the options given in the federal law. In part to prevent overreach by the federal government, the delegates to the Convention explicitly rejected this kind of veto power for Congress. They considered three negatives: (1.) the limited negative of the Virginia Plan, (2.) Madison's universal congressional negative, and (3.) Hamilton's negative wielded by the state governor, who would be appointed by the national government. They rejected even the most limited form of a negative. In doing so, they created a Constitution that contains the legislatures of the state government and the national government within different spheres.

The issue in the Rehnquist Court's other key anti-commandeering case, *Printz v. United States*, was whether Congress has the authority to issue orders to officers of the executive branch in the states. Hamilton felt strongly that the national government must have this power. He proposed to make the state governor an appointed position and argued that the governor of each state should "be appointed by the General Government and [should] have a negative upon the laws about to be passed in the State" in which he is the governor.[54] Hamilton saw the state legislative and executive branches as a great threat to the long-term cohesion of the union. It would be insufficient simply to eliminate the state legislatures, as execution of the laws requires a great deal of discretion and has a substantial impact on how the people are actually ruled. Thus, the state executive must answer to the legislative body responsible for creating all the laws.

Again, the Constitution that emerged from the Convention rejects this idea. The delegates clearly had the opportunity to allow national control over state executives. They

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[54] Madison, *Notes*, 139.

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explicitly declined to include that as a feature of the Constitution. Congress does not have the authority to create all laws, and the state executive cannot be compelled to carry out congressional acts. The Constitution states that the President must "take care that the laws be faithfully executed,"[55] and it allows Congress to create officers subordinate to the President to allow for the effective execution of the laws. The Constitution does not bind state executives to enforce federal laws. Instead, it allows for the creation of a robust national executive branch under the command of the President. Congress may direct those officers to enforce the laws and set the guidelines for them to do so. The Constitution grants Congress no power to treat state executive officials in the same manner.

The structural design of the Constitution supports the anti-commandeering jurisprudence of the Rehnquist Court. This is evident, in part, from the opposing plans that the delegates at the Convention considered and rejected. It is unacceptable to say that Congress can exercise this kind of leverage over the state government as long as it is pursuing legitimate powers. From the start, it has been clear that state legislatures and executives are separate entities. The national government has its own operating mechanisms that it can use to carry out its legitimate powers. Those mechanisms were explicitly designed not to be dependent upon the states for their support, so Congress cannot claim to need to force the states to provide their services. If Congress is pursuing a legitimate power, it may use its own executive officials and directly regulate the people. The Constitution gives these tools to the national government to rectify an error under the Articles of Confederation, when state governments had the power to paralyze the national

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[55] *Constitution of the United States*, Article II, Section 3.

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government by refusing to cooperate. Under the Constitution, then, Congress cannot claim to need to control state legislatures and executive officials.

4.6 Conclusion

The Rehnquist Court's federalism jurisprudence was deeply rooted in the structure and design of the Constitution. Article I limits Congress to a set of enumerated powers. The delegates to the Convention considered a plan that would give Congress supreme legislative power, as well as plans that included a congressional negative over state laws. The discrepancy between the final document and these proposals emphasizes the decision made at the Convention to restrict the powers of Congress. The Rehnquist Court's outer bounds doctrine for Commerce Clause cases and its refusal to allow the commandeering of state legislatures and executive branches was consistent with the structure of the Constitution and the evidence of the design that gave rise to that structure. The Court's Section 5 jurisprudence explicitly endorsed the state action doctrine, which likely falls short of the intent behind the Fourteenth Amendment. However, the justices provided an extensive discussion of remedial versus substantive powers and a consideration in *Morrison* of whether Virginia had failed to provide an appropriate system of justice. These facts lead to the conclusion that the Rehnquist Court's actions endorsed some form of the state failure doctrine. Finally, the Court's state sovereign immunity cases rejected the idea that Congress can abrogate state sovereign immunity under its Article I powers. The grant of jurisdiction to the federal courts in Article III, Section 2 is very specific. It says nothing about allowing lawsuits brought against a citizens' own state, so the federal judiciary does not have authority over such cases.

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In each section of the Rehnquist Court's federalism jurisprudence, the justices showed an understanding of how the Constitution is structured and how it was designed. The textual and theoretical support for their decision again undermines charges of novelty and activism. Rehnquist and his allies did not undertake a new endeavor in these cases. Instead, they employed arguments consistent with the structure and design of the Constitution as amended.

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CHAPTER 5:

THE REVOLUTION'S THEORETICAL FOUNDATIONS

5.1 The Importance of Theory

Having established that the Rehnquist Court's federalism jurisprudence is grounded in the structure and design of the Constitution, as well as the precedents of the Supreme Court, I now turn to the crucial normative questions. First, what ought to be the role of judicial review when it comes to federalism? The place of the Court in establishing the boundaries between state and national power is not clear. Second, is there any value in maintaining the constitutional structure of authority? Again, the Constitution divides authority between Congress and the states, but the Constitution was written more than two centuries ago and contains a few amendments that relate to questions of federalism. It is valid to ask if ignoring the established structure would better serve the people. This inquiry leads naturally to the final question: what good are the Rehnquist Court's federalism decisions doing for us? Precedent and structure are satisfying from a legal perspective, but we ought to strive for a system of government that is demonstrably positive.

To examine these issues, it is essential to turn to the history of political thought. Some works, such as the *Federalist* and the corresponding anti-federalist objections, deal explicitly with our Constitution. But other thinkers, both before and after 1787, address us in more general terms. Aside from the *Federalist*, Rehnquist and his allies do not

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explicitly invoke political theory in support of their reasoning. However, their decisions are built upon a theoretical foundation composed of other thinkers. In particular, these decisions lean on the reasoning and arguments found in Locke, Montesquieu, and Tocqueville. These thinkers' approaches to liberty and the separation of powers prove critical to understanding whether the Rehnquist Court's federalism jurisprudence can actually have a demonstrably positive impact.

5.2 Judicial Review in Federalism Cases

Accusations of activism swirl around the Rehnquist Court's federalism jurisprudence.[1] These claims rely on a theoretical foundation that insists that the Court should not involve itself with congressional interpretation of the Constitution's federalism principles. In *Garcia v. San Antonio Metropolitan Transit Authority* (1985), the Court determined that states' rights under the Constitution amount only to their representation in Congress. Writing for the majority, Justice Blackmun argued that "the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through state participation in federal governmental action."[2] Rehnquist, then an Associate Justice, dissented vigorously. But the Court's majority opinion insisted that the judiciary should stay out of disputes between Congress and the states. In the Garcia view, judicial review has no place in federalism cases because the Constitution contains no formal limits on congressional power vis-à-vis the states. If, as I have argued, the structure and design of

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[1] See, most prominently, Noonan 2002, as well as my discussion of this criticism in the preceding chapters.

[2] *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), 556.

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the Constitution impose restrictions on congressional power, then Rehnquist and his allies can summon formidable theoretical arguments in support of their use of judicial review in these cases.

The Constitution vests a robust and extensive power of review in the Supreme Court. In a well-known passage from *Federalist* No. 47, Publius writes that the "accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny."[3] The separation of powers is vital to free government. This requires an independent judiciary, for which the Constitution provides, and judicial review is an integral part of the independent judiciary. In No. 82, Publius observes that though the Constitution does not directly say that the Supreme Court will have the final word on constitutional interpretation, this principle is deducible "from the general theory of a limited Constitution."[4] The Constitution says that the Court will resolve questions of law, and it is necessary in the "standard of construction for the laws" that "laws ought to give place to the Constitution."[5] The Supreme Court will ultimately determine what the law is, and the Constitution is the supreme law of the land. As Publius explains, the "courts of justices are to be considered as the bulwarks of a limited Constitution against legislative encroachments."[6]

Though this arrangement for judicial review was not formally referenced in our constitutional law until *Marbury v. Madison* (1803), it was certainly not a secret at the time of ratification. Even some critics of the Constitution agreed that the Supreme Court

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[3] *Federalist*, 298.

[4] *Federalist*, 482.

[5] *Federalist*, 481.

[6] *Federalist*, 468.

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would possess this power. Anti-Federalist Brutus complained that the judgments of the Supreme Court "are final and irreversible, for there is no court above them to which appeals can lie, either in error or on the merits."[7] The document was designed to place the judiciary, and ultimately the Supreme Court, in a position to check the legislature by determining whether legislation is consistent with the Constitution.

Federalism does not present a unique case that allows an exception to this rule. The *Garcia* Court would have the justices step back in federal-state disputes, leaving the determination of boundaries to Congress. But the Court is vested with the final say on how to interpret provisions of the Constitution in order to determine whether laws are consistent with that supreme law. The justices have the same responsibility in federalism cases that they do in civil-rights cases. In fact, the Court's authority in these structural cases is crucial to the operation of the government under the Constitution. As Publius argues in No. 51, the "great security against a gradual concentration of the several powers in the same department consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others."[8] The Court must actively participate in examining laws of Congress and defining the boundaries of constitutional provisions. The parchment barriers of the Constitution require attention and enforcement through the full engagement of all three branches in interpreting and applying the Constitution.

Examining the American system of government, Tocqueville observes that in "the United States the constitution dominates the legislators as well as ordinary citizens. It is,

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[7] Michael P. Zuckert and Derek A. Webb, eds., *The Anti-Federalist Writings of the Melancton Smith Circle* (Indianapolis: Liberty Fund, 2009), 259.

[8] *Federalist*, 318-319.

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therefore, the highest law and cannot be modified by a law. So it is right that the courts obey the constitution in preference to all laws."[9] In this manner, liberty is preserved and tyranny forestalled because the legislature cannot seize all power. The judiciary remains free to refuse to enforce a law that is inconsistent with the Constitution. Tocqueville praises the stability of this arrangement in observing that the "Americans have given their courts an immense political power; but by forcing them to challenge laws only by judicial means, they have greatly diminished the dangers of this power."[10] Our system will not tolerate assaults on the laws by non-judicial means. As became evident during the nullification crisis, neither the states nor individual parties can override or unilaterally ignore federal law. Tocqueville argues that judicial review in America is "most favorable to public order" and "most favorable to liberty as well."[11] The process of judicial review provides stability and helps to secure the liberty of the people by ensuring that there is a defined and unitary path for challenges to Acts of Congress. Not only does the Supreme Court have the power to review such laws, it has the responsibility to act as the arbiter for the sake of preserving the Constitution itself.

John Rawls affirms the indispensable nature of judicial review in both *A Theory of Justice* and *Political Liberalism*. He argues that judicial review provides "one of the institutional devices to protect higher law," and its role is "to prevent that law from being eroded by the legislation of transient majorities, or more likely, by organized and well-

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[9] Alexis de Tocqueville, *Democracy in America*, ed. Eduardo Nolla, trans. James T. Schleifer (Indianapolis: Liberty Fund, 2010), 173.

[10] Tocqueville, *Democracy in America*, 174.

[11] Tocqueville, *Democracy in America*, 174.

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situated narrow interests skilled at getting their way."[12] The *Garcia* Court's approach of deferring to the representative process is insufficient by this argument. The people's representatives can overstep their bounds in the area of federalism as much as in any other area. The Court's job is, in part, to secure higher law against encroachment from the legislature.

This examination of the principles and goods of judicial review is essential because the Rehnquist Court's critics have argued that the Court should not actively involve itself in cases that present a conflict between Congress and the states. This approach is impermissible because it is inconsistent with an invaluable constitutional mechanism that is in place to secure the liberty of the people. Congress has far-reaching powers, but it is limited by the Constitution to specifically enumerated powers. The Tenth Amendment confirms that lawmaking authority neither granted to Congress nor prohibited to the states is reserved to the states. The justices cannot simply say that an issue is of national concern or that a law was passed in accordance with the representative process. Instead, they have a responsibility to examine a challenged law in light of the principles of the Constitution. This responsibility certainly does not mean that a majority of the justices will always come down on the side of the Rehnquist Court's federalism jurisprudence. But it does mean that Rehnquist and his allies have the stronger position in this critical argument over the Court's role in federalism cases.

