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The politics of judicial restraint : the Rehnquist court and the new federalism

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The Politics of Judicial Restraint: The Rehnquist Court and the New Federalism

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Preface

Chief Justice William H. Rehnquist and the Supreme Court under his leadership have been charged, respectively, with leading and enacting a federalism revolution. From the beginning, Rehnquist, first as an associate justice and later as Chief Justice, has displayed a commitment to notions of constitutionalism, originalism, and federalism. In the years before Rehnquist joined the Supreme Court, the idea of federalism, what Felix Frankfurter described as "the happy relation of States to Nation," certainly underwent numerous transformations, altering it from what was originally intended into a doctrine far friendlier to the expansion of national power at the expense of the States. It is essential to understand these changes and their broader consequences for federalism doctrine in order to grasp the true implications of the federalism jurisprudence of Rehnquist and the Rehnquist Court. At the most basic level, Rehnquist upholds the notion of State sovereignty as a general principle rooted in the idea that the text of the Constitution has a fixed and knowable meaning, one that constrains both the Court and Congress.

The Rehnquist Court's federalism cases can be divided into two categories: institutional federalism cases, and rights-based federalism cases. It is the former cases that constitute the new federalism of the Rehnquist Court. In rights-based cases the Court generally shuns the argument of State sovereignty, due largely to the swing votes of justices O'Connor and Kennedy, who often are persuaded to join their federalist colleagues Rehnquist, Scalia, and Thomas in institutional cases, but advance what they consider to be more pragmatic reasoning in rights-based cases. As a result, the federalism jurisprudence of the Rehnquist Court is ultimately more a commitment to the ideas of judicial restraint than it is a commitment to federalism for federalism's sake.

The so-called "federalism revolution" of the Rehnquist Court has not been a revolution at all, but merely a stop-gap measure by the majority of the Court trying to limit further expansion of the national government in particular areas. Concerns over a wholesale reversal or rollback of national prerogatives are largely unfounded for numerous reasons, not least that the federalist triumvirate on the Court is not able to unite a consistent majority in federalism cases. Without such a majority, it seems unlikely that either Rehnquist or the Rehnquist Court will seriously engage in the reconsideration of significant precedent cases that could, in fact, produce a true federalism revolution.

Chapter One
The Politics of Judicial Restraint:
The Rehnquist Court and the New Federalism

Under the chief justiceship of William H. Rehnquist, the Supreme Court has been described as leading a "federalism revolution."[1] One scholar has noted that it "seems agreed on all sides now that the Supreme Court has an agenda of promoting constitutional federalism."[2] Indeed, the record shows that, in contrast to the most recent courts preceding it, the Rehnquist Court has engaged in a purposeful revival of federalism and the recognition of States' rights and sovereignty. The decisions the Court has rendered in a number of cases in support of State sovereignty have led to speculation about the course on which the Court seeks to set American jurisprudence. Some have lauded these pro-State power decisions, believing that the Court is reviving an important and necessary debate about the most fitting role of the federal government in America.[3] Others have argued that the Court's jurisprudence damages the States and the Congress, and that it is in fact not even truly rooted in the Constitution, as proponents of the Court's philosophy claim.[4]

It has been suggested that the modern day Rehnquist Court has, in fact, enacted a transformation of federalism above and beyond the arrangement that the founders intended.[5] Others propose that there is no revolution, but rather "what has occurred is a revitalization of a long-standing

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[1] J. Mitchell Pickerell, "Leveraging Federalism: The Real Meaning of the Rehnquist Court's Federalism Jurisprudence For States," *Albany Law Review* 66 (2003): 823, 823. "The Rehnquist Court has been credited with, or accused of—depending on one's perspective— creating a 'federalism revolution'."

[2] Richard H. Fallon, Jr., "The "Conservative" Paths of the Rehnquist Court's Federalism Decisions," *University of Chicago Law Review* 69 (2002): 429, 429.

[3] Richard A. Brisbin, Jr., "The Reconstitution of American Federalism? The Rehnquist Court and Federal-State Relations, 1991-1997," *Publius* 28 (1998): 189, 190, .

[4] Richard Briffault, "A Fickle Federalism: the Rehnquist Court Hobbles Congress—and the States, Too," *The American Prospect* 14 (2003): 26, 26.

[5] Pickerell, "Leveraging Federalism," 823.

interpretive conflict about the deployment of government power within a legally constituted regime" and that the debate is about "how the political principles contained in the nation's foundational legal and historical texts, such as *The Federalist* and other records of the American Founders, ought to be interpreted by the justices."[6] Still others, in response to the Court's renewed attention to federalism, have charged that the new conservative majority has been hastily overturning precedents, exchanging earlier dissents for new Court opinions because they now have the votes.[7]

While there is no doubt that the Rehnquist Court has sought to revive federalism, the question remains as to whether that revival in fact constitutes a true "federalism revolution". In order to answer that larger question, the interpretive rationale for the Court's decisions must be understood, as well as the implications of the decisions that are touted as embodying this revolution.

Rehnquist's Constitutional Interpretation

Time and again, federalism decisions handed down by the Rehnquist Court have referred to the notion of original understanding as the basis of its judgments.[8] Originalism is one of several methods of constitutional interpretation, one to which Rehnquist himself has long tried to remain faithful. In the realm of constitutional theory, however, there has been a decided move away from an understanding of the Constitution as a fixed body of knowable law, the basis for the notion of original understanding, to a more amorphous and malleable conceptual

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[6] Brisbin, "Reconstitution of American Federalism," 189.
[7] Fallon, "Conservative Paths," 430.
[8] "We look first to the original understanding of the Constitution...," in *Alden v. Maine*, 527 U.S. 706 (1999); "I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause...," in *City of Boerne v. Flores*, 521 U.S. 507 (1997); "I continue to believe that we must "temper our Commerce Clause jurisprudence" and return to an interpretation better rooted in the Clause's original understanding..." in *Printz v. United States*, 521 U.S. 898 (1997).

interpretation. The current trend is to perceive the Constitution as enumerating concepts that are rooted in a set of implied "basic values", which in turn give rise to further values that are implicit in the text, but not explicitly stated.[9] This constitutional notion and others like it can be described by the term "living Constitution". Those who subscribe to the doctrine of a "living Constitution" believe it is the judges' responsibility to ascertain what implied principles can be found in the text and then draw on these principles as the situation warrants.

This idea that the Constitution does not have a particularly fixed meaning is one that Rehnquist soundly rejects. Four years after he was named an associate justice of the United States Supreme Court, he published an article on "The Notion of a Living Constitution".[10] The article offers a great deal of insight into his understanding of the Constitution and the originalist ideas of federalism he has long espoused. Furthermore, it also clearly illustrates Rehnquist's view of the proper constitutional role of judges, which allows for a greater understanding of the way he conceptualizes the function of federal courts as arbiters of the relationship between the national government and the governments of the several States.

To Rehnquist, the phrase "living Constitution" is one of "teasing imprecision".[11] "At first blush it seems certain," he writes, "that a living Constitution is better than what must be its counterpart,

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[9] Congress, Senate, Committee on the Judiciary, *Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States*, 103d Congress, 2d sess, 12-15 July 1994, 355-356. "What the Framers thought is that the Constitution should adapt, preserving certain basic values. So, what are these values?... You look back into history. You try to determine what are the basic values that underlay those things which are enumerated, and that gives you a key to other basic values... you look to history in the past, to history in the present, and to the meaning, to what life is like today, to try... to get an idea of what are those things that are fundamental to a life of dignity."

[10] William H. Rehnquist, "The Notion of a Living Constitution," *Texas Law Review* 54 (May 1976): 693.

[11] Ibid.

a *dead* Constitution."[12] But, as he explains, the dichotomy between notions of a "living" Constitution and a "dead" Constitution creates a false distinction. The reason, Rehnquist suggests, is that the term "living Constitution" is "susceptible" to two vastly dissimilar meanings.[13]

The first possible meaning Justice Rehnquist calls the "Holmes version", which he finds in Justice Oliver Wendell Holmes' opinion in *Missouri v. Holland*:

> When we are dealing with words that also are a constituent act, like the Constitution of the United States, we must realize that they have called into life a being the development of which could not have been foreseen completely by the most gifted of its begetters. It was enough for them to realize or to hope that they had created an organism; it has taken a century and has cost their successors much sweat and blood to prove that they created a nation.[14]

In response, Justice Rehnquist notes that simply because the framers "could not have conceived" of certain eventualities "cannot mean that general language in the Constitution may not be applied to such a course of conduct".[15] That is to say, Rehnquist understands that to argue that the Constitution covers only those things that those who originally drafted the document could take into account would be to render the document relatively useless as American society develops. Of course there will be new challenges that arise in every epoch; Rehnquist believes that the Framers' design was to create a Constitution that would serve as a framework that would allow the American political system to adapt to each new challenge.

There is, he proposes, a second notion of a "living Constitution" that varies widely from the Holmesian notion of constitutional interpretation. This definition implies that certain contemporary and evolving values should be read into the language of the Constitution. To make his point, he cites a

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[12] Ibid.
[13] Ibid., 693-694.
[14] *State of Missouri v. Holland*, 252 U.S. 416 (1920).
[15] Rehnquist, "Notion of a Living Constitution," 694.

brief filed on behalf of prisoners of a particular state who argue that the environment of their prison "offend[s] the United States Constitution."[16] The brief exhorts the Court to take charge:

> We are asking a great deal of the Court because other branches of government have abdicated their responsibility ... Prisoners are like other "discrete and insular" minorities for whom the Court must spread its protective umbrella because no other branch of government will do so ... This Court, as the voice and conscience of contemporary society, as the measure of the modern conception of human dignity, must declare that the [named prison] and all it represents offends the Constitution of the United States and will not be tolerated.[17]

Rehnquist rejects this notion that judicial review is appropriately governed by a "philosophical approach" that accepts the Supreme Court as "the voice and conscience of contemporary society".[18] He does not believe that there is constitutional authority such that "nonelected members of the federal judiciary may address themselves to a social problem simply because other branches of government have failed or refused to do so."[19]

Building on the first approach to the idea of a "living Constitution", that the Constitution establishes a framework wherein the American political system can grow and adapt to changing times, Rehnquist turns to John Marshall's opinion establishing judicial review in *Marbury v. Madison*.[20] There, Marshall argues that the Court should consider the Constitution as elevated above government acts, but that if the other branches are acting within the authority granted to them by the Constitution, the Court has no constitutional right to interfere. In Marshall's view, it is essential that the justices understand that "the framers of the Constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature."[21]

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[16] Ibid., 695.
[17] Ibid.
[18] Ibid.
[19] Ibid. He will return to this argument thirteen years later in *Deshaney v. Winnebago County Social Services*, 489 U.S. 189 (1989).
[20] Rehnquist, "Notion of a Living Constitution," 696.
[21] *Marbury v. Madison*, 5 U.S. 137, 179-180 (1803).

Drawing on this, Rehnquist argues that because "the judges will be merely interpreting an instrument framed by the people, they should be detached and objective." In his view, "a mere change in public opinion since the adoption of the Constitution, unaccompanied by a constitutional amendment, should not change the meaning of the Constitution."[22] He echoes the argument of Alexander Hamilton in *The Federalist*, No. 78, that judges "ought to regulate their decisions by the fundamental laws rather than by those which are not fundamental."[23] An amendment, Rehnquist believes, is the legitimate way to add new and different meaning and direction to the constitutional text.

While Justice Rehnquist does note that there is "wide room for honest difference of opinion," he refuses to accept that these differences allow for judicial imposition of a will "independent of popular will."[24] In fact, he sees three serious flaws in this type of reasoning. First, he argues that the purpose of the Constitution is not simply to empower the judicial branch, but rather to "enable the popularly elected branches of government" to govern:[25]

> Surely the Constitution does not put either the legislative branch or the executive branch in the position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution.[26]

Second, he points out that attempts by the Supreme Court to apply this kind of doctrine historically often has had poor results, most notably with the *Dred Scott v. Sandford*[27] and *Lochner v. New York*[28] decisions. The credibility of the Court after *Dred Scott*, the justice notes, took a generation

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[22] Rehnquist, "Notion of a Living Constitution," 696-697.
[23] Alexander Hamilton, *The Federalist* No. 78, in *The Federalist Papers*, ed. Clinton Rossiter (New York: New American Library, 1961), 466.
[24] Rehnquist, "Notion of a Living Constitution," 697.
[25] Ibid., 699.
[26] Ibid., 700.
[27] *Dred Scott v. Sanford*, 60 U.S. 393 (1857).
[28] *Lochner v. New York*, 198 U.S. 45 (1905).

to recover, with attacks on the Court "unequalled in their bitterness even to this day."[29] Not content with the argument that these cases were badly decided because they tried to incorporate the *wrong* extra-constitutional principle, Rehnquist insists that it is never legitimate for judges to incorporate *any* extra-constitutional principle—ever.

Third, Justice Rehnquist believes that promoting "socially desirable" goals through an appointed judiciary runs counter to the most basic notions of democracy.[30] "Individual conscience," he points out, is what serves "as a platform for the launching of moral judgments."[31] As a result, he concludes that there is "no conceivable way" to "logically demonstrate" that opinions of one conscience are superior to those of another.[32]

> I know of no other method compatible with political theory basic to democratic society by which one's own conscientious belief may be translated into positive law and thereby obtain the only general moral imprimatur permissible in a pluralistic, democratic society. It is always time consuming, frequently difficult, and not infrequently impossible to run successfully the legislative gauntlet and have enacted some facet of one's own deeply felt value judgments. It is even more difficult for either a single individual or indeed for a large group of individuals to succeed in having such a value judgment embodied in the Constitution. All of these burdens and difficulties are entirely consistent with the notion of democratic society... it should not be easier just because the individual in question is a judge.[33]

Rehnquist does not believe in the notion of a "living Constitution" because to do so is to accept an individual judge's notions of morality as the basis of constitutional law. He argues not that the Constitution is "dead" in that it has no real and relevant meaning for contemporary judges and lawmakers; rather, he supports a view of the Constitution as fundamentally knowable and unalterable by mere interpretation. His is not a "living" or a "dead" Constitution, but a

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[29] Rehnquist, "Notion of a Living Constitution," 702.
[30] Ibid., 699.
[31] Ibid., 704.
[32] Ibid.
[33] Ibid., 705-706.

permanent one. In this way, Justice Rehnquist believes the Constitution itself demands judicial restraint in matters of constitutional law.

The limited and defined nature of constitutional provisions must be respected and understood by judges:

> It is essential for those engaged in judicial interpretation to realize that the underpinnings of our legal system depend upon the assumption that such words have an objective meaning—one set of words, that is, has a different meaning from another set.

He does not, however, advocate a simplistic and formulaic approach to judging or the Constitution.

> This is not to say that the meaning of a particular set of words will be crystal clear to each judge who is called upon to interpret it, but only that those judges, familiar with the ordinary English usage, will be able to agree that the words at their broadest embrace only so much, and necessarily exclude matter beyond that.[34]

As is argued above, Rehnquist's rejection of unwarranted insertions of extra-textual notions into the Constitution is grounded in his view that elements of constitutional doctrine may only change on the basis of formal constitutional amendment.[35]

Rehnquist's Federalism Revolution?

It is clear that Rehnquist places federalism at the top of his hierarchy of constitutional values.[36] This is shown in the justice's own opinions, and is arguably mirrored in the direction

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[34] William Rehnquist, "The Nature of Judicial Interpretation" (Speech delivered at the American Studies Center Conference on the Judicial Interpretation of the Constitution, Washington, D.C., June 12, 1987), p. 1., as quoted in McDowell, "Language and the Limits of Judging: Chief Justice Rehnquist's Jurisprudence of Common Sense," in *American Conservative Opinion Leaders*, p. 242.

[35] *Edelman v. Jordan*, 415 U.S. 651, 660 (1974), *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-448 (1976).

[36] Sue Davis, *Justice Rehnquist and the Constitution* (Princeton, NJ: Princeton University Press, 1989), 32.

the Court under his leadership has taken on federalism issues. While federalism undeniably holds a significant place among Rehnquist's general principles of adjudication, the question still remains as to whether such a commitment is truly about federalism for federalism's sake. At first glance, such a question may seem incongruous with the current reputation of the Rehnquist Court and the volume of material produced by Rehnquist himself championing notions of State sovereignty; however, such a question is legitimate and necessary to understand fully the Court's new federalism and its broader institutional implications.