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[12] John Rawls, *Political Liberalism* (New York: Columbia University Press, 1996), 233.

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5.3 The Relevance of Maintaining the Constitutional Structure

The constitutional provisions that the Court must interpret in federalism cases relate to the division of authority between the federal and state governments. The Rehnquist Court's opinions insist on enforcing outer bounds to congressional power. The process of drawing the boundaries helps to secure liberty for citizens, as can be seen in a closer examination of how governments preserve and support liberty. The Rehnquist Court's federalism decisions tie into the works of Locke and Montesquieu. They also gain support from the *Federalist* and Tocqueville's writings. Ultimately, Rehnquist and his allies were not on theoretically novel ground at all. The principles behind their decisions were rooted in some of the seminal works of political theory. Their insistence on enforcing the existing constitutional structure provided stability and security, allowing citizens to enjoy their personal liberties.

5.3.1 Locke

The Rehnquist Court steadfastly denied that national power can expand simply because congressional power naturally evolves or states voluntarily cede some authority under our modern system of government. Rehnquist and his allies insisted that it was their responsibility to maintain the constitutional arrangement of authority, unless and until the Constitution is amended. In doing so, they made an argument that was consistent with John Locke's understanding of the limits on legislative power and the importance of respecting the structure of government established by the people.

In his *Second Treatise,* Locke argues that the legislative branch "*cannot transfer the Power of Making Laws* to any other hands."[13] The creation of law must lie with the

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legislature because that authority to make laws is "a delegated Power from the People."[14] The legislature, having received this power from the people, "cannot pass it over to others."[15] In other words, there can be no secondary delegation of this authority. Only the people themselves have the authority to change the structure and assignment of legislative power.

One might object that Locke's arguments on legislative power do not apply to apply to the division of power in a federal system. After all, Congress is a legislative branch, making laws in accordance with its authority as granted by the people in the Constitution. Can Locke's points really be used to distinguish between Congress and the state legislatures? His further exposition on the topic helps to put this question to rest. He explains that "when the People have said, We will submit to rules and be govern'd by *Laws* made by such Men, and in such Forms, no Body else can say other Men shall make *Laws* for them."[16] Going even further, he argues that the people cannot "be bound by any *Laws* but such as are Enacted by those, whom they have Chosen, and Authorised to make *Laws* for them."[17]

These principles apply to a division of power between multiple levels of government, in addition to the separation of powers on the same level. As I established in the preceding chapter, the design and structure of the Constitution make it plain that power is to be divided between the constitutionally created national government and the

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[13] John Locke, *Two Treatises of Government* (New York: Cambridge University Press, 1960), 362.

[14] Locke, *Two Treatises*, 362.

[15] Locke, *Two Treatises*, 362.

[16] Locke, *Two Treatises*, 362-363.

[17] Locke, *Two Treatises*, 363.

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state governments. The Constitution did not spring into existence by divine providence and become binding on the people of the United States. Instead, the people of the several states elected delegates to ratifying conventions in their own states. The delegates expressed the will of the people in these conventions and eventually approved the new Constitution. Thus, the structural provisions and delegation of power in the Constitution are binding unless the people approve a change. This is a crucial matter of sovereignty. No one may give away or change powers under the Constitution because that document expresses the will of the people as to how they will be governed.

The issue of changing the delegation of powers appears in all of the Rehnquist Court's federalism cases, but *New York v. United States* (1992) provides the clearest view of the arguments on this front. In his dissent in *New York*, Justice White explains that his "disagreement with the Court's analysis begins at the basic descriptive level of how the legislation . . . came to be enacted."[18] He argues that the Court's version of events would have you "think that Congress was the sole proponent of a solution to the Nation's low-level radioactive waste problem."[19] But he contends, "Not so. The … Act resulted from the efforts of state leaders to achieve a state-based set of remedies to the waste problem. They sought not federal pre-emption or intervention, but rather congressional sanction of interstate compromises they had reached."[20]

The problem that emerges with White's reasoning, particularly in relation to the take-title provision that was at issue in the case, is that even state governments cannot

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[18] *New York*, 189.

[19] *New York*, 189.

[20] *New York*, 189-90.

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agree to give some of their power to the national government. The fact that some state governments, including New York's government, requested and helped to create the law has no bearing on this matter. Neither the New York legislature nor its governor had the power to give away lawmaking authority that resided in the state legislature. The people of the several states established the division of power between the state governments and the national government. Only the people of the several states have the authority to change that delegation. Justice O'Connor's opinion for the Court in *New York* builds on this principle. She argues that the "Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities."[21] Instead, the Constitution "divides authority between federal and state governments for the protection of individuals."[22] To change who holds legislative authority over a particular matter is effectively to change how (or whether) the government protects the people. Neither Congress nor the state governments have the authority to make that decision. The people themselves must decide such a fundamental matter.

Locke's restrictions on who may create laws are part of his broader understanding of liberty in society. Earlier in the *Second Treatise*, Locke asserts that the "*Liberty of Man, in Society,* is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or restraint of any Law, but what the Legislative shall enact, according to the Trust put in it."[23] The question of who holds authority is important. Locke observes that confining authority to

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[21] *New York*, 181.

[22] *New York*, 181.

[23] Locke, *Two Treatises*, 283.

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designated spheres is critical to securing the liberty of the people. If the people do not know who can make a law or if they can be subjected to laws that are not passed through constitutional means, then they do not truly possess liberty. Instead, they live at the mercy of those with power. Our constitutional structure is designed to prevent this from happening, through both the separation of powers at the national level and the federal system that creates a vertical separation of powers.

One might object to this line of reasoning between Locke and the Rehnquist Court by pointing out that we are centuries removed from the populace that approved the existing division of powers. Should these structural provisions of the Constitution be mutable given the fact that our nation and its population have changed? The immediate, most important response to this question is outlined in the preceding paragraphs. If the boundaries are shifting and the people do not know who possesses lawmaking authority, then liberty and just government are in danger.

In addition, the design in a federal system serves dissenters in a way that a centralized system never can. As Levy explains, federalism allows for "the *possibility* of exit and jurisdictional choice" because in such a system "it is legally permissible and possible to exit one intermediate group and join another."[24] Short of garnering support for a constitutional amendment or leaving the country, those who object to particular policies may simply move to another state with more agreeable policies. Centralization of power is advantageous for one's political purposes if one agrees with the policies of the central government. However, if one does not, he has limited choices for addressing his concerns. In a federal system, many more options are open to individuals. In our specific

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[24] Jacob T. Levy, "Federalism, Liberalism, and the Separation of Loyalties," *American Political Science Review* 101.3 (2007): 474.

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system, the central government wields a great deal of authority. But the states retain significant powers, as well. This arrangement dramatically increases the chances of finding a situation more agreeable to one's principles and political choices. An individual is not bound to be always in the minority. He may seek out a state with others who agree more with him.

This crucial aspect of federalism, which encourages citizens to vote with their feet by choosing a different state, underscores the importance of maintaining the constitutional structure. An individual's support for centralization is likely to wax and wane depending upon whether he is in the majority or the minority on a particular issue. The federal structure removes this aspect of happenstance from the life of the individual. He is not purely at the whim of the majority within the nation. Much decision-making occurs at the state level, and individuals can move to another state without leaving the country. Kreimer explains that the Court's federalism cases impose limits that "not only preserve the possibility of exit and sanctuary" but also "respond to the underlying argument for devolution that 'the Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens.'"[25] Thus, the Rehnquist Court's decisions serve individual choice and freedom of movement. Limiting the sphere of congressional authority and maintaining the existing constitutional structure is more than a nod to history. It is an acknowledgment of the goods that our system pursues and the importance of the citizens' choices in their governments.

The Rehnquist Court's decisions stand largely on the strength of Locke's doctrines on liberty and structural arrangements. In acknowledging in *United States v.*

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[25] Seth F. Kreimer, "Federalism and Freedom," *Annals of the American Academy of Political and Social Science* 574 (2001): 77.

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Lopez (1995) that drawing the lines between congressional and state power is a difficult task, Rehnquist insisted that any "benefit from eliminating this 'legal uncertainty' would be at the expense of the Constitution's system of enumerated powers."[26] To obliterate the system of enumerated powers is to reject explicitly the only governmental structure approved by the people. As Baker explains, Locke's relevance to federalism largely arises out of the importance of respecting and upholding the covenant that binds both the people and the government.[27] In our system, then, the duty of the Supreme Court is to the Constitution, and the Constitution can only be changed through the specified amendment process. The justices are not free to discard portions of the Constitution at will; to do so is to trample on the liberty of the people.

5.3.2 Montesquieu

In the *Spirit of the Laws* Montesquieu echoes Locke's emphasis on structural stability and the separation of powers, and he incorporates a more personal assessment in his definition of liberty. In his chapter on the constitution of England, Montesquieu defines "political liberty in the citizen" as "that tranquility of spirit which comes from the opinion each one has of his security."[28] He proceeds to insist upon the separation of powers as a condition of liberty. Montesquieu observes that if the power of judging "were joined to legislative power, the power over the life and liberty of the citizens would be

[26] *Lopez*, 566.

[27] J. Wayne Baker, "Faces of Federalism: From Bullinger to Jefferson," *Publius* 30.4 (2000): 39.

[28] Montesquieu, *The Spirit of the Laws*, eds. Anne M. Cohler, Basia C. Miller, and Harold S. Stone (New York: Cambridge University Press, 1989), 157.

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arbitrary."[29] He has in mind legislators sitting in judgment in individual cases, a topic that has no particular relevance to the Rehnquist Court's federalism jurisprudence. But the point he makes emphasizes the importance of the Court's insistence on closely examining congressional acts. If the Court were simply to rubber-stamp acts of Congress, this same problem would emerge. Punishments and restrictions could be applied to citizens in a manner inconsistent with the Constitution. A defense of the structural arrangement of the separation of powers is essential to this definition of liberty.

This point that Montesquieu shares with Locke does not complete his definition of liberty. Montesquieu's definition adds something new: a personal component through which the citizen has "tranquility of spirit" and a positive opinion of his own security. This addition makes sense. It is difficult for anyone truly to enjoy liberty if he thinks that his person or his freedom is at risk. This requirement helps to illuminate the necessity of stable government functions. No citizen can have a positive opinion of his own security if he does not know who can make laws to govern him. The Rehnquist Court's decision in *Lopez* emphasizes this point. The Gun Free School Zones Act regulated individual action, and it overlapped substantially with the traditional spheres of authority for state governments. When someone plans an action, he should know who has the power to proscribe that action. Uncertainty about governmental authority necessarily means that a citizen cannot have a positive opinion of his own security.

For the purposes of Montesquieu's definition of the political liberty of the citizen, it is no comfort to point out that carrying a gun in a school is a nefarious act. A closer examination of the Gun Free School Zones Act illustrates how congressional overreach

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[29] Montesquieu, 157.

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can lead to dangerous confusion even for well-intentioned citizens. Alfonso Lopez, Jr., the respondent in *United States v. Lopez*, carried a gun into his high school.[30] This was an action that violated Texas law and federal law. He was initially charged in state court. But shortly thereafter the state charges were dropped, and he was charged in federal court. It is hard to muster much sympathy for Lopez. Not only did he take the gun with him to school, he apparently intended to sell it on the premises. His prosecution does not seem like an unacceptable imposition on his liberty. Instead, it seems like a reasonable consequence of a clearly illegal action.

However, application of the Gun Free School Zones Act would not always be so straightforward. The law prohibited the possession of a firearm in a school zone. It defined a school zone as:

> (A) in, or on the grounds of a public, parochial or private school; or
> (B) within a distance of 1,000 feet from the grounds of a public, parochial or private school[31]

Some states define a school zone using a distance of less than 1,000 feet. So, an individual could be in compliance with a state law prohibiting possession of a gun in a school zone while simultaneously being in violation of the federal prohibition. When the federal government inserts itself into an area outside of its enumerated powers, even law-abiding citizens cannot be certain which laws apply to them and under what circumstances.