Critics of the Rehnquist Court have decried the seeming lack of weight it extends to precedent cases. It is quite true that the Chief Justice, at least, believes with Thomas Hobbes that precedent only shows "what was done, and not what was well done".[37] If a constitutionalized principle is historically inaccurate, Rehnquist does not believe courts are required to uphold it on the grounds that it is bad law. "Stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history"[38] He believes that individuals should not have particular policies "thrust upon them" by perhaps appropriately sympathetic but overzealous judges who extend the Constitution's text beyond what he sees as its reasonable meaning.[39] Indeed,

> important decisions of constitutional law are not subject to the same command of stare decisis as are decisions of statutory questions. Surely there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments.[40]

While it is true that Rehnquist has expressed a less than complete faith in the supremacy of precedents, it is important to note the sort of precedents that continue to stand, despite the

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[37] Thomas Hobbes, *A Dialogue between a Philosopher and a Student of the Common Laws of England*, Ed. J. Cropsey (Chicago: University of Chicago Press, 1971), 129.
[38] *Wallace v. Jaffree*, 472 U.S. 38, 99 (1984).
[39] *Deshaney v. Winnebago County*, 489 U.S. 189, 203 (1988).
[40] *Fry v. United States*, 421 U.S. 542, 559 (1975).

Rehnquist Court's foray into the questions of federalism doctrine. Rehnquist rarely, if ever, more than briefly considers cases that are foundational to the extension of the Court's and Congress's power in relation to the States and which arguably extend past the point that he would consider to be constitutionally appropriate; these cases certainly appear to be in no danger of being overruled.[41] The continued acceptance of these cases as valid, not necessarily overtly, but at least by their omission in the Court's federalism discussions, suggests that the Rehnquist Court's federalism revolution is at best an incomplete one.

One key case of this nature that illustrates this tendency is *Wickard v. Filburn*, decided November 9, 1942.[42] In *Wickard*, the Court found that the Commerce Clause allowed Congress to regulate the local production of wheat on private farms because such action in aggregate could have an effect on interstate commerce. This reading of the Clause arguably vastly extended the limits of a plenary power of Congress to involve itself in localized activities, without any explicitly textual basis. Such an expansion would seem to cut against the arguments that Rehnquist himself extends about the appropriate interpretation of constitutional text:

> It is illuminating for purposes of reflection, if not for argument, to note that one of the greatest "fictions" of our federal system is that the Congress exercises only those powers delegated to it, while the remainder are reserved to the States or to the people. The manner in which this Court has construed the Commerce Clause amply illustrates the extent of this fiction.[43]

Rehnquist cites *Wickard* as a case in point for expansion of congressional power; however, though arguing that it is important to continue to acknowledge that Congress's power has "constitutional limits", he does not suggest that *Wickard* is constitutionally flawed.[44]

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[41] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937); *Wickard v. Filburn*, 317 U.S. 111 (1942).; *Miranda v. Arizona* 384 U.S. 486 (1966) are just three examples.
[42] *Wickard v. Filburn*, 317 U.S. 111 (1942).
[43] *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 307 (1981).
[44] Ibid., 308-309.

Why would Rehnquist accept *Wickard*, when, for all intents and purposes, it extends the same extra-textual constitutional legitimacy to legislation and policies as other cases that Rehnquist rejects?[45] It seems that Rehnquist should reject *Wickard* as a clear example of an overbroad interpretation on the same grounds that he rejects others—that such a measure falls outside the original meaning of the constitutional text. Yet, he does not. Neither Rehnquist—nor the Rehnquist Court, for that matter—have seriously dealt with *Wickard* as a constitutional issue, even though the case is one of the clearest examples of the very things that proponents of original understanding abhor, an understanding which is, after all, the philosophical basis for Rehnquist's notions of federalism.

The answer to this question about the legitimacy of *Wickard* may seem mystifying on its face, but it is in fact one of eminent practicality. It is apparent that Rehnquist, for all his talk of original understanding, does not really believe that the American system of government as it currently stands can be returned to the original constitutional conception, although he may believe that would be the ideal.[46] Political realities seem to demand that he accept past decisions of the Court that have allowed for certain extra-textual provisions, provided they are not unconstitutional on their face.[47]

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[45] See *Fry v. United States*, 421 U.S. 542 (1975), *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

[46] There are others, like Edward C. Banfield, who argue that federalism was doomed from the first because of the nature of popular government. "Nothing of importance can be done to stop the spread of federal power, let alone to restore something like the division of powers agreed upon by the framers of the Constitution. The reason lies in human nature: men cannot be relied upon voluntarily to abide by their agreements, including those upon which their political order depends. There is an antagonism, amounting to an incompatibility, between popular government—meaning government in accordance with the will of the people—and the maintenance of limits on the sphere of government. This... constitutes 'the dilemma of popular government.'" Edward C. Banfield, *Here the People Rule: Selected Essays* (Washington, D.C.: The AEI Press, 1991), 24.

[47] *National League of Cities v. Usery*, 426 U.S. 833, 846 (1976).

The Politics of Judicial Restraint

Debates over federalism at the founding are quite different from federalism debates today. Then, the debates centered narrowly around the legitimacy of allegedly implied powers for the national government; today it is widely accepted that some of the national government's powers are indeed unenumerated. What is more, many projects and policies of the federal government that are integral to its functioning are based on such unenumerated powers. Federalism questions, as a result, are simply not posed in the same way as they were originally. It is clear that too much has been done, and too much time has passed, to expect realistically to recover the lost world of the Founders. It is apparent that Rehnquist realizes this, one way or another. While one may argue that Rehnquist's constitutional philosophy is unnecessarily rigid, it is more difficult to make the case that he holds fantastical expectations. Federalism, rather than an ideal for its own sake, is one way that Rehnquist, and perhaps those on the Court who agree with certain of these notions, can limit any further damage to a system that he perceives as being already fundamentally out of balance.[48] In this way, Rehnquist's federalism jurisprudence should be understood as part of a larger strategy of affirming the notions of judicial restraint. As a result, his controlling philosophy necessitates not so much a revolution, but a sort of damage

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[48] Rehnquist rejects the political safeguards theory, originally proposed by Herbert Wechsler, which suggests that the balance between federal and State power can be appropriately maintained without any judicial intervention, because the structure of the national government is such that the States themselves can resist federal laws that overreach their limits (Wechsler argued, by influencing the national political process by virtue of State actors involvement in the various branches, particularly the Congress); thus, judicial review of federal laws and their limits is unnecessary. Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government," *Columbia Law Review* 54 (1954): 546, 559.

control. Federalism becomes just one tool with which to say—effectively, perhaps— "This far, but no farther."

Certainly, the relationship between the powers of the nation and the powers of the States has undergone many transformations since the Founding. Each of the transmutations that this relationship endured made an indelible impression on the way federalism was understood by the time Rehnquist was named to the Court. Understanding this extensive, and often convoluted, history is essential to understanding the role that Rehnquist, and the Rehnquist Court, has played in the continuing history of federalism.

Chapter Two
The Evolution of Federalism

Since the beginning of the American constitutional experiment, the appropriate balance in the relationship between the nation and the States has been a central debate in American political life. Indeed, when the Founding Fathers gathered in Philadelphia to draft the Constitution, they brought with them diverse views about the correct nature of this relationship. Initially, the new nation was organized under the Articles of Confederation, based on the notion of confederalism, that created not a true government but merely established "a firm league of friendship" among the sovereign States.[49] The central proposition of the theory of confederalism was that sovereign bodies could contract to form a union for very specific and limited purposes, without forfeiting any of their sovereignty. The weaknesses of confederalism, which were apparent to many from the inception of the Articles of Confederation, were the primary reasons that led to the Constitutional Convention of 1787, where a more nationalistic approach to the union was advocated. This approach eventually supplanted the confederalism of the Articles of Confederation. Such writings as *The Federalist* and the essays of the leading Anti-Federalists reveal the difficult process of determining which principles would ground the new United States of America.