This uncertainty cuts directly against Montesquieu's definition of political liberty in a citizen. No one can feel secure if he does not know which government has the

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[30] *Lopez*, 551.

[31] 18 U.S.C. § 921(a)(25)

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authority to alter or prohibit his activity. While Lopez himself was clearly a criminal, it is easy to imagine a situation where a law-abiding citizen could find himself in violation of the Gun Free School Zones Act even if he had gone to lengths to comply with the relevant state law. As the Rehnquist Court determined, this kind of law does not fall within the enumerated powers of the federal government. In such an area the citizen should only have to concern himself with complying with state law. Congressional overreach inserts confusion and instability in the life of the public. Another definition of liberty that Montesquieu provides in Book XI helps to bring this concept into focus. In Chapter Three he argues that liberty "is the right to do everything the laws permit."[32] If a citizen does not know which lawmaking body can constitutionally restrict his action, he cannot possibly know what the laws truly permit.

One may object that the solution to this dilemma is simple: the federal government rules supreme in all areas. This is, indeed, a simple answer. It also has disastrous consequences for the concept of a written constitution and the rule of law. If the federal government is free to preempt the states and control laws and regulations in all areas, then state governments are fully subordinate. Even if this were a better system of government, it is not the structure laid out in our Constitution. That document, the supreme law of the land, clearly establishes the powers of the national government and reserves the remaining authority to the states. It is simple to allow Congress to take over in every area. But doing so sacrifices the idea that we have a written constitution that rules the land. In place of this written constitution we would have congressional rule checked only by the President's veto. The veto is an important check on the power of

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[32] Montesquieu, 155.

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Congress, but it is certainly not sufficient as a sole check. The vertical separation of powers found in our federal system checks both Congress and the state legislatures. Eliminating that safety mechanism destroys the stability of the law and the confidence of the people that the Constitution rules all.

Some see the Rehnquist Court's arguments as contrary to the liberty of the people. Wolfe writes that maintaining the Rehnquist Court's vision of our system of government requires "the maintenance of a specifically constitutional or political federalism, rather than administrative pluralism or a voluntary cession of jurisdictions to the states by the federal government."[33] Moreover, he argues that such a system "would also require state police power to deal with safety, health, welfare, and morals, even at the expense of individual liberty."[34] This line of reasoning has two key problems. First, it fails to take account of multiple protections of individual liberty in the Constitution and in the Rehnquist Court's jurisprudence. Maintaining our federal system does not simply require us to allow the states to do what they want, even if it harms the citizens and their liberty. The Constitution vests immense power in the national government. In particular, the courts are constantly hearing cases that arise out of the states and dealing with state abuses of power against individual rights. The Rehnquist Court left that system and the concept of congressional correction of state failures in place.[35] Its work to bound congressional power protects citizens against congressional overreach without

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[33] Christopher Wolfe, "The Confederate Republic in Montesquieu," *Polity* 9.4 (1977): 445.

[34] Wolfe, 445.

[35] See my discussion of the Rehnquist Court's consistency with the state-failure doctrine in Chapter Four.

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eliminating the existing, extensive national protections against abuses of liberty in the states.

Secondly, Wolfe's argument denies the value of constitutionally established intermediary institutions. The stability of the government and, by extension, the protection of the liberty of the people can be supported by a constitutional structure that contains layers of authority. A further analysis of Montesquieu's work shows the value that intermediary institutions hold. Though Montesquieu's enthusiasm and respect for the English system of government are evident, this does not imply an endorsement of the English system as appropriate for all times and all peoples. In fact, in the *Spirit of the Laws*, Montesquieu explores a variety of conditions and situations that affect the formation of an effective, stable government in nations. On this note, Ward observes that "while Montesquieu praises the English judiciary and regional representation in the lower house as the preservation of some aspects of the Gothic original, he mourns the loss in England and France of the intermediary regional institutions."[36] When describing the advantages of monarchical government over despotic government, Montesquieu explains that it is in the nature of monarchy "to have under the prince several orders dependent on the constitution."[37] This arrangement leads to a state that is "more fixed," a constitution that is "more unshakeable, and the persons of those who govern more assured."[38] A properly organized monarchy is stable and assured, in part, due to its intermediary

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[36] Lee Ward, "Montesquieu on Federalism and Anglo-Gothic Constitutionalism," *Publius* 37.4 (2007): 552.

[37] Montesquieu, 57.

[38] Montesquieu, 57.

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institutions. The constitution of such a nation establishes layers of government that help to secure the constitution itself and a stable government for the nation.

As Ward explains, these “subordinate, intermediary institutions comprise the constitution along with the sovereign power.”[39] Layers of government join with the monarchical fixed and established laws in a true monarchy to protect the constitution and the people. Though the English system is admirable in a great deal of respects, it does not have this kind of protection. After all, in England “the constitution is for all intents and purposes indistinguishable from parliamentary rule.”[40] There is no legitimate check on the powers of parliament. This fact has serious potential consequences for constitutional stability that persist in the United Kingdom’s system to this day. Parliament can change the substance of the constitution at any time because their constitution establishes parliamentary sovereignty over all else.

Centuries later, the Scots and the Welsh are objecting to this system and insisting that Parliament must cede control over some matters. They do not wish to be dependent upon Parliament’s largesse. A simple bill decentralizing some powers is not good enough. Instead, they have insisted that this decentralization be treated as a part of the UK’s constitution. Recently, the English have joined in the movement, insisting that only English Members of Parliament be allowed to vote on issues that affect England alone.[41] This swelling movement in the UK recognizes what Montesquieu already observed.

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[39] Ward, 558.

[40] Ward, 559.

[41] I discuss these proposals from the United Kingdom in more detail in Chapter Six.

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Complete centralization of power in one institution is dangerous to the constitution and to the liberty of the people.

Thus, Montesquieu's observations about the importance of intermediary institutions clearly have import outside of monarchies in his era. The tendency of centralization to push a monarchy toward despotism portends the same risks in our system of government. It is important to have a central authority. Our own experience, in addition to political theory, confirms that a fully decentralized federation is not fit to the task of governing a large territory and defending it. However, serious risks exist at the other extreme, as well. Having too much power at the national level crushes the protections provided by intermediary institutions. In addition, centralization shreds the federal arrangement laid out in the Constitution. That structure is more than an arrangement of parchment barriers. Montesquieu confirms the importance of stability in a nation's constitution. It is essential to know who has power and to ensure that appropriate checks are in place. Again, a decision about whether to maintain the constitutional structure is very significant to the citizens of a nation. To abandon that structure is abandon the central source of stability that the nation knows.

These arguments from Montesquieu make it essential for us to understand the scope and purpose of the Rehnquist Court's federalism jurisprudence. As I have established, Rehnquist and his allies did not forge a new jurisprudential path. Instead, they explicitly sought to secure the existing constitutional structure against encroachments by Congress. A common objection to this jurisprudence holds that the justices were activist because they "departed from precedent."[42] But the tendency of

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[42] Noonan, *Narrowing the Nation's Power*, 119.

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those precedents to centralize power in the face of constitutional provisions to the contrary belies this interpretation. Rehnquist and his allies undertook an effort that finds strong support from Montesquieu as they worked to maintain the existing Constitution and provide stability in the treatment of congressional power. The state governments play a valuable role in our system as intermediary institutions, and respect for our Constitution entails respect for their spheres of authority.

Montesquieu emphasizes many of the same concepts as Locke, but his addition of the personal component to the definition of liberty helps to bring relevant aspects of the Rehnquist Court's federalism jurisprudence into focus. Drawing the lines is often a difficult task, but it is a crucial one in our federal system if Montesquieu's definition of liberty is valid. A pure insistence on state power does not serve the liberty of the people. Federalism has its weaknesses, and the Rehnquist Court never claimed otherwise. Unchecked power in the hands of the states can harm individuals, as can unchecked power in the hands of a centralized government. As McGinnis notes, the "Rehnquist Court's jurisprudence does not favor [mediating institutions] simplistically in every case," instead "recalibrating the balance between national and state government . . . in light of experience . . . and moving the balance closer to that envisioned by the original Constitution."[43]

The Constitution, as amended, recognizes the risks of too much centralization and too much decentralization. It carves out a path between these extremes, insisting that most powers are reserved to the states but giving the federal government absolute,

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[43] John O. McGinnis, "Reviving Tocqueville's America: The Rehnquist Court's Jurisprudence of Social Discovery," *California Law Review* 90.2 (2002): 507.

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unassailable authority in its spheres of action. The Rehnquist Court's efforts to uphold this balance are not attempts to retain a bygone past. Instead, they are positive efforts to keep government in the United States from going to either of these two extremes. Maintaining the structural provisions of the Constitution respects the people as the ultimate sovereign and provides stability and confidence in our governmental institutions.

5.4 The Benefits of Federalism

These conclusions regarding judicial review and the preservation of constitutional structure bring us, finally, to a consideration of whether the principles espoused by Rehnquist and his allies actually do the people any good. If an argument is legally defensible but theoretically unsound, its force is weakened. Again, Justice O'Connor insisted that the Constitution "divides authority between federal and state governments for the protection of individuals."[44] Thus, it is valuable to consider how this division of authority secures liberty for the people. Alexis de Tocqueville's work in *Democracy in America* provides an excellent lens through which we may view competing goods for the people and their places in our federal system.

5.4.1 Critics

First it is important to consider those who argue that this jurisprudence is not theoretically defensible. Sotirios Barber's work presents a prime example. His Marshallian federalism takes the axiom that the powers of the national government are limited to mean that "though the ends of the national government are few, they are the controlling elements of the people's happiness, and as long as Congress pursues them in

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[44] *New York*, 181.

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good faith, it can disregard the reserved powers of the states."[45] He concludes that the ends of the national government are national security and national prosperity and that these ends can be deduced from the structure of the Constitution and the preamble. The term "national defense" is not used anywhere in the Constitution, but it is clear that the various enumerated powers add up to total congressional control over this area. Barber explains, "Marshall concludes that Congress can govern 'all the [nation's] external relations,' and, in tune with Marshall's reasoning about national security, others deduced that Congress" could undertake such actions as establishing military academies.[46] Barber argues that the enumerated powers relating to internal affairs must use the same logic. He asserts that the enumerated powers, taken in the aggregate with regard to internal affairs, add up to the end of national prosperity. While acknowledging that Marshall never went this far, Barber argues that the "dominant thrust" of Marshall's argument in *McCulloch* points to this conclusion and that the end of national prosperity is the natural conclusion from that decision.[47]

Barber directly addresses the claim that states' rights federalism, which he identifies with the Rehnquist Court, secures the blessings of liberty more effectively for citizens. He argues that this approach to defending states' rights federalism necessarily falls apart. In particular, he says that from "the nation's beginning a principal impetus for the advance of national power at the states' expense has been the vindication of personal rights against the abuses of the state governments."[48] Liberty must mean the same thing

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[45] Barber, *Fallacies of States' Rights*, 44.

[46] Barber, 56.

[47] Barber, 60.

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across the entire nation. Certainly, there will be different conceptions of liberty, but ultimately, true liberty is one thing for everyone. Because liberty is universal in this way, it makes no sense that reserving powers to the states will enhance liberty. Liberty must be the same thing for all, so Barber argues it is inherently a national concern to be addressed by the national government.

From this perspective, insistence upon outer bounds to congressional power is antithetical to the good of the people. This is true even if such a decision is consistent with precedent and the structure of the Constitution, which Barber is obviously not willing to concede. In relation to the Court's jurisprudence specifically, Barber picks up and develops some arguments from Garcia, insisting that the Rehnquist Court abused its power in its federalism decisions. He argues that it is "dishonest to pretend that there can be a reason—textual, moral, or whatever—for disabling national authority from addressing any problem that confronts the nation as a whole."[49] This theory posits that Congress must have the authority to confront any problem of national importance by using its national power.