"Federalism" originally meant the same thing as "confederalism", the idea that a union consisted of basically autonomous States. In a brilliant political and rhetorical move, those who supported a move from pure "federalism" or "confederalism" towards a true nation appropriated the name "Federalists" for themselves, leaving the true defenders of "federalism" to be called the "Anti-Federalists." The Federalists were convinced that the new constitution they advocated was not an

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[49] "Articles of Confederation 1777 (1781)," in *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham (New York: Penguin Books USA Inc., 1986), 357.

abandonment of the principle of federalism, but merely "a judicious modification" of it.[50] As Federalist Alexander Hamilton wrote

> The proposed Constitution, so far from implying an abolition of the State governments, makes them constituent parts of the national sovereignty, by allowing them a direct representation in the Senate, and leaves in their possession certain exclusive and very important portions of sovereign power. This fully corresponds, in every rational import of the terms, with the idea of a federal government.[51]

The Federalists defended the idea of a strong central government, while the so-called Anti-Federalists voiced concerns about the potential of such a system to threaten the republican freedoms that had only recently been won from Britain, arguing that strong States, not a more consolidated nation, would best safeguard these freedoms. The Federalists criticized the ineffectiveness of the present confederation—it was, they said repeatedly, unable to meet the "exigencies of the union"—while the Anti-Federalists voiced powerful concerns that in forming the new federal system, the sovereignty of the States eventually would be lost.[52]

From the Founding to the Civil War

These debates about the relationship of nation to States were central to the creation of the American republic. From these two starkly different political understandings, a Constitution emerged that was, as James Madison noted, "neither wholly federal nor wholly national," what Tocqueville would later call "an incomplete national government."[53] Some believed that it was not theoretically possible for two sovereignties to exist within the same borders, but the reality was that "the

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[50] James Madison, *The Federalist* No. 51, 322.
[51] Alexander Hamilton, *The Federalist* No. 9, 71.
[52] Alexander Hamilton, *The Federalist* No. 31,191.
[53] James Madison, *The Federalist* No. 39, 243; Alexis de Tocqueville, *Democracy in America*, eds. Harvey C. Mansfield and Delba Winthrop (Chicago: University of Chicago Press, 2002), 149.

intense attachment of the Founders to the sovereignty and independence of their States compelled theory to bend to political necessity."[54] Alexander Hamilton argued for the notion that both the States and the nation could be sovereign. "That two supreme powers cannot act together is false," he argued. "They are inconsistent only when they are aimed... at one indivisible object."[55] He further tried to ease the fears of those who were convinced the arrangement would lead to the demise of the States by insisting that it would always "be far more easy for the State governments to encroach upon the national authorities than for the national government to encroach upon the State authorities."[56] The Constitution granted only limited and enumerated powers to the national government; the very nature of the document established and confirmed the fundamental power of the States in any but these specifically distinguished areas. "But as the plan of the convention aims only at a partial union or consolidation, the State governments would clearly retain all the rights of sovereignty which they before had, and which were not, by that act, *exclusively* delegated to the United States."[57]

The Constitution codified and embodied this notion of dual sovereignty. Practically, dual sovereignty meant that the United States was "a confederation in which the central authority had enforceable supremacy only in sharply limited areas, with the States retaining their sovereignty in all others."[58] Much later, the Court would note that if the Constitution had sought to "reduce the [states] to little more than geographical subdivisions of the national domain... it would never

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[54] Raoul Berger, *Federalism: The Founders' Design* (Norman, OK: University of Oklahoma Press, 1987), 50.
[55] Jonathan Elliot, *Debates in the Several State Conventions on the Adoption of the Federal Constitution*, 2d ed. (Washington, D.C.: Library of Congress, 1836), 355-356.
[56] Alexander Hamilton, *The Federalist* No. 17, 114.
[57] Alexander Hamilton, *The Federalist* No. 32, 194.
[58] William Murphy, *The Triumph of Nationalism: State Sovereignty, the Founding Fathers, and the Making of the Constitution* (Chicago: Quadrangle Books, 1967), 147-148.

have been ratified."[59] Indeed, James Madison argued that the Constitution itself was established not by "a *national* but [by] a *federal* act."[60]

The practicalities of this neither-federal-nor-national relationship, however, had yet to be worked out, and much of the responsibility for interpreting the specifics of that relationship would fall to the Supreme Court. In the fledgling young nation, the Supreme Court was in a unique situation, positioned, as it were, without a foundation of precedents, at least in terms of the positive constitutional law of the new nation. From the beginning, the Court would play a crucial role in debates over federalism; it would become a truism that "the happy relation of States to Nation—constituting as it does our central political problem—is to no small extent dependent upon the wisdom with which the scope and limits of the federal courts are determined."[61]

Anti-Federalists were apprehensive about the potential power of the national government and the possible threats posed by a "consolidated government."[62] In order to bring about ratification, the Federalists agreed to a post-ratification inclusion of amendments to spell out protections for individual citizens and States from incursions of national power; this document was known as the Bill of Rights. The amendments enacted, however, did not simply deal with individual liberty—they constitutionalized restrictions on the power of national government, despite some Federalists' protestations that such measures were superfluous because the

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[59] *Carter v. Carter Coal Company*, 298 U.S. 238, 295-296 (1936).
[60] Madison, *The Federalist* No. 39, 239.
[61] Felix Frankfurter and James M. Landis, *The Business of the Supreme Court: A Study in the Federal Judicial System* (New York: The Macmillan Company, 1928), 2.
[62] "Speeches of Patrick Henry" in *The Anti-Federalist Papers and the Constitutional Convention Debates*, ed. Ralph Ketcham, 207.

government possessed only delegated powers.[63] The Tenth Amendment is particularly addressed to the concerns of the relationship between nation and States, and promises 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." As James Madison had written in *The Federalist*, No. 45,

> 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.[64]

In the early days of the American republic, debates about federalism centered almost entirely around the issue of enumerated and unenumerated powers. Initially, the decision-making of the Supreme Court concerning federalism revealed tensions and some confusion about the justices' role in arbitrating the relationship between nation and States. In *Chisholm v. Georgia* (1793), the Court held that States were subject to the jurisdiction of the Supreme Court when in conflict with citizens of other States. This doctrine subordinating the States was arguably not the intention of those who drafted the Constitution; in fact, *Chisholm* served as the stimulus for the enactment of the Eleventh Amendment.[65]

The Supreme Court under John Marshall, who became Chief Justice in 1801, would do much for codifying and clarifying the Court's role and policies in questions of federalism. Marshall led the Court in establishing a doctrine of national supremacy within certain

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[63] *The American Constitution: Its Origins and Development*, ed. Alfred A. Kelly, Winfred A. Harbison, and Herman Belz (New York: W.W. Norton and Company, 1991),18.
[64] James Madison, *The Federalist* No. 45, 289.
[65] The Eleventh Amendment 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."

boundaries. The seminal case demonstrative of this nationalizing influence was the Court's holding in *McCulloch v. Maryland*[66], which arose over the congressional chartering of the Second Bank of the United States in 1816. The concerns raised in *McCulloch* are grounded in the misgivings that were raised when the subject of a national bank was first proposed in 1791. In the debate over the proposal to establish the First Bank of the United States, a major clash occurred concerning the notion of implied or inferred powers. Secretary of State Thomas Jefferson opposed the establishment of a national bank on the grounds that the Tenth Amendment allowed only for enumerated powers. Arguing that to "take a single step beyond the boundaries thus specially drawn around the powers of Congress, is to take possession of a boundless field of power, no longer susceptible of any definition," Jefferson strongly advocated limiting the powers of the national government.[67] The Constitution made no mention of any power to establish a bank, and Jefferson believed that the "necessary and proper" clause should be construed to mean that only those things *absolutely* necessary to achieve responsibilities granted to the national government were allowable; he did not include the bank in his strict interpretation.[68]

James Madison, who had argued in *The Federalist* in favor of a strong national government, nevertheless opposed the establishment of a national bank on the grounds that it was unconstitutional, for "the Constitution was not a general grant, with specified exceptions of particular powers, but rather the reverse." The enumerated powers "subjoined" to the clauses that were offered in support of the measure, Madison pointed out, did not include any such

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[66] *McCulloch v. Maryland*, 4 Wheaton 316 (1819).
[67] *The Papers of Thomas Jefferson*, ed. Julian P. Boyd et al. (Princeton, N.J., 1950-), 275-280.
[68] Stanley Elkins and Eric McKitrick, *The Age of Federalism: The Early American Republic, 1788-1800* (New York: Oxford University Press, 1993), 233.

provision.[69] "The doctrine of 'implication' and 'construction,' he declared, was infinitely dangerous; with it could be formed a chain that would reach all objects whatever."[70] Disclaiming his own earlier position regarding the national government's power, Madison, with Jefferson, argued for the strict construction of the Constitution.[71]

The proposal for the national bank had been drafted by Alexander Hamilton, who argued that "every power vested in a Government is in its nature *sovereign*, and includes... the right to employ all the *means* requisite, and fairly applicable to the attainment of the ends of such power."[72] The essence of his case was that the legal test for "necessary and proper" was extremely fluid, and that in order to fulfill the functions commissioned to it in the Constitution, the national government clearly had to be able to act in ways that may not be explicitly stated in the Constitution. Proponents of Hamilton's plan argued that it was "rather late in the day to adopt [Madison's argument] as a principle of conduct" as implication and construction had been used to establish many other laws.[73] Furthermore, the argument followed that in establishing the bank they did not seek to give new powers under the "necessary and proper" clause, but simply to establish the doctrine of implied powers.[74] The doctrine of implied powers held "that construction may be maintained to be a safe one which promotes the good of the society, and the ends for which the Government was adopted, without impairing the rights of any man, or the powers of any State."[75] In the end, this argument triumphed, and the doctrine of implied powers,

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[69] Elkins and McKitrick, 230.
[70] Ibid., 230.
[71] Ibid., 224.
[72] *The Papers of Alexander Hamilton*, ed. Harold C. Syrett et al. 26 vols. (New York: Columbia University Press, 1961-1981): 63-134.
[73] Elkins and McKitrick, *The Age of Federalism*, 230.
[74] Ibid., 231.
[75] Ibid.

the notion that not all powers of the national government were enumerated, began to gain legitimacy.

This debate was only recent history when *McCulloch v. Maryland* was brought before the Supreme Court. Congress chartered the Second Bank of the United States in 1816. In 1818, the State of Maryland enacted legislation that would tax the bank that was within its borders. When the bank refused to pay the tax, the case was taken to the Supreme Court, to decide on the constitutional legitimacy of two questions: whether Congress had the authority to establish a bank, and if so, whether Maryland's tax was an unconstitutional intrusion on that authority. The Supreme Court unanimously found in *McCulloch v. Maryland*[76] that Congress had the authority to establish a bank:

> The government of the United States... though limited in its powers, is supreme; and its laws, when made in pursuance of the constitution, form the supreme law of the land... Although, among the enumerated powers of government, we do not find the word "bank" or "incorporation"... it may with great reason be contended, that a government, entrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be entrusted with ample means for their execution... [on the necessary and proper clause] To have prescribed the means by which government should, in all future time, execute its powers, would have been to change, entirely, the character of the instrument... It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they occur[77]

Furthermore, the Court found that it was unconstitutional for Maryland to infringe on Congress's execution of its constitutional powers by imposing a tax,

> The constitution and the laws made in pursuance thereof are supreme. . . they control the constitution and laws of the respective States, and cannot be controlled by them... the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in general government.

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[76] *McCulloch v. Maryland*, 4 Wheaton 316 (1819).
[77] Ibid., 317-318.

> This is, we think, and unavoidable consequence of that supremacy which the constitution has declared.[78]

McCulloch v. Maryland was not simply about the Supreme Court deciding the question of the national bank. Fundamentally, the case encompassed the entire question of the practical constitutional relationship between the States and the nation, and established the Supreme Court as central to the sorting out of this relationship. Furthermore, it constitutionally legitimated the notion that some of the powers of the national government were unenumerated.

While *McCulloch v. Maryland* was often cited as the most pivotal federalism case considered by the Marshall Court, numerous cases decided by the Court had a nationalizing influence on the Court's continuing federalism adjudication. Two such cases were *Martin v. Hunter's Lessee*[79] and *Cohens v. Virginia*;[80] both dealt with the constitutional power of the Supreme Court in relation to State courts, and both ultimately established the preeminence of the Supreme Court. *Martin* considered whether the Constitution gave the Supreme Court appellate power over Virginia courts, and *Cohens* asked whether the Supreme Court could review rulings of the Virginia Supreme Court.

Martin v. Hunter's Lessee came about when a Virginia court refused to recognize a claim to land by Denny Martin, the descendent of Loyalist Lord Fairfax, instead holding that State confiscation laws overrode the 1783 treaty of peace with Great Britain and the Jay Treaty, which guaranteed such holdings.[81] This was especially significant because the Supreme Court had affirmed the supremacy of the treaties; thus, in finding against Martin the Virginia court was

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[78] Ibid., 330.
[79] *Martin v. Hunter's Lessee*, 14 U.S. 304 (1816).
[80] *Cohens v. Virginia*, 19 U.S. 264 (1821).
[81] Jean Edward Smith, *John Marshall: Definer of a Nation* (New York: Henry Holt and Company, 1996), 427.

flagrantly flouting the authority of the Supreme Court.[82] The case was appealed to the Supreme Court, who was to decide whether the State and national government were equally sovereign. In a "judicial tour de force... that would become the keystone in the arch of the Supreme Court's appellate authority," the Court held that "the importance, and even necessity of uniformity of decisions throughout the whole United States, upon all subjects within the purview of the constitution" required appellate jurisdiction for the Supreme Court and further, that "the constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States" with section 25 of the Judiciary Act. [83]

The holding in *Martin v. Hunter's Lessee* "provided the rationale for the supremacy of the Union" employed in later cases like *Cohens v. Virginia*.[84] The brothers Cohen illegally sold

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[82] Ibid., 426.

[83] Ibid.; *Martin v. Hunter's Lessee*, 14 U.S. 304, 347-348, 342 (1816).
Section 25 of the Judiciary Act reads: And be it further enacted, That a final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favour of such their validity, or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said Constitution, treaty, statute or commission, may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error, the citation being signed by the chief justice, or judge or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the Supreme Court of the United States, in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the Supreme Court, instead of remanding the cause for a final decision as before provided, may at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution. But no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute.

[84] Smith, *Definer of a Nation*, 430.

lottery tickets and were convicted under a State law by the Virginia Supreme Court. The case was brought on writ of error to the Supreme Court, where Virginia argued that it was the State courts, and not the Supreme Court, who had the final constitutional authority when conflict arose between a State and the nation.[85] The justices rejected this view, however, and Chief Justice Marshall's opinion held that the Supreme Court had jurisdiction over "all cases arising under the Constitution," and furthermore, that "the constitution and laws of a State, so far as they are repugnant to the constitution and laws of the United States, are absolutely void."[86] Although the Court affirmed the Virginia court's conviction, in rejecting the State's jurisdictional argument, the Supreme Court's jurisdiction over constitutional questions in the States was firmly established.

The next case to arise concerning the relationship between the power of the States and the power of the nation was *Gibbons v. Ogden*, which dealt with the Commerce Clause.[87] The State of New York had granted exclusive operating rights within its waters, including the waters between itself and other States, to several individuals. An individual who already operated a ferry in the waters between New Jersey and New York under a license granted by an Act of Congress in 1793 brought a challenge against New York's authority to extend its grant on the grounds that the State was interfering with the power to regulate interstate commerce given to Congress by the Commerce Clause. In the case, the Supreme Court had to determine whether both the New York statute and the Congressional statute could stand, and what relationship the two had to the power of Congress to regulate interstate commerce.

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[85] *Cohens v. Virginia*, 19 U.S. 264, 377 (1821).
[86] Ibid., 405, 414.
[87] *Gibbons v. Ogden*, 22 U.S. 1 (1824).

Chief Justice Marshall, writing for the Court, found that the New York statute violated the Supremacy Clause, which stated that "the Laws of the United States... shall be the supreme Law of the Land... the... Laws of any State to the contrary notwithstanding." The power granted to Congress by the Commerce Clause validated the federal legislation of 1793 and invalidated the law passed by New York. Marshall defined the commerce power, writing

> It was in vain to look for a precise and exact definition of the powers of Congress, on several subjects. The constitution did not undertake the task of making such exact definitions. In confering powers, it proceeded in the way of enumeration, stating the powers conferred, one after another, in few words; and, where the power was general, or complex in its nature, the extent of the grant must necessarily be judged of, and limited, by its object, and by the nature of the power.[88]

Although the Commerce Clause did not specifically articulate that the States would not also possess power to regulate interstate commerce, Chief Justice Marshall pointed out that the granting of power to Congress seemed a clear abrogation of that authority. Otherwise, the elucidation of such a grant was pointless, and a confusing situation wherein both the States and the nation would have sovereignty within the same sphere would result. Strict construction of the Commerce Clause—assuming that the States also had power to regulate interstate commerce—would frustrate the meaning of the clause and render it obsolete.