Indeed, the Supreme Court adopted a political theory of centralization in the decades prior to the Rehnquist era. McGinnis explains that "implicit in the Warren Court's, and in much of the Burger Court's, jurisprudence was a coherent political theory of social reform through centralized democracy."[50] Barber highlights the *Garcia* Court, and it is valuable to note that *Garcia* was not an anomaly for the pre-Rehnquist Court.

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[48] Barber, 98.

[49] Barber, 163.

[50] McGinnis, 502.

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The overall body of jurisprudence constructed by the Warren Court (and persisting into the Burger era) emphasized "centralized federal action" and "collective democratic processes."[51] The role of the states was reduced during this period.

This approach from the Warren Court was not obviously misguided. The southern states had utterly failed to protect the lives and liberty of African-Americans. The Court stepped in to use centralized power to repair this governmental breach of trust. This response was reasonable and may well have been the only solution to the problem at hand.[52] However, those realities do not automatically mean that centralized decision-making is the solution to securing the liberty of the people generally.

5.4.2 Tocqueville

For perspective on the benefits of federalism, we may turn to the work of Alexis de Tocqueville. In line with concerns in the *Federalist* about appeals to the people, Tocqueville expresses a concern that the people will not always endeavor to protect liberty. He identifies structural solutions within the system of American democracy to help preserve liberty under these circumstances. As McGinnis argues, the "Rehnquist Court's jurisprudence seems designed to protect the decentralized order and mediating institutions that . . . [Tocqueville] viewed as our society's distinctive principle."[53]

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[51] McGinnis, 500.

[52] Again, see Chapter Four for a summary of the state-failure doctrine, with which the Rehnquist Court's federalism jurisprudence is consistent.

[53] McGinnis, 490-491.

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In *Democracy in America* Tocqueville observes that in democracies the "principal passion that agitates men" is a love of equality.[54] He explains:

> The evils that liberty sometimes brings are immediate; they are visible to all, and more or less everyone feels them. The evils that extreme equality can produce appear only little by little; they gradually insinuate themselves into the social body; they are seen only now and then, and, at the moment when they become most violent, habit has already made it so that they are no longer felt.[55]

Equality, of course, brings many goods, just as liberty does. But by Tocqueville's assessment, the risk in democratic states is that the people's passion for equality will lead to the trampling of political liberty. As people seek the short-term conveniences of equality, they lose sight of the long-term ramifications of their actions.

Tocqueville identifies the danger of "soft despotism" arising out of this scenario, allowing the concentration of all political power in the representatives of the state itself and harming liberty. He writes that under these circumstances

> the sovereign power extends its arms over the entire society; it covers the surface of society with a network of small, complicated, minute, and uniform rules, which the most original minds and the most vigorous souls cannot break through to go beyond the crowd . . . and finally it reduces each nation to being nothing more than a flock of timid and industrious animals, of which the government is the shepherd.[56]

This vision of a centralized government with minute control over daily life and actions has proven to be prescient. People were concerned about this kind of centralization at the time of the Founding, and as discussed above the *Federalist* explicitly addresses the issue of avoiding consolidation. In those letters Publius acknowledges the importance of maintaining the state governments and citizens' involvement at that level.

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[54] Tocqueville, 875.

[55] Tocqueville, 876.

[56] Tocqueville, 1252.

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Tocqueville similarly sees involvement at the local level as essential to preventing soft despotism. One of his explicit solutions to this danger is the use of local governments to help limit the reach of the national government. Because of his insistence upon the importance of local government, Tocqueville already envisions a robust, vertical separation of powers. The Rehnquist Court's jurisprudence supports this approach. It insists that there are bounds to the constitutional powers of the national government. Even if the people's representatives in Congress want to expand national power, they do not have the authority to do so in the absence of a constitutional amendment. The boundaries enforced by the Court maintain that key aspects of government must be decided at a more local level. Congress does not have the authority to consolidate power to itself. Tocqueville's work highlights two key manners in which overriding our constitutional structure and its division of authority poses risks to the liberty and security of the people.

First, the people's involvement in the process of government is essential to preventing despotism. Tocqueville warns that the emphasis on equality and individualism means that "despotism, which is dangerous in all times, is to be particularly feared in democratic centuries."[57] The key to avoiding this risk is to involve the people as a whole in the governance of the nation. Citizens who "are forced to occupy themselves with public affairs . . . are necessarily drawn away from the middle of their individual interests and are, from time to time, dragged away from looking at themselves."[58] Democracy inculcates individualism, and the solution is not necessarily easy to find. It makes sense

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[57] Tocqueville, 889.

[58] Tocqueville, 889.

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that the individual's concern with public affairs is limited when he can have no real impact on those affairs. As Tocqueville explains, the "general affairs of a country occupy only the principal citizens."[59] For the rest of the population, governing the nation as a whole is an abstract concept. Power is too far removed, and the incentive to get involved is weakened by the fact that there are so many other people involved.

Contrast this with Tocqueville's vision of the purpose behind state and local government in the United States. He argues that the founders thought that "it was appropriate to give political life to each portion of the territory, in order infinitely to multiply for citizens the occasions to act together, and to make the citizens feel every day that they depend on each other."[60] The people are actually involved at the local and state levels. They will frequently be affected directly by legislation, and they know others who will be affected, as well. This much closer attachment makes the divisions of government that are closer to the people more sensitive to their liberty. So much at the national level is abstracted, but that is not the case at the local and state levels.

The system also inculcates in individuals the importance of liberty and rights for all. Tocqueville explains that the "free institutions that the inhabitants of the United States possess, and the political rights that they use so much, recall constantly, and in a thousand ways, to each citizen that he lives in society."[61] The constitutional structure encourages people to overcome the potential vices of equality and realize the value and importance of the collective. As a result, "to combat the evils that equality can produce,

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[59] Tocqueville, 891.

[60] Tocqueville, 891.

[61] Tocqueville, 893.

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there is only one effective remedy: political liberty."[62] The citizen's freedom to partake in the political process and assert his rights prompts him to see past individual interest to realize the needs of society. Thus, liberty in a structure such as ours is self-perpetuating. The people's involvement and interest at the local level keeps them grounded in society. Allowing a central government to remove all decisions means that government is merely an abstract concept to people. This approach will inevitably let the vices of equality run amok.

The dynamics Tocqueville observed in the nineteenth century remain in force today. Decisions at the national level are abstract and distant. Decisions at the local or state level hit closer to home.[63] As a result, the people respond more aggressively and become more engaged in those sub-national decisions. Action that would be impossible at the national level is imminently achievable at the local level. Today, competition among the states clearly encourages this trend. Individuals and businesses that think a state is encroaching upon liberty may both advocate for changes and move to a different state. The American tradition of engagement at the local and state level remains strong.

The continuation of this tradition is not happenstance. It is, instead, a credit to our constitutional structure. It is also a credit to the Rehnquist Court's federalism jurisprudence. Kennedy's opinion for the majority in *City of Boerne v. Flores* (1997) left the door open for debates in the states over the Religious Freedom Restoration Act (RFRA). The federal RFRA purported to apply to the states, but Kennedy and the majority insisted that this was an encroachment upon the independent spheres of

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[62] Tocqueville, 894.

[63] For example, the controversy over state iterations of the Religious Freedom Restoration Act shows the level of engagement and perceived impact from state legislation.

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authority in the states. Without the Rehnquist Court's federalism jurisprudence, the current state-level debate over RFRA's impact on individual liberties would be impossible. The virtually unassailable federal law would simply override these concerns and insist that the national government knows best. The ongoing debates over individual rights at the state level are enhanced by these decisions. Citizens remain engaged, seeking liberty in its best form according to their opinions. The results are not always perfect, but the processes and protections in our constitutional structure allow an in-depth pursuit of liberty and individual rights that could otherwise simply be overridden by a federal decision.

Second, the protection of local institutions is crucial to the success of liberty-preserving efforts. One example of the tie between Tocqueville's theory and the Rehnquist Court's jurisprudence comes in the reasoning in *Printz v. United States* (1997). Writing for the Court, Justice Scalia argues that the federal government cannot draft sheriffs into the service of the federal government, "reducing them to puppets of a ventriloquist Congress."[64] The central government tried to reach out and control local officials in a manner not seen before. Scalia and the majority rebuffed this move on the grounds of state sovereignty. In doing so, they preserved the local nature of law enforcement in the states. The federal government cannot interfere with this notably local function and must maintain its own system for executing federal laws.

This principle in the case law connects to Tocqueville's concern for preservation of local action for the good of liberty. Tocqueville argues that "local liberties, which make a great number of citizens put value on the affection of their neighbors and those

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[64] *Printz*, 892.

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nearby, constantly bring men back toward each other despite the instincts that separate them, and force them to help each other."[65] The principle that the federal government cannot commandeer state and local officials runs much deeper than simply saving sheriffs' time when it comes to background checks. Political association at the local level forces individuals out from a focus on themselves, and it prompts them to help one another. The structure of American democracy depends upon association at that level. But if the federal government is free to set agendas and order local officials to comply, this aspect of association disappears. State legislatures, state and local executive officials, and local political bodies are where the people actually interact with the political process. The decision to centralize decision-making removes their incentive to participate and to consider what is best for their communities. Scalia's decision in *Printz* and O'Connor's decision in *New York* identify constitutional arguments that protect local political associations.

Barber says that national problems require national solutions. Tocqueville accurately diagnoses the problem with this theory. Individuals do not actually engage in the process of making "national solutions." Those decisions seem abstract, and as a result, citizens rarely get involved in the process of making them. Instead, the task is delegated to a congressional committee or, more frequently today, to bureaucrats in the executive branch. Their solutions are national in the sense that they are made at the national level. But those decisions cannot take account of the diverse needs of varying communities across the nation. Perhaps more importantly, solutions at the national level are not made by individuals who "are in a way forced to know each other and to please

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[65] Tocqueville, 892.

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each other."[66] Bureaucrats and congressional committees rarely interact with those who will be affected by the policies they create. This process does nothing to encourage the protection of individual liberties. Instead, it encourages decision makers to see those affected by their policies as abstract numbers, not real people. Under such circumstances, it is only natural that they will not maintain a full focus on the preservation of liberty.

This is not to say that national solutions are never in order. The enumerated powers of Article I, Section 8 provide a spectacular list of the kinds of activities and ideas that require centralization and big-picture decisions at the national level. Given the evolution and development of our nation since its inception, there are even more issues like those today. Adding control over serious national issues is a key reason for the existence of the amendment process. But the unauthorized, encroaching power of the central government is a menace. People are plugged into political bodies at the local and state level far more than they could ever be plugged into congressional or executive decisions at the national level. It is at those levels that they can be most attentive to the protection of their liberty. The Rehnquist Court's federalism jurisprudence protects this process by ensuring that the Tenth Amendment maintains its force. The justices' insistence that there are outer bounds to congressional power allows the people to maintain a closer control over activities that affect their lives and their liberties.

One might object that Tocqueville talks about local action and civic participation, while the Rehnquist Court's decisions deal with upholding a much more centralized kind of state power. *Printz* again helps us see the errors in this line of reasoning. The sheriffs in that case were protected by their status as state executive officials. Constitutionally

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[66] Tocqueville, 891.

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speaking, it is the existence of state governments that preserves government at the local level. From the beginning, local governments have been treated as units of the states. Sometimes this leads to state control wiping out local rule in a city or county. But this legal arrangement also allows the states to act as a buffer between the national government and local institutions. In fact, this role for state governments is essential. Creeping national power is difficult to address once it begins. The states have far more power than any particular local official, and the support of state governors or attorneys general can make the difference for local governments pushing back against federal overreach.

The Rehnquist Court's insistence that their federalism decisions are meant to protect underlying principles squares well with Tocqueville's vision of soft despotism and protection of liberty. In *New York*, Justice O'Connor argues that the "Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[67] This risk is precisely the one that Tocqueville identified, and the Court's structural protection of state sovereignty helps to protect one of Tocqueville's solutions–local decision-making and activity. The process will never be perfect, but the Court's insistence on outer bounds to congressional power helps to prevent a full consolidation of government that would likely lead to the version of soft despotism that Tocqueville feared.

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[67] *New York*, 187.

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5.5 Conclusion

Understanding the theoretical underpinnings of the Rehnquist Court's federalism jurisprudence is critical to comprehending its long-term implications and place in our national discourse. If Rehnquist and his allies invented new doctrines and foisted them upon the people, that would be tremendously problematic. After all, this jurisprudence is centered on an insistence that upholding the structure of the Constitution and its division of authority actually serves the people. My examination of the theories and concepts that form the foundation for this jurisprudence shows that the central concepts we see trace back to key political theorists. Again, Rehnquist and his allies do not explicitly look to these theorists, but their decisions clearly owe a great debt to Locke, Montesquieu, Tocqueville, and others.

In particular, this examination results in three crucial conclusions. First, federalism cases call for a stringent application of judicial review. The Supreme Court owes as much consideration to structural cases as it does to civil-rights cases. One of the key reasons for this finding is that stability, security, and liberty depend upon a consistent, constitutional application of the division of authority in our nation. This fact leads to the second conclusion: maintaining the existing constitutional structure serves the liberty of the people. It is a mistake to allow a national majority to overstep the bounds imposed by the Constitution. The federal system is in place to protect citizens' rights. This division of authority is critical to the entire system in the United States, and allowing a simple majority to override it would break the system's safeguards. Failure to maintain the constitutional structure can lead to uncertainty and instability for the population. Finally, the principles found in the Rehnquist Court's federalism

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jurisprudence actively serve the liberty of the people. The division of authority in our federal system insists that many decisions must be made at the state and local level. At this level, citizens are more engaged in protecting their rights, as well as those of their neighbors. Allowing the central government to seize power leads to an abstraction of power and the removal of citizen-involved decision-making. In turn, it opens the door for Tocqueville's feared soft despotism. The Rehnquist Court's insistence that state governments maintain broad spheres of authority actively serves the people by ensuring that more decisions affecting them are made at a level where they can be engaged.

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CHAPTER 6:

FEDERALISM AND THE SUPREME COURT: LOOKING FORWARD

6.1 Goods of Federalism

Why should we care about federalism in constitutional law? The preceding chapter laid out theoretical arguments for the importance and wisdom of the Rehnquist Court's federalism jurisprudence. These substantive arguments are extremely important to understanding the impact of this jurisprudence on the liberty of the people. Still, if debates must play out in the realm of public policy and practicality, one might argue that federalism is essentially a political question, as opposed to a higher-level theoretical concept. To put this argument in context, it is valuable to examine what we might call the mid-range goods of federalism. These lie between pure theory, on the one hand, and straightforward arguments about who can win a policy debate on the other. Calabresi posits a few goods of constitutional federalism, and these are borne out by the Rehnquist Court's federalism jurisprudence and its implications. The relationship of three of these goods to this jurisprudence helps to bridge the gap between theory and practice.

First, Calabresi argues that constitutional federalism "should seem important because it is a major theme of the constitutional text."[1] This idea is central to the Rehnquist Court's federalism jurisprudence. In the post-New Deal era, the Supreme

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[1] Steven G. Calabresi, "Federalism and the Rehnquist Court: A Normative Defense," *Annals of the American Academy of Political and Social Science* 574 (2001): 26.

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Court largely ignored ongoing disputes over federalism. But that position was untenable, and it came under great pressure in the decades preceding Rehnquist's tenure as Chief Justice. Two cases spaced only nine years apart created constitutional whiplash in this jurisprudential area. The Court caromed from emphasizing the importance of state authority in *National League of Cities v. Usery* (1976) to permitting near-absolute congressional authority in *Garcia v. San Antonio Metropolitan Transit Authority* (1985).

Issues of federalism occupy a substantial amount of space in the Constitution and its amendments. Article I enumerates the powers of Congress, implying that residual authority resides in the states, and the Tenth Amendment makes this explicit. Article II and Article III establish the authority of the federal executive and judicial branches, empowering them while also binding them to national matters. The Eleventh Amendment reinforces the idea of state sovereign immunity. The Fourteenth Amendment, in extensively empowering Congress on civil-rights matters, shows that Congress did not have full authority in that realm in the past. The Constitution focuses at great length on the boundary between federal and state power, and thus it is unsurprising that disagreements over the Court's decision to ignore this boundary in the post-New Deal era eventually came to a head.

The Rehnquist Court's federalism jurisprudence was a response to that crisis. If the Constitution is concerned with the boundary between federal and state authority, then the justices interpreting the document must address that issue, as well. Rehnquist, the author of the Court's decision siding with the states in *National League of Cities*, reshaped the Court's Commerce Clause jurisprudence and guided the direction of other federalism issue areas as the nation entered the twenty-first century. A central tenet of the

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Rehnquist Court's federalism jurisprudence as a whole was that the Constitution draws a boundary between federal and state authority, so the Court must enforce that boundary. The Court's obligation is to the Constitution above all else. This is true both in theory and in practice. From a theoretical perspective, the rule of law in the United States is dependent upon the view of the Constitution as the supreme law of the land. Laws are built around a hierarchy, and the Constitution sits at the top of that pyramid. Nothing may be permitted that the Constitution prohibits without risking the structure of legal authority.

A further examination at the practical level shows that it matters that the Constitution is the supreme law of the land. Even if one thinks that judges merely cloak their personal preferences in the guise of the Constitution, it is a fact that constitutional interpretation will remain a vital component of the judicial process in the United States. The power of the federal courts emanates from Article III. Thus, the justices must always stay within the ambit of the Constitution, even from a practical perspective. Acknowledging and enforcing structural constitutional boundaries will remain an essential aspect of making the law in the federal judiciary. Though their opinions on those boundaries may vary widely, the justices cannot escape the responsibility to draw the lines and defend them on constitutional grounds.

The second good of constitutional federalism from Calabresi suggests that "federalism should seem important to the justices because it is an important feature of the landscape throughout the contemporary world in which we live."[2] This is true in two important senses. Globally, governments are increasingly experimenting with a divided

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[2] Calabresi, 26.

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system of authority, and the American experiment is the oldest of its kind. Legally, the states continue to push in both vertical and horizontal federalism. Ignoring federalism cases is not an option for the justices, and it is crucial that they keep their opinions tied to the constitutional structure of our system.

Federalism pervades world politics at the moment, as multiple nations are maintaining or increasing the power of sub-national units of government. For example, Canada retains its strong federal system in which the provinces, and Quebec in particular, frequently assert their authority and insist on being allowed to legislate and regulate within their spheres of authority. Strikingly, the United Kingdom is moving beyond a system of devolved powers to embrace a structure that looks more like federalism. The Smith Commission has proposed a number of changes to increase independent decision-making in Scotland.[3] For instance, the Scottish Parliament and the Scottish Government are to become permanent institutions. The UK Parliament is to pass legislation that establishes the Scottish Parliament as part of the UK's constitutional structure. Moreover, the Sewel Convention, which holds that the UK Parliament should not legislate on devolved matters without the consent of the Scottish Parliament, is to be formally enshrined in law. The UK Parliament will also grant Scotland more authority over the operation of its government and elections. Additionally, in response to one of the principal arguments in favor of Scottish independence, the UK Parliament is to devolve much more authority over taxation and spending to the Scottish Parliament. At the same time, the separate McKay Commission proposes to give England more control over its

[3] Smith Commission."Report of the Smith Commission for further devolution of powers to the Scottish Parliament," November 27, 2014, accessed August 30, 2015, https://www.smith-commission.scot/wp-content/uploads/2014/11/The_Smith_Commission_Report-1.pdf.

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own affairs by providing that votes in Parliament that affect only England should require the consent of English MPs.[4] The increased devolution of powers to sub-national legislatures will make the UK's system of government more like the federal systems in the US and Canada.

Decisions in Canada and the UK should not guide the Court's federalism jurisprudence, but the ongoing resurgence of federal arrangements "should predispose a fair-minded observer to the possibility that something that is terribly important in many other contexts might also be important in the context of American politics."[5] Far from being an outdated solution for the concerns of the past, federalism is garnering more and more respect as a legitimate and effective way of governing. This should cause us to embrace and appreciate the structure that the federal system brings to our practical politics. Other nations are experimenting with the approach that we have used for more than 200 years. We have the lengthiest experience of any nation with how federalism works for the people (and how it does not). Again, this fact cannot prescribe conclusions about the interpretation of the Constitution's federalism portions. However, it does underscore the relevance and importance of the Rehnquist Court's insistence on actively interpreting constitutional federalism. The Supreme Court was satisfied in the post-New Deal era essentially to dismiss federalism as a bygone principle that had given way to the progress of national power. That position is untenable in the current global climate. Centralization of power has not emerged as the end-all solution to the world's problems.

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[4] McKay Commission. "Report of the Commission on the Consequences of Devolution for the House of Commons," March 25, 2013, accessed August 30, 2015, http://webarchive.nationalarchives.gov.uk/20130403030652/http://tmc.independent.gov.uk/wp-content/uploads/2013/03/The-McKay-Commission_Main-Report_25-March-20131.pdf.

[5] Calabresi, 27.

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Instead, the world is experimenting with divided authority and federal systems. We are well served to continue that method of governance in the United States.

On that note, it is clear from a practical perspective that federalism is alive and surging in our policy debates and day-to-day American politics. This is true when we consider both vertical federalism and horizontal federalism. Vertically, many states are actively engaged in challenges to federal authority. I will extensively evaluate two prominent challenges in the next section: marijuana regulations and sanctuary cities. Other confrontations occur over issues such as environmental regulation and education policy. State legislatures are unwilling to cede to the federal government control over issues they deem important. Moreover, the rise of marijuana deregulation in the states shows that the states are willing to actively confront and defy the federal government. Thus, the Court will inevitably continue to field appeals dealing with the boundary between state and federal authority. States are challenging the federal government, and the Supreme Court must be the ultimate arbiter on this front.

Horizontal federalism also raises issues that the Court will likely have to address. For example, the states of Nebraska and Oklahoma wanted to file an original jurisdiction case in the Supreme Court, claiming that the marijuana-related sections of the "Colorado Constitution are preempted by federal law, and therefore unconstitutional and unenforceable under the Supremacy Clause."[6] Their petition was denied on March 21, 2016, but they continue to press the issue. Competition and disagreements among the states, like disagreements between the states and the federal government, require an

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[6] SCOTUSblog. "*Nebraska and Oklahoma v. Colorado*: SCOTUSblog," last updated March 21, 2016, accessed April 29, 2016, http://www.scotusblog.com/case-files/cases/nebraska-and-oklahoma-v-colorado/.

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ultimate arbiter. Clearly, the Court must fill that role, often as part of its original jurisdiction. These horizontal federalism challenges differ from typical disputes between individual states. In water-rights or boundary-issue cases, the Court can and does assign a special master to work out all of the details. Frequently, the Court then simply provides a *per curiam* opinion affirming the special master's findings or making minor alterations.

That hands-off approach will not be possible in cases that arise from controversies in the realm of federalism. Nebraska and Oklahoma claim that Colorado has violated the federal Constitution in legalizing marijuana in the face of federal prohibitions. Colorado claims that it has acted entirely within its own sphere of authority and that neither the federal government nor other states has authority to override the relevant provisions of the Colorado Constitution. A special master cannot resolve this disagreement. The justices must eventually do so. Even if rejecting the petition from Nebraska and Oklahoma is the final word on this subject, and that is far from certain, it is an indication of the justices' decision to allow Colorado to proceed apace.