While Marshall affirmed the constitutional power of Congress to regulate commerce, he also made quite clear that there were limits to the argument that the Court presented. Congressional power under the Commerce Clause was not to be interpreted as reaching beyond specific commercial limits.

> The power, as granted in the constitution, is a limited power. It is a clear principle, that when the means of executing any given power are specified in the

[88] Ibid., 10-11.

> grant, Congress cannot take, by implication, any other means, as being necessary and proper to carry that power into execution. This power, then, is limited.[89]

Marshall made clear that the power of Congress under the Commerce Clause was limited by the specific nature of commerce, and even more so by the fact that it could only regulate "among the several states." While the decision affirmed an aspect of the national government's power, it was careful to also maintain the doctrine of State sovereignty.

An equally significant case that had heavy bearing on federalism in constitutional terms was that of *Barron v. Baltimore*.[90] The case asked an important and significant question: what was the relationship of the Bill of Rights to the States? John Barron sued the city of Baltimore for losses incurred when the city's development damaged the profitability of his wharf. He contended that under the Fifth Amendment, the State could not take his "private property" for "public use" without "just compensation".[91] Writing for a unanimous Court, Chief Justice Marshall rejected the claim that the States could be held liable for Barron's financial losses under provisions of the Bill of Rights. The Supreme Court, he argued, had no jurisdiction in the case.

> The question thus presented is, we think, of great importance, but not of much difficulty. The constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution, provided such limitations and restrictions on the powers of its particular government, as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the

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[89] Ibid., 45.

[90] *Barron v. Baltimore*, 32 U.S. 243 (1833).

[91] The Fifth Amendment reads, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

> limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes. If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States.[92]

Marshall argued that the nature of the Constitution itself, as well as the intentions of those who framed and drafted that document and the Bill of Rights, could not be construed to mean that the Bill of Rights applied to the States.

Although the debate about the constitutionality of the national bank lapsed for the time being, bolstered by the support of *McCulloch v. Maryland,* the "bank war", as it were, would be taken up again in 1832. Opposition to the bank continued to be expressed in terms of federalism concerns. President Andrew Jackson vetoed the re-chartering of the bank because he believed it to be a "violation of... the principle of dual federalism" because it granted sole control over monetary issues to the national government without an explicit textual basis.[93] He argued that the Executive and Legislature were not permanently "bound by the judiciary's reading of the Constitution, but rather were obliged to interpret the fundamental law for themselves."[94] Arguing that even the Supreme Court had conceded that what was "necessary and proper" for the national government to accomplish the goals it was charged with was a question of political discretion, Jackson opposed this extension of federal power.

Illustrating the complicated nature of the dual sovereignty position, Jackson that same year demonstrated a commitment to national supremacy during the nullification crisis in South Carolina.[95] Outraged by the perceived injustices of a protective tariff, South Carolinians

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[92] *Barron v. Baltimore*, 247.
[93] Kelly et al., *The American Constitution*, 205-206.
[94] Ibid., 206.
[95] Ibid., 208-212.

challenged the legitimacy of the federal statute, and began to mobilize a fighting force.[96] Jackson, though in agreement that the tariff was an "instrument of anti-republican privilege," argued that the constitutional compact into which the States entered "created a 'binding obligation' and was backed by an explicit sanction that made an attempt to destroy the government by force an offense punishable under the public law of self-defense".[97] Indeed, he contended that "[t]o say that any State may at pleasure secede from the Union is to say that the United States are not a nation."[98] Jackson requested from Congress the ability to call up the army and navy to quell a violent uprising, which was granted to him in the form of the Force Bill.[99] Eventually, a Compromise Tariff that appeased the South Carolinians was enacted, rendering the use of force unnecessary, but the enactment of the Force Bill had far-reaching ideological implications concerning the ultimate supremacy of the nation within the constitutional compact. In many ways, the call to arms by South Carolinians was an effort on the part of slaveholders to substantively bolster their claims of State sovereignty that were being challenged by abolitionists advocating a national moratorium on slavery. The relative failure of this movement as a result of the assertion of national supremacy implicit in the presidential call-to-arms "irretrievably smashed" this hope.[100]

The morally contentious issue of slavery certainly heightened the significance of the federalism question. During the antebellum era those who advocated the idea that the national government had certain unenumerated powers and prerogatives began increasingly to clash with those who advocated States' rights. The Civil War, in part, was about this very notion of States'

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[96] William W. Freehling, *Prelude to Civil war: The Nullification Controversy in South Carolina*, (New York: Oxford University Press, 1965), 280-284.
[97] Ibid., 211, 210.
[98] Ibid., 212.
[99] Ibid., 285.
[100] Ibid., 297.

rights, nascent in the South Carolina nullifiers argument: what State policies were outside the national reach, and how strong were the claims of the States against the nation?

The growing controversies over slavery in the United States were intensified by continued westward expansion, which had a fundamental effect on the debates about how sovereign were the respective spheres of State and national power. For slave-holding Southerners, the rising tide of antislavery sentiment threatened their existence and way of life, and the territorial issue came "to symbolize a struggle for survival."[101] In an effort to minimize the escalation of tension, Congress enacted what came to be known as the Missouri Compromise. Originally, the bill regarding the statehood of Missouri contained an amendment that sought to restrict slavery in the new territory, prompting heated debates about the function and role of the national government in relation to individual States' practices.[102] These debates were especially contentious because representation of slave States and free States were equal in the Senate. When the territory of Maine also applied for statehood, the two applications were combined into one bill, and the original amendment was altered to prohibit slavery in the Louisiana Purchase north of 36° 30'.[103] After much deliberation and several losing votes, the Missouri Compromise finally passed the House and the Senate in 1820, with unresolved questions as to its constitutionality. Controversy over the involvement of the national government in regulating the decisions of States only escalated as a result of the Missouri Compromise. The Kansas-Nebraska

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[101] Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics*, (New York: Oxford University Press, 1978), 165.
[102] Ibid., 106.
[103] Ibid., 107.

Act of 1854 eventually repealed the law.[104] Shortly thereafter, the case of *Dred Scott v. Sandford* was brought before the Supreme Court of the United States.[105]

Dred Scott at its broadest asked the Supreme Court to decide whether the national government embodied in Congress had the constitutional authority to enact the Missouri Compromise, and to determine the constitutional status of slavery in the territories.[106] At this point, the North possessed a political, economic, and numerical "preponderance" and was convinced that it possessed a "moral duty" to "make the nation over in its own image". The South found itself continually reacting against attacks on the States' ability to do as they might choose with regard to slavery, and the *Dred Scott* case became representative of this ongoing struggle. Dred Scott, a slave, sued for his freedom in a Missouri court, but his claim that his former residence in a free part of the Louisiana territory made him a free man was rejected. [107] The case was brought on appeal to the Supreme Court, and further provocation of the already divisive States' rights issue was the inevitable result. Significantly, Chief Justice Taney, who wrote the opinion of the Court, argued that it was unconstitutional for Congress to enact the Missouri Compromise because it violated due process in the taking of private property. Congress could not make a law that, for example, quartered troops in people's homes, Taney argued; likewise, they could not make a law that amounted to a seizure of one's property if one changed geographic location. This was the first instance of a Supreme Court justice giving credence to the notion of Substantive Due Process—that the Due Process Clause contained not

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[104] Ibid., 187.
[105] *Dred Scott v. Sandford*, 60 U.S. 393 (1857).
[106] Carl B. Swisher, *History of the Supreme Court of the United States: Volume V, The Taney Period, 1836-64* (New York: Macmillan Publishing Co., Inc., 1954), 599.
[107] Ibid., 131-133.

only procedural, but also substantive rights guarantees—which would so affect questions of federalism in later years.[108]

When Chief Justice Taney, writing for the majority, said that no slave could be considered a citizen, the Court effectively destroyed any legal means by which the States could come to a peaceful resolution on the issue of slavery. The *Dred Scott* decision, in essence, affirmed a constitutional right to slave-holding and denied the national government any role in arbitrating the difficult issue."[109] When Abraham Lincoln, a staunch critic of the decision, was elected to the presidency, secession by the Southern States soon followed. Lincoln, like Jackson, rejected secession as a constitutional right. The Civil War very clearly showed the practical significance of federalism debates in America that seemed, on their face, quite theoretical. While the debate over the constitutional rights of States had certainly not been peaceful for some time, the Civil War became the bloodiest escalation of that controversy in the history of the United States, and with the eventual defeat of the South and its belief in State's rights, the original understanding of federalism would be altered in fundamental ways.

From the Civil War to the New Deal

The political debate over federalism was certainly affected by the Civil War, but the lines of argument remained largely unchanged. "Notwithstanding that the States' Rights doctrine had been badly tarnished by its association with secession, there remained a deep-seated attachment to State sovereignty" in post-Civil War America. [110] The notion of dual federalism, that the States maintained jurisdiction over most areas outside those specifically granted to Congress,

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[108] Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (New York: Simon and Schuster, 1990), 43.
[109] Fehrenbacher, *The Dred Scott Case*, 516.
[110] Berger, *The Founders' Design*, 158.

was still very much the order of the day. This idea would persist from the antebellum period through the early 1930s.[111]

The post-Civil War Congress enacted the Thirteenth Amendment, along with the Civil Rights Act of 1866, in order to abolish slavery. The purpose of the Civil Rights Act, which was based on the Thirteenth Amendment, was to "provide a permanent guarantee of rights equality" for the newly freed slaves.[112] In spite of the Thirteenth Amendment—or perhaps in response to it—many southern States passed "black codes" limiting the freedoms of newly freed slaves.[113] It became clear to those who had enacted the amendment and the Civil Rights Act that neither the Act nor the amendment were explicit enough to provide a sufficient "constitutional basis" to prevent or correct State abuses of freed blacks enabled by indirect means, such as citizenship requirements.[114] This concern prompted the drafting and passage of the Fourteenth Amendment, in order to restate and to reaffirm the constitutionality of the Civil Rights Act and address the citizenship issue. The most significant and lasting alteration of the relationship between the States and the nation to come out of the Civil War was the Fourteenth Amendment, which, contributing as it did to the rise of Substantive Due Process, ushered in a new era for federalism.

The most pertinent sections of the Fourteenth Amendment with regard to federalism were sections 1 and 5, which read, respectively:

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[111] Charles A. Lofgren, "The Origins of the Tenth Amendment: History, Sovereignty, and the Problems of Constitutional Intention," in *Constitutional Government in America: Essays and Proceedings from Southwestern University Law Review's First West Coast Conference on Constitutional Law*, ed. Ronald K. L. Collins (Durham, NC: Carolina Academic Press, 1980), 331.

[112] Kelly et al., *The American Constitution*, 330.; The Thirteenth Amendment reads, "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction... Congress shall have power to enforce this article by appropriate legislation."

[113] Kelly et al., *The American Constitution*, 327-328.

[114] Ibid., 332.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States; not 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 law.
>
> The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

John Bingham, who drafted the Fourteenth Amendment, said, "the care of the property, the liberty, and the life of the citizen... is in the States and not in the federal government. I have sought to effect no change in that respect."[115] Indeed, "nearly all said that it was but an incorporation of the Civil Rights Bill... there was no controversy as to its purpose and meaning."[116] Under this understanding, the Fourteenth Amendment simply allowed the power of review over State laws that did not guarantee equal rights.

Initially, the Fourteenth Amendment had little, if any, appreciable impact on questions of federalism outside the strictly limited sphere of the original intent of the amendment: achieving parity in legal treatment for former slaves. One of the first and seminal instances of an effort to apply the provisions of the Fourteenth Amendment to State regulations not regarding a civil rights issue came in *The Slaughterhouse Cases*.[117] Butchers challenging Louisiana state regulations of their industry claimed guarantees against such legislation under three clauses of the Fourteenth Amendment: the Equal Protection Clause, the Privileges and Immunities Clause, and the Due Process Clause. The Supreme Court rejected all of these claims, finding that such a challenge was not intended by the amendment. The purpose of the Equal Protection Clause, the

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[115] *Congressional Globe* (39th Congress 1st Sess. 1866), 1292, as quoted in Berger, *The Founders' Design*, 159.
[116] Harry Flack, *The Adoption of the Fourteenth Amendment* (Baltimore: Johns Hopkins University Press, 1908), supra note 6 at 81.
[117] *The Slaughterhouse Cases*, 83 U.S. 36 (1873).

Court held, was to prevent the enactment of laws discriminating against blacks, not to deal with labor and property questions. The claimants argued that the Fourteenth Amendment extended to all people by virtue of their national citizenship the guarantees of the Privileges and Immunities Clause, which meant that citizens could bring claims against the State based on those guarantees. This argument, if accepted, would have altered the relationship between the State and individual rights, setting up the federal government as the guarantor. The Supreme Court rejected this argument, interpreting the Privileges and Immunities Clause narrowly and holding that the language of the clause[118] did not warrant the incorporation of such protections against the States. The clause, the Court held, only forbade States from infringing on "rights peculiar" to an individual's national citizenship, and did not serve as a guarantee of rights for the individual against the State.[119] The Privileges and Immunities Clause continued to be narrowly construed, and never figured prominently in federalism adjudication. Finally, the Court found that the Due Process Clause was a strictly limited procedural guarantee, not a provision that could be read to contain specific rights.[120] Although in *The Slaughterhouse Cases* the Court strictly construed the Due Process Clause, it would not long hold to this position.

The rise of Substantive Due Process would radically alter the legal ramifications of the Fourteenth Amendment, and have far-reaching effects on the relationship between the States and the nation, and on the role of the Court as arbiter of that relationship. The doctrine of Substantive Due Process maintained that the phrase "due process" not only contained procedural safeguards, but also secured unenumerated rights. These rights are bestowed on the citizens of the States by the Court's interpretation of the Due Process Clause. As a result, the Fourteenth

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[118] "No State shall make or enforce any law which shall abridge the privileges or immunities of citizen of the United States..."
[119] *The Slaughterhouse Cases*, 126.
[120] Kelly et al., *The American Constitution*, 388.

Amendment, with the Due Process Clause, would become and remain "the great engine of judicial power," expanding national prerogatives against the States.[121]

The way was paved for the application of Substantive Due Process at the State level in *Allgeyer v. Louisiana*. In this case, the Supreme Court proclaimed that the term liberty in the Due Process Clause included a guarantee of "liberty of contract"—the right to make contracts for the acquisition of property.[122] From that point this doctrine of "liberty of contract" allowed the Court in cases like *Lochner v. New York*[123] to find state laws and regulations unconstitutional, not on the basis of an explicit textual provision, but because the laws violated the notion of Substantive Due Process. The basis for these substantive prohibitions and the definition of "liberty of contract" were the justices' beliefs that the regulations in question were economically unsound and politically undesirable, and thus, that the Due Process Clause must extend a prohibition against the States regulating certain aspects of business and industry.

In many ways, it is difficult to characterize the Court's federalism jurisprudence during the first three decades of the twentieth-century. The rise of Substantive Due Process meant that the Court's decisions were often based on ideas of "reasonableness," an inherently arbitrary concept grounded in each individual's conception of what was a "reasonable" law.

> Throughout the period from 1900 to 1933 the Court drew the line against social and economic legislation that seemed to alter market and property relationships too drastically. Often the Court's nay-saying was unexpected, disregarding what appeared to be controlling precedents in support of regulatory legislation... it expressed the reluctance of the society as a whole to move too rapidly toward positive government and the regulatory state.[124]

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[121] Bork, *Tempting of America*, 36.
[122] *Allgeyer v. Louisiana*, 165 U.S. 578, 591 (1897).
[123] *Lochner v. New York*, 198 U.S. 45 (1905). "Liberty of contract" was applied against federal law in *Adair v. United States*, 208 U.S. 161 (1908).
[124] Kelly et al., *The American Constitution*, 446.