The core of the Rehnquist Court's federalism jurisprudence lays out a path for dealing with these controversies between a state and the federal government or another state. The majority in those cases insisted on separating the spheres of authority for the federal and state governments. Rehnquist's consistent approach of searching for the outer bounds to federal power can help to resolve these questions. Moreover, this jurisprudence serves an immense good from a practical perspective. It is clear that we cannot get rid of our current disputes over federalism by having the Supreme Court ignore the issue. The states' willingness to defy the federal government also shows that they will not accept the *Garcia* solution of deferring to congressional authority. The major issues must ultimately

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be resolved by the Supreme Court as they come up. The core of the Rehnquist Court's federalism jurisprudence provides a solid framework for dealing with disputes in a consistent and constitutionally legitimate manner.

Finally, Calabresi argues that federalism is important because "the specific issues that the Court's federalism case law touches upon implicate serious concerns about the dangers of overweening national power."[7] This is clearly true of the issues involved in the Rehnquist Court's federalism jurisprudence. These cases touched upon critical constitutional issues that have been relevant since the inception of the nation. Disputes over interstate commerce, civil liberties protections, commandeering, and sovereign immunity have played out in various particulars over the last two centuries. They are still around today.

These disagreements remain relevant today because new issues and policy agendas still draw on early debates. The development of new technologies has not eliminated the arguments from either side of the interstate commerce debate. For example, illegal immigration has emerged as a serious concern only recently, but it implicates many aspects of our old debates over the commandeering of state officials. Ultimately, the Court's position on these crucial debates means more than simple resolution to a particular policy debate.

Something important frequently gets lost in our concerns over whether the justices are simply voting their policy preferences when they issue opinions. It is certainly true that the justices will have personal preferences on many of the policy vehicles that bring constitutional issues to the Court. We cannot ignore the fact that those

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[7] Calabresi, 28.

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nine individuals may sometimes (or even frequently) vote based on their preferences. However, we also cannot ignore the fact that every particular opinion in constitutional law has extremely far-ranging implications. This is especially true because of the hierarchical structure of the judiciary. Judges in federal district and circuit courts must take the generalizable arguments from the Supreme Court's opinions and in turn apply them to other, particular cases in which the issue at hand is often very different.

From this perspective the harm done by the post-New Deal surge of national power without the Court's interference is significant. When the Supreme Court abandoned the constitutional principles involved in our vertical separation of powers, the lower federal courts were compelled to follow it. This was a major blow to constitutional principles because it prompted the federal judiciary to ignore the Constitution's clear concerns with consolidation of power in the national government. Yes, the Constitution's primary goal was to establish an empowered federal government that could effectively govern a nation and carry on foreign affairs. However, the text, as I detail in Chapter Four, is exceedingly concerned with limiting the reach of the federal government and with ensuring the vitality of state governments.

Similarly, the Rehnquist Court's federalism jurisprudence has far-reaching implications. The resurgence of state authority during that period has emboldened the states to assert their power, often in an aggressive manner. Rehnquist and his allies ensured that the Court would once again seriously consider and debate issues related to federalism. The dissenters in those cases had to make constructive arguments for national power and against the strict division of authority that the majority was drawing. Even if those dissenters win the day in the coming years, the climate we have now sets the

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expectation that they will provide substantive explanations and detailed interpretation of the relevant constitutional provisions. From a practical perspective, then, the Rehnquist Court's federalism case law will continue to matter precisely because it is tied to larger, theoretical debates that we still have. New policies will be made, and many of them will eventually end up before the Court. The substantive, critical analysis from the Rehnquist era will form an extensive part of the foundation for the Court's future federalism decisions. Whether the Court sides with Rehnquist or with the dissenters from his era, those cases have made a permanent impression upon the framework of judicial federalism.

Constitutional interpretation occupies a hazy position between legal/political theory and everyday practice. As a rule, the Supreme Court avoids taking cases for the sake of the particular parties in those cases. In its constitutional decisions, the Court issues a general interpretation of the relevant constitutional principles, then it applies that interpretation to the particular issue at hand in the case. As the justices often say, the Supreme Court is not a court of error correction. It must issue general opinions because its job is to provide the ultimate interpretation of the Constitution. We need to understand how the justices interpret the Constitution so that we can ensure stability and the rule of law, where like cases are decided in a like manner. At the practical level this means that the justices need to issue generalizable decisions because lower-court judges will have to interpret the Court's decisions and apply them to cases that may be very different.

At the same time, the Court does take cases because of the specific issues at hand. The most obvious example of these involves extensive challenges to an Act of Congress. The justices did not just happen upon *NFIB v. Sebelius* (2012) or *King v. Burwell* (2015).

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Instead, everyone understood that the Supreme Court would have to decide whether the Affordable Care Act was constitutional. It is inevitable that the justices will have to resolve controversies over high-profile laws. Additionally, it is inevitable that the justices will resolve certain specific controversies. Again, the Court did not just happen upon the issue of same-sex marriage while resolving general controversies over Fourteenth Amendment interpretation. Instead, the justices took *Obergefell v. Hodges* (2015) specifically to resolve the controversy over state prohibitions of same-sex marriage.

These three goods of federalism that Calabresi identifies help to illuminate the role of the justices in federalism cases, somewhere between pure theory and straightforward practice. Federalism occupies substantial portions of the constitutional text. Our nation and the world are increasingly focused on the division of power between a national government and sub-national units. The specific issues that the Court addresses in federalism cases are frequently the furthest stretch of national power at a given moment. The Rehnquist Court insisted on taking these issues seriously as a constitutional matter. In doing so, the justices reasserted the crucial role of the Court in checking congressional power at its boundaries. Their decisions looked both for a clear, correct interpretation of the Constitution and a workable balance that did not upset the practical operation of government in the nation.

This jurisprudence made significant changes from the perspective of constitutional interpretation, upending the post-New Deal norm of simply permitting federal action. However, Rehnquist and his allies were careful not to destroy the ability of the national government to operate. As noted in Chapter Three, Rehnquist offered reasoning in *Lopez* to assert that his decision did not conflict with the New Deal-era

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federalism cases. It is not clear that those 1930s decisions could survive examination according to the principles put forth in *Lopez* and *Morrison*, but Rehnquist and his allies carefully carved around provocations that would actually upset the operation of the government. The ideas in these decisions, while not new, had not been written in the Court's voice in decades. They represented a substantial change from the existing state of affairs vis-à-vis federalism. Still, their practical goal was always forward-looking. Rehnquist and his allies worked to change how the judiciary would interpret future actions taken by Congress or the states. They carefully avoided demolishing established arrangements in federal-state relations. In doing so, the Rehnquist Court majority observed both their ultimate duty to the Constitution and their limited but important role in the nation's practical politics.

6.2 Federalism: Not Just for Conservatives

Federalism in general, and the Rehnquist Court's federalism in particular, are overwhelmingly associated with political conservatism. However, this point of view limits our vision of the impact that the Rehnquist Court's jurisprudence can have. Marijuana deregulation and sanctuary cities are two examples of politically liberal policies that gain support from this jurisprudence.

The federal Controlled Substances Act prohibits the use, possession, sale, cultivation, and transportation of marijuana. However, an increasing number of states are legalizing and regulating the sale of marijuana within their boundaries. In spite of the Supreme Court's 2005 ruling in *Gonzales v. Raich*,[8] Alaska, Colorado, Oregon, and Washington have fully decriminalized recreational marijuana. Moreover, many other

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[8] See Chapter One for a full description of *Raich*.

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states have loosened their restrictions in a variety of ways.[9] Though federal law prohibits it, legalized trade in marijuana exists in many states today. The states are largely able to accomplish their goals because "as a practical matter, federal authorities cannot enforce national law without the cooperation of state officials."[10] The states know that their defiance of federal law is likely to avoid punitive measures while also affecting the federal government's ability to enforce its own laws. As Schwartz argues, "rarely in our history have the obligations of officials of all branches of state government to conform to federal law been more uncertain."[11] The states know that they cannot, by themselves, overrule federal law. But they can take steps to attempt to make certain laws obsolete and effectively unenforceable.

Thus, in a sense, the fight over marijuana regulation is a new version of nullification. The states know that they are acting in opposition to federal law and the Court's decision in *Raich*. Those states that have fully legalized marijuana are purposefully taking a stand against the federal government. Other states that have legalized medicinal marijuana are taking a more limited, but still principled, stand against the scope of federal regulation. Unlike during the nullification crisis, these states have the Constitution on their side. The core of the Rehnquist Court's federalism jurisprudence supports these states' stance on both the Commerce Clause and anti-commandeering principles.

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[9] National Conference of State Legislatures, "State Medical Marijuana Laws," last updated April 18, 2016, accessed April 20, 2016, http://www.ncsl.org/research/health/state-medical-marijuana-laws.aspx.

[10] Ernest A. Young, "Modern-Day Nullification: Marijuana and the Persistence of Federalism in an Age of Overlapping Regulatory Jurisdiction," *Case Western Reserve Law Review* 65.3 (2015): 772.

[11] David S. Schwartz, "High Federalism: Marijuana Legalization and the Limits of Federal Power to Regulate the States," *Cardozo Law Review* 35 (2014): 570.

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The Court's decision in *Raich was* at odds with the core of the Rehnquist Court's federalism jurisprudence. Justices Scalia and Kennedy voted with the majority, while the Chief Justice and Justices O'Connor and Thomas dissented. The majority and Scalia both made an effort to distinguish the issue at hand in *Raich* from the Court's decisions in *Lopez* and *Morrison*. But, as I discussed in Chapter One, these arguments are largely unconvincing. *Raich* was inconsistent with those decisions.

Sanctuary cities are cities that refuse to cooperate with arresting, holding, and prosecuting illegal immigrants. The federal government has the undisputed authority to create and enforce immigration laws. The Constitution is clear on this point. Article I, Section 8 vests Congress with the power to "establish a uniform Rule of Naturalization." However, the governments of some cities object to the strictness of current immigration laws. As a form of protest and in an effort to protect immigrants, these cities do not allow officials, including city police officers, to aid the federal government in enforcing the law.

Sanctuary cities tend to be decidedly left of center politically, but the Rehnquist Court's federalism jurisprudence provides them with a great deal of protection from federal retaliation. In particular, these cities can lean on the anti-commandeering and sovereign immunity aspects of those decisions. Congressional Republicans attempted to strip sanctuary cities of their federal funding in 2015.[12] Under the Rehnquist Court's anti-commandeering precedents, such an action would be struck down. There was also increased discussion of punishing sanctuary cities through lawsuits filed by those harmed

[12] Erin Kelly, "Senate Democrats block bill to strip federal funds from 'sanctuary cities,'" *USA Today*, October 20, 2015, accessed April 25, 2016, http://www.usatoday.com/story/news/2015/10/20/senate-democrats-block-bill-strip-federal-funds-sanctuary-cities/74267790/.

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by illegal immigrants who were not arrested by the city.[13] If the sanctuary policies were secured at the state level, they could claim sovereign immunity from such lawsuits.

Applied consistently, the precedents set in *New York v. United States* (1992) and *Printz v. United States* (1997) would clearly forbid retribution against sanctuary cities. On the financial front, *New York* makes it clear that the withdrawal of federal funding should be considered coercion. The Rehnquist Court distinguished between inducement and coercion. Inducement is constitutionally permissible. For example, Rehnquist and a majority of the justices upheld the challenged law in *South Dakota v. Dole* (1987), holding that it constituted inducement instead of coercion. The law required states to set the drinking age to twenty-one or face a five-percent reduction in federal highway funding. Because it only threatened to withhold a small portion of a particular kind of funding, Rehnquist ruled that the action was not coercive. By contrast, the Court held that the take-title provision at issue in *New York* was coercive. It attempted to make the states enforce a federal regulatory regime or take physical and financial responsibility for low-level radioactive waste.

The threat to withdraw most or all federal funding from sanctuary cities is clearly more like the situation in *New York*. As a practical matter, it would leave city officials with no choice but to aid in the enforcement of federal immigration laws. Under our current financial structure, cities are heavily dependent upon federal grants to fund law enforcement, community development, housing, and much more. Losing all of that funding would quickly bankrupt a city. Again, it is important to note that the status of

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[13] Perry Chiaramonte, "Courts could give San Francisco sanctuary in potential suit over illegal immigrant policy," *Fox News*, July 13, 2015, accessed April 25, 2016, http://www.foxnews.com/us/2015/07/13/courts-could-give-san-francisco-sanctuary-in-potential-suit-over-illegal.html.

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cities as subdivisions of the states provides them with protection from this kind of coercion. The federal government cannot threaten to withdraw funding from the states or their political subdivisions for a refusal to enforce federal law. Such an action would be coercion, and the Rehnquist Court's federalism jurisprudence clearly prohibits financial coercion to force an outcome desired at the federal level.

New York and *Printz* also make it evident that the federal government may not commandeer state and local officials to enforce federal immigration laws. The federal Constitution has no issue with the state government compelling city governments to take action. States direct cities in this manner as a matter of course. But the relationship between the federal government and the states does not work in the same manner. *New York* applied that principle to the particulars of nuclear waste regulation. *Printz* applied the principle to the specific gun control regulations. As with any good example constitutional interpretation, the Rehnquist Court's anti-commandeering jurisprudence set out broad rules that courts can apply to particular instances in the future. As Scalia wrote for the Court in *Printz*, the federal government may not "command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[14]

This is a hard-and-fast rule in the Rehnquist Court's federalism jurisprudence. As discussed above, Republicans in Congress considered plans to compel state and local police officers to aid in the enforcement of federal immigration laws. But Congress does not have the constitutional authority to do so. If Congress wants stricter enforcement of federal immigration laws, it must look for ways to exert pressure on the President,

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[14] *Printz*, 935.

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because the responsibility for enforcing federal law falls on the officials of the federal government. It is unconstitutional to conscript local police and other officials into the service of the federal government's immigration-enforcement efforts.

This principle appears even more clearly in *Prigg v. Pennsylvania* (1842). As discussed in Chapter Three, Scalia's majority opinion in *Printz* borrowed from and built upon *Prigg* without directly citing it. The Court decided in *Prigg* that the Fugitive Slave Act was constitutional under the Fugitive Slave Clause. However, Justice Story's opinion clarified that Pennsylvania officials could not be compelled to participate in the enforcement of that law. He explained that

> "the national government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, judicial, or executive, as the case may require, to carry into effect all the rights and duties imposed upon it by the Constitution."[15]

Immigration law provides evident parallels, at least on the matter of constitutionality and enforcement. Congress clearly has the authority to create whatever immigration restrictions it wishes. Under the Constitution, immigration authority belongs to the federal government exclusively. However, the authority to make the law carries with it a responsibility. The federal government may request or even incentivize assistance from states and localities, but it may not compel or coerce that assistance. Ultimately, if the federal government wants to enforce its immigration laws, it must hire, equip, and authorize its own officials to that end.

Congressional Republicans have also considered creating an easier path for individuals to sue sanctuary cities after falling victim to violent crimes perpetrated by illegal immigrants released by those cities. As a rule, individual cities cannot claim a

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[15] *Prigg*, 541.

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constitutional right to sovereign immunity. So, these lawsuits might be constitutionally permissible when dealing with cities on a case-by-case basis. But if a state enacted sanctuary policies at the state level, that state and its political subdivisions could clearly rely on the Rehnquist Court's state sovereign immunity jurisprudence for protection from lawsuits. Rehnquist himself explained in *Seminole Tribe of Florida v. Florida* (1996) that for "over a century we have reaffirmed that federal jurisdiction over suits against unconsenting States 'was not contemplated by the Constitution when establishing the judicial power of the United States.'"[16]

This broad protection through sovereign immunity gives state governments extensive authority to shape policy without being subject to financial penalties enforced by the federal judiciary. On the policy front, sovereign immunity and anti-commandeering principles go hand-in-hand. *Printz* presents a good hypothetical to prove this fact. The Court clearly said that Congress could not compel sheriffs and police chiefs to run background checks. But imagine a scenario in which Congress created an expedited path for federal lawsuits against those chief law enforcement officers when someone in their jurisdiction committed a crime with a gun. This sort of policy would avoid directly compelling the CLEOs to aid in the enforcement of federal law while simultaneously coercing cooperation through the threat of financial losses. This is where sovereign immunity comes in to protect state officials. If the state created a policy prohibiting cooperation with the background check procedures, it could claim sovereign immunity protection for CLEOs if they were sued under these circumstances in federal court.

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[16] *Seminole Tribe of Florida*, 779.

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In just the same way, if states prohibited cooperation on immigration by their officials, they could claim to be constitutionally immune from lawsuits for money damages over actions taken by illegal immigrants who could have been imprisoned. Again, this would likely require policy creation at the state level, as cities do not possess a constitutional right to sovereign immunity by themselves. But the Rehnquist Court's decisions in the realm of state sovereign immunity would clearly extend to lawsuits over a refusal to assist in enforcing federal law.

The classification of the Rehnquist Court's federalism jurisprudence as politically conservative bears little weight in the legal realm. Rehnquist and his allies espoused constitutional principles that were not bound to the specific policy issues before the Court at the time. Rehnquist's strike against overreaching federal policymaking in *Lopez* also applies, in theory, to overreaching federal policy on drugs. Similarly, Scalia's stand against federal control over state officials in the area of gun control also applies to attempts to coerce state officials into enforcing federal immigration laws. These are particular examples of the simple fact that federalism qua federalism is not ideological. It is an institutional concept designed to protect liberty by dividing governmental authority between different levels of government. Conservative and liberal states alike have spheres of authority that are independent from the authority of the federal government. Sometimes the states use direct challenges to federal policy. On other occasions they refuse to cooperate in the enforcement of laws with which they disagree. The specifics vary, but the methods remain the same regardless of ideology or particular policies.

The Rehnquist Court's endorsement of state autonomy and protection of these methods has certainly contributed to a conservative movement to reduce the size of the

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national government. But those decisions also opened the door to liberal or libertarian causes advanced through state-level policy. Rehnquist and his allies in the majority simply brought back to constitutional law the understanding that federal authority has outer bounds and that the Court must enforce those bounds. Lower courts interpreting these decisions in the long run will use those neutral principles far more than they employ the policy-specific implications from those Rehnquist-era cases.

6.3 Revisiting the Critics

Having addressed precedent, constitutional structure, and normative arguments, it is time to return to the arguments presented by the Rehnquist Court's critics. The ability of this jurisprudence to withstand those criticisms is important both legally and theoretically. But it is also important for future federalism decisions issued by the Supreme Court. The Rehnquist Court's federalism jurisprudence strikes a delicate balance between fidelity to text and precedent, on the one hand, and realism on the other. I have highlighted the ability of this jurisprudence to withstand harsh criticism and show its legal and theoretical value. The justices of the current and future Supreme Court would do well to accept and build upon this well-argued, sound set of federalism decisions.

6.3.1 Novelty

The most common criticism leveled against this jurisprudence is that these decisions were novel. This critique cannot stand up to examination on any of its points. While it is true that Rehnquist and his allies abandoned the post-New Deal era's deference to Congress, it is just as clear that the Court relied heavily upon earlier

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precedents to lay the foundation for these decisions. Far from striking out on their own, the majority in these cases was simply returning to the pre-New Deal status quo on federalism, reasserting the importance of outer bounds to congressional power.

Similarly, each of the areas of this jurisprudence was consistent with the structure and design of the Constitution. The Commerce Clause and anti-commandeering decisions reinforced the Constitution's separation between federal and state authority, acknowledging the important role that the Tenth Amendment plays in clarifying that arrangement. The state sovereign immunity cases affirmed that the Eleventh Amendment simply ensures that no one may use federal courts to seek money damages from the states in federal courts without the consent of the states. The Section 5 jurisprudence acknowledged that the Fourteenth Amendment dramatically expanded federal power in civil rights, and it gave the federal government wide discretion in that area. At the same time, those decisions insisted that the Fourteenth Amendment does not simply authorize Congress to do whatever it wants. Constitutional barriers remain, even in the area of civil rights, and it is the role of the Court to enforce those boundaries. Finally, this jurisprudence had a strong foundation in political theory. The theoretical arguments employed by Rehnquist and his allies were not new at all. Instead, they were deeply rooted in established theories regarding individual liberty and the rule of law.

These precedential, structural, and theoretical foundations are vital for the Supreme Court's federalism decisions going forward. The justices could reject the Rehnquist Court's federalism jurisprudence as an aberration, simply a blip of novelty now in the Court's past. This would be a tremendous mistake. Regardless of whether the current Court carries this jurisprudence forward, it is clear that these decisions were built

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on well-established legal and theoretical principles. Arguing that these decisions were novel is a crucial point for those who wish to ignore or overturn them. The Court generally should not traffic in wholly new constitutional arguments, and decisions that do so are immediately suspect. But this jurisprudence was not novel in any sense. Those who wish to do away with it must find a better argument.

6.3.2 Activism

The next major criticism leveled against these decisions is that they were activist and supportive of the policy preferences of the justices in the majority. Examining the reasoning in this jurisprudence provides a strong counterargument. The ideas are not tied at all to any particular policy. Instead, the Court repeatedly affirmed the long-standing understanding that the Constitution divides authority between the federal government and the state governments. As discussed in Chapter Five, it is the place of the Court in our system of judicial review to enforce the boundary between the different levels of government. Striking down a law of Congress is not, in itself, an activist measure. Instead, it is an active assertion of the Court's constitutional authority. Ultimately, the Court says what the law is. This is true in structural cases, just as it is in civil-rights cases. The charge of activism is a bogeyman that both sides of the political spectrum employ tactically against judicial decisions with which they disagree. In this situation, as usual, it goes hand-in-hand with an attempt to show that a decision or set of decisions is novel. If the justices are making up new things or overstepping their bounds, it heavily weakens their arguments. But just as the Rehnquist Court's federalism jurisprudence was not novel, it was not activist.

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My largely structural argument on this front is borne out in reality by the limited nature of these decisions. As discussed above, the Rehnquist Court avoided any major upsets to the status quo. They did not overrule *Wickard v. Filburn* (1942), and they did not declare Social Security unconstitutional. The Rehnquist Court established the moderation of its decisions by simply enforcing the boundary between state and national authority going forward. An activist Court would take advantage of the opportunity to rewrite signature programs and assert its policy preferences. The Rehnquist Court did not do so in the area of federalism. The justices simply trimmed recent unconstitutional additions to the United States Code and established boundaries for congressional power moving forward.

6.3.3 Criticism of Structuralism and Theoretical Foundations

Next, critics often argue that the Rehnquist Court was too focused on the structure of institutions in these decisions. This criticism has two primary sub-arguments. The first is that Rehnquist and his allies lost sight of the individuals affected by their decisions when they chose to focus on structures. From this perspective, the purpose of the Court is to serve the individuals who make up the nation. Therefore, every decision issued by the justices must be evaluated for its impact on the individual, not simply in terms of governmental structures. But our federal structure does not exist for its own sake. Instead, the structure is designed to protect the people and the republic. As detailed in Chapter Five, our system of federalism serves both individual liberty and the rule of law. This fact makes the Rehnquist Court's federalism jurisprudence supremely concerned with individual rights and the protection of the people. The justices authoring these opinions

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recognized that the Constitution requires a division of authority and, moreover, that this division explicitly seeks to serve the people by creating a vertical separation of powers. The critics' argument that the justice lost sight of individuals cannot hold water. Rehnquist and his allies sought to preserve the structures that could protect individual liberty long after their term of service on the Court had ended.

The second sub-argument holds that the textual arguments underlying these structural decisions have no basis in the text of the Constitution. The evidence against this claim is extensive. The Rehnquist Court's commerce power jurisprudence was rooted in the text of the Commerce Clause, which gives Congress authority only over certain types of commerce, and in the reservation of residual authority to the states in the Tenth Amendment. Their Section Five jurisprudence was rooted in the grant of power in the Fourteenth Amendment, while acknowledging the limiting nature of the language in Section 1 of that amendment. The anti-commandeering cases recognized that the text of the original Constitution never granted control over state officials to the federal government, and the Tenth Amendment clearly reserves unstated powers to the states. In combination with the creation of a federal executive branch, these factors act as a clear indicator that the textual responsibility to enforce federal laws falls upon the federal government. Finally, despite extensive claims to the contrary, the Rehnquist Court's state sovereign immunity cases are rooted in the text. Indeed, the Eleventh Amendment does not say that individuals may not sue their own states in federal courts. However, because Article III never placed that kind of case within the federal courts' arena in the first place, the Eleventh Amendment confirms that the federal judiciary may not hear such lawsuits.

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The theme that runs through this sub-argument is that Rehnquist and his allies made too many assumptions, all of them in favor of the states. But this argument ignores the fact that the federal government is one of enumerated powers. If the Constitution does not grant authority over a particular issue or action to the federal government, then that power is reserved to the states. The Tenth Amendment is exceedingly clear on this point. The Rehnquist Court's federalism jurisprudence is rooted in the text of the Constitution. Its critics argue otherwise because they want to deny the efficacy and importance of the Tenth Amendment.

The criticisms over treatment of individuals and textual justification go hand-in-hand with the fourth major criticism: that this jurisprudence lacks a theoretical foundation. The priorities I highlighted in Chapter Five, individual liberty and the rule of law, provide a sharp retort to this claim. The Rehnquist Court did not prop up the structures and institutions of federalism for their own sake. Instead, their decisions drew from a deep well of political theory on the benefits of stable institutions and division of authority.

The Rehnquist Court's reinvigoration of the Tenth Amendment provides an opportunity for current and future justices to acknowledge and enforce the division of authority between federal and state governments. Again, dismissing these decisions as an unacceptable anomaly would be much easier if Rehnquist and his allies really had ignored individuals and set aside the text of the document. Similarly, it would be easier to do away with these decisions if they had no theoretical foundation. But those charges against the Rehnquist Court's federalism jurisprudence are flimsy. The justices embraced a strong understanding of individual liberty and provided the proper textual background

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for their decisions. If the Court decides to set aside this jurisprudence, it will be incumbent upon current or future justices to explain their departure from decisions strongly grounded in the rights of the people and the text of the Constitution.

6.4 Practical Considerations and Long-Term Implications

The last major criticism of the Rehnquist Court's federalism jurisprudence is the most practical one, and it is the only one without a clear answer. Both supporters and critics of these decisions have wondered whether they will have any staying power in the long run. Did the Rehnquist Court usher in a new era of federalism, or will it appear only as a blip before a return to the national-power status quo? One portion of this criticism is clearly inaccurate. Some have argued that these decisions did not represent a significant shift because they did not touch any sizeable federal programs and they avoided major confrontations with Congress.[17] As I have explained, the Court's decisions most likely did not reflect a fear of being ignored or overruled. Instead, the justices wisely chose to try to influence the expansion of federal power in the future. The Rehnquist Court was not looking to use these decisions to dismantle the federal government as we know it today. Instead, the justices used their legal authority to affect the realm of constitutional interpretation and its application to future disputes between the states and the federal government. Most of these disputes over non-signature pieces of legislation and lesser, non-legislative issues play out in the federal courts of appeals, never reaching the Supreme Court. Certainly, the Rehnquist Court's immediate, practical impacts were relatively slim in the area of federalism. But the reasoning was far-reaching in its potential effect in the lower courts. These decisions were well designed to influence

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[17] See, most prominently, Whittington (2001) and Claeys (2005).

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interpretation going forward, but Rehnquist and his allies never set out to rewrite history and ditch the major, entrenched federal programs of the twentieth century.

The consideration of lower-court interpretations brings us to the valid side of this criticism. Critics and supporters alike argue that this jurisprudence will not mean much in the long run if it is not carried forward by the Supreme Court and the lower federal courts. To some extent, this is necessarily true. Even if the Rehnquist Court's jurisprudence is true to precedent, the structure of the Constitution, and the liberty of the people, that means little as a practical matter if the current justices do away with it. The Court's federalism decisions since the end of the Rehnquist era make this an open question.

First, the Court's decision in *Raich* was issued just prior to Rehnquist's death. Some critics say that it repudiated *Lopez*, *Morrison*, and the core of the Rehnquist Court's Commerce Clause jurisprudence. Supporters of that core argue that *Raich* was an anomaly, specific to the Controlled Substances Act and without negative implications for the longevity of *Lopez* and *Morrison*. Either way, *Raich* clearly added a question mark to the end of the Rehnquist era.

Second, the most prominent federalism case in the Roberts era was a toss-up. In their complicated decision in *NFIB v. Sebelius* (2012), a majority of the justices upheld the Affordable Care Act's individual mandate while striking the mandatory Medicaid expansion. Chief Justice Roberts wrote a complete opinion that only he signed. He argued that the individual mandate was impermissible under the Commerce Clause, citing *Lopez* and *Morrison* to show that such an action is outside the constitutional authority of Congress. Justices Scalia, Kennedy, Thomas, and Alito agreed with him on that point.

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However, Roberts then argued that because the Court should be deferential to Congress where possible, the mandate could stand as a tax. Justices Ginsburg, Breyer, Sotomayor, and Kagan joined him in upholding the mandate. Finally, Roberts explained that requiring the states to expand Medicaid or lose all Medicaid funding was unconstitutionally coercive, drawing on *New York*. Scalia, Kennedy, Thomas, and Alito joined him on that point.

This seminal federalism opinion left the legacy of the Rehnquist Court's federalism jurisprudence in question. Scalia, Kennedy, Thomas, and Alito were apparently ready to proceed directly from the reasoning in the Rehnquist Court's decisions and strike down any congressional overstepping vis-à-vis the commerce power without trying to interpret the law according to a different part of the text. Roberts sought an alternative way to let the congressional decision stand. At the same time, he cited and agreed with the reasoning from the Rehnquist Court's Commerce Clause and anti-commandeering cases. Thus, Roberts appeared to be positioned as the swing justice on most federalism issues. Justice Scalia's unexpected death has thrown the future of this jurisprudence into turmoil. While Roberts appeared to be a swing justice on these issues, he clearly leaned toward agreeing with the conservatives and applying reasoning from the Rehnquist-era decisions. With the great uncertainty over Scalia's replacement, the murky waters of the Court's current federalism jurisprudence have become even less clear.

The question of Scalia's replacement is crucial for forecasting the future of the Rehnquist Court's federalism jurisprudence. Assuming the Republicans in the Senate decline to hold a vote on President Obama's nominee, Merrick Garland, there will be a vacant seat on the Court until a new President takes office. If a Donald Trump is elected

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President in November, he has pledged to fill that seat with a conservative judge. But even assuming that happens, it will not be immediately clear if that nominee will be consistent with Rehnquist or Scalia on federalism. Republican presidents have seen mixed results when attempting to appoint conservative judges to the Court. Justice Souter, a nominee of President George H.W. Bush, frequently voted with the Court's liberal wing. Justice Kennedy, a nominee of President Reagan, remains a swing vote on many issues before the Court. Chief Justice Roberts, as noted above, has not proven as reliable as most conservatives might have hoped. If Hillary Clinton is elected President, it is extremely likely that her nominee will join with the four liberal justices on the Court to either set aside or override the Rehnquist Court's federalism decisions.

The other key practical consideration is the legacy of this jurisprudence in the lower courts and particularly in the federal courts of appeals. This aspect of the judiciary is important because the appeals courts will decide far more particular issues than the Supreme Court will. The random assignment to three-judge panels for appeals cases makes things on this front even less certain. It is essential to remember that whatever happens at the Supreme Court will have real, lasting impacts at the appeals level. If the Court proceeds to endorse and uphold the Rehnquist Court's federalism jurisprudence, the judges in the appeals courts will feel more constrained because deviating from that line could bring a sharp rebuke from the Supreme Court. If the Court is lukewarm about those decisions, appeals judges will feel less constrained and would be more likely to depart from the Rehnquist-era precedents. Finally, if the Supreme Court abandons or overturns this jurisprudence, judges in the appeals courts will likely be constrained from endorsing or employing these decisions.

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These are practical considerations, and their outcomes matter enormously. On a purely day-to-day level, they matter because of the uncertainty they insert into federal/state relations and the workings of the federal judiciary. As long as it is unclear how the Supreme Court will treat federalism and the Rehnquist Court's federalism jurisprudence, it is difficult for both the states and Congress to know where the boundaries are. This situation encourages the states to push against federal policies they disagree with, as we see particularly with marijuana policy now. No one can be sure who will have control in that policy area. The current administration has shown no interest in forcing the issue against the states through strict enforcement of federal marijuana laws. But if that changes when the administration changes, the conflict will have to be resolved in the courts. It is difficult for policymakers in the states or at the federal level to know how to plan under these circumstances.

These practicalities also matter when we consider the individuals whose rights our federal system is designed to protect. Remember that both the vertical separation of powers and the rule of law are designed to protect individual liberty. Uncertain boundaries in the Court's federalism jurisprudence translate to uncertainties about the extent of protected liberties and who is tasked with protecting those liberties. The Supreme Court has established that it has the ultimate say in constitutional interpretation. This much power in the Court necessarily means that uncertainty from the justices on a particular topic will breed uncertainty in the nation.

6.5 Looking Forward

The Supreme Court should embrace and build upon the Rehnquist Court's federalism jurisprudence. Rehnquist and his allies in the majority got it right—

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constitutionally, theoretically, and practically in today's society. Constitutionally, these decisions marked a return to the reasoning of the dominant regime of federalism that existed before the New Deal. Moreover, the majority opinions in these cases were heavily grounded in the text of the Constitution itself. Theoretically, this jurisprudence pursued individual liberty and the rule of law by recognizing the importance of our federal structure and its maintenance over time. Practically, the Rehnquist Court acknowledged a push from the states that has continued to grow in the decade since Rehnquist's death. Fewer of the states are willing to take marching orders from Congress on every subject, which necessarily means that the federal judiciary will have to resolve more disputes.

These decisions displayed a good, principled balance, avoiding extremes of consolidation and confederalism. That moderate approach sets an excellent precedent for all federal courts going forward, as they consider the increasing disputes between the state and federal governments. The consolidation extreme would do as the Court did in *Garcia v. San Antonio Metropolitan Transit Authority* (1985), saying that representation is the only enforceable right that the states maintain. On the other hand, confederalism would, to borrow terminology from First Amendment jurisprudence, erect a high wall of separation between federal and national power, enforcing it stringently. The Rehnquist Court insisted on enforcing the outer bounds of congressional power, but it did not attempt to dismantle the dramatically expanded national government. Instead, the justices moderately placed some limited constraints on Congress moving forward.

For these reasons the Supreme Court and the federal courts of appeals should enthusiastically utilize the Rehnquist Court's federalism jurisprudence. It is worth noting that even if the Supreme Court abandons them, these decisions remain important. They

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struck a balance and acknowledged the Court's important role in enforcing the limits that the Constitution places on the federal government. If abandoned, they will stand strong, waiting for a return to this approach in the same manner that Rehnquist and his allies returned to the pre-New Deal precedents. However, it will be a travesty if the Court does abandon this jurisprudence. In the second half of the twentieth century, the Supreme Court largely ignored the text of the Constitution when it came to federalism. Despite the facts that Article I limits Congress to the enumerated powers and the Tenth Amendment confirms that residual powers are left to the states, the Court refused to check congressional power at all. Congress naturally proceeded to legislate and make policy on whatever the majority of representatives wanted to do. This progression of events was in direct conflict with the very concept of our federal system, which leaves residual power in the states in order to prevent a dangerous centralization of power. Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas stood against this trend. While not trying re-legislate the past, they insisted that the Court must enforce the constitutional bounds of congressional power. In doing so, they pursued reasoning that looked to protect individual liberty and the rule of law. These decisions are admirable constitutionally, theoretically, and practically, and the federal judiciary should embrace them as it moves forward.

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