The Court would swing from opposing federal and state legislation to upholding it, often while composed of the same members.[125]

During this time, the Court also began interpret Bill of Rights' provisions more expansively. In *Gitlow v. New York* (1925),[126] the Court affirmed that the First Amendment's freedom of speech and press did indeed apply to the States, incorporated by way of the Due Process Clause of the Fourteenth Amendment.[127] The fact that such incorporation was assumed by the Court without any discussion of precedent or the purpose of the Fourteenth Amendment hinted at a potential sea change in judicial understanding of the Bill of Rights. "For present purposes," opined Justice Sanford in *Gitlow*, "we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."[128]

In the late 1800s, the Progressive movement swept through America. The primary goal of the movement was to "introduce a more expansive understanding of national power, particularly with respect to interstate commerce."[129] Progressives believed that "the expansion of governmental authority for regulatory purposes required the formulation of new doctrines of

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[125] Examples of laws upheld include *Holding v. Hardy*, 169 U.S. 366 (1898); *Muller v. Oregon*, 208 U.S. 412 (1908); *Bunting v. Oregon*, 243 U.S. 426 (1917); Examples of laws struck down include *Lochner v. New York*, 198 U.S. 45 (1905); *Adair v. United States*, 208 U.S. 161 (1908); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Wolff Packing Company v. Kansas Court of Industrial Relations*, 262 U.S. 522 (1923).

[126] *Gitlow v. New York*, 268 U.S. 652 (1925).

[127] Ten years later, the Court argued that the incorporation of the freedoms of speech and press inherently affirmed the incorporation of freedom of assembly. *Grosjean v. American Press Company*, 297 U.S. 233 (1936); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

[128] Ibid., 666.

[129] Martha Derthick and John J. Dinan, "Progressivism and Federalism," in *Progressivism and the New Democracy*, ed. Sidney M. Milkis and Jerome M. Mileur (Amherst, MA: University of Massachusetts Press, 1999), 85.

constitutional power, especially at the federal level"; specifically, they desired a broader conception of congressional power under the Commerce Clause.[130] Indeed, they argued that the notion of dual sovereignty and placing limitations on Congress's power through strict construction of the Commerce Clause was "outdated."[131] The Court did not wholeheartedly acquiesce to these desires to expand the Commerce Clause; sometimes it would uphold laws, and other times it would strike them down, again with a certain level of unpredictability.[132] Congress continued passing legislation that amounted to the assumption of a federal police power, ostensibly under the power to regulate interstate commerce granted to it by the Commerce Clause.[133] Nevertheless, generally the Court limited the national government's power to regulate the States and intrastate matters by opposing the more drastic federal economic regulations and advocating a laissez-faire economic theory. It was at the same time, however, laying the

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[130] Kelly et al., *The American Constitution*, 416.; Theodore Roosevelt, a leader of the Progressives, argued that, "[Under a] wise and farseeing interpretation of the interstate commerce clause the national government should have complete power to deal with all of this wealth which in any way goes into the commerce between the States." Theodore Roosevelt, "State and Federal Powers," Address delivered at Harrisburg, Pennsylvania, 4 October 1906, reprinted in *Selected Articles on States Rights*, ed. Lamar T. Beman (New York: H. W. Wilson, 1926), 148-158.

[131] Derthick and Dinan, "Progressivism and Federalism," 86.

[132] Thus, the Court's record on the Commerce Clause in the period between 1900 and 1933 is mixed. Federal regulations were upheld in cases that included: *Railroad Commission of Wisconsin v. Chicago, Burlington, and Quincy*, 257 U.S 563 (1922); *Dayton-Goose Creek Railway Company v. United States*, 263 U.S. 456 (1924); *Stafford v. Wallace*, 258 U.S. 495 (1922); Federal laws were struck down in *United States v. E.C. Knight*, 156 U.S. 1 (1895); *First Employer's Liability Cases*, 207 U.S. 463 (1908); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Bailey v. Drexel Furniture Company*, 259 U.S. 20 (1920). It should be noted that in *E.C. Knight* the Court made a distinction between commerce and "manufacturing," holding that the Sherman Anti-Trust Act was constitutional where it dealt with the former, but that it did not and could not interfere with manufacturing.

[133] Kelly et al., *The American Constitution*, 417.

groundwork for the ever-expanding power of the federal judiciary over the States by legitimating the idea of Substantive Due Process.[134]

The election of Franklin D. Roosevelt in 1932 and the introduction of his New Deal program were the harbingers of a new constitutional era and a new era for federalism. The central tenet of the New Deal was a massive conglomeration of power at the national level never before seen; the government justified this expansion of power with the Commerce Clause. Although the Supreme Court had accepted some federal laws that expanded the Commerce Clause during the preceding three decades, none of these were of the scope or magnitude proposed by the New Deal. This legislation required a new and much more expansive interpretation of the Commerce Clause, which the Court was loath to accept. Between 1933 and 1936, the Court struck down at least a dozen New Deal laws.[135] In the combined cases *Amazon Petroleum Company v. Ryan* and *Panama Refining Company v. Ryan*, the Court found that section 9(c) of the National Industrial Recovery Act was an unlawful delegation of Congress's authority to the president.[136] In *Perry v. United States*,[137] the Court struck down the Emergency Banking Relief Act of 1933 on the grounds that it overextended Congress' power under the Commerce Clause. In *Retirement Board v. Alton Railroad Co.*, the Court invalidated the Railway Workers' Pension Act on the same grounds.[138]

While each of these cases in their turn did little to help the relationship between Roosevelt and the Court, the 1936 case of *Schechter Poultry Corp. v. United States* did the most

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[134] Ibid., 443.
[135] Marian C. McKenna, *Franklin Roosevelt and the Great Constitutional War: The Court-Packing Crisis of 1937* (New York: Fordham University Press, 2002), 27.
[136] *Panama Refining Company et al. v. Ryan et al.*, 293 U.S. 388 (1934).
[137] *Perry v. United States*, 294 U.S. 317 (1935).
[138] *Retirement Board v. Alton Railroad Co.*, 295 U.S. 330 (1935).

damage to this already contentious relationship.[139] In *Schechter*, the Court overturned the National Industrial Recovery Act because the justices rejected the argument that one could not differentiate between direct and indirect effects on interstate commerce; indeed, if such differentiation was not made then "the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government."[140] The Court expressed concern that to accept a broad "effects doctrine" that allowed for indirect effects as a justification of congressional power allowed for an imprecision which would justify many congressional actions that were not part of the original scope by the Commerce Clause. The opinion harkened back to the limits Chief Justice Marshall set out in his *Gibbons* opinion; in both cases, the Court argued that the maintenance of a distinct notion of interstate commerce, thus constraining the breadth of Congress's power, was "fundamental" and "central to the maintenance of our constitutional system."[141] Roosevelt was continually frustrated on all sides by the onslaught of Supreme Court rulings, and he constantly feared for the survival of legislation that had as yet escaped the Court's reach.[142] For Roosevelt, the choice was clear—in order to preserve the New Deal, he must remake the Court in his favor.

After his reelection in 1936, Roosevelt forged ahead with a plan to pack the Court. He presented a bill in Congress that would allow the Court's membership to be increased to fifteen justices, with the president being able to appoint a new justice for every judge over age seventy

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[139] *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).
[140] Ibid., 546.
[141] Ibid., 546.
[142] Bork, *The Tempting of America*, 51-53. These included the National Industrial Recovery Act of 1932, the Railroad Retirement Act of 1934, the Bituminous Coal Conservation Act of 1935, and the Agricultural Adjustment Act of 1933.

who had served for ten years or more.[143] In retrospect, it seems that Roosevelt's plan was doomed to fail from the start, as the effort was remarkably maladroit; Roosevelt neither followed the traditional channels of bill introduction, nor did he try to veil the baldly political reasoning for the bill.[144] Indeed, even those who supported Roosevelt's New Deal were not particularly enthusiastic about his announcement to enlarge the Court's membership, thus allowing him the freedom to add judicial nominees who favored his policies.[145] Opposition to the bill was so strong that it was never brought to a vote.[146] Nevertheless, while this plan may have failed spectacularly, the reform that Roosevelt sought still came. In 1937, the Supreme Court dramatically changed course with "the switch in time that saved nine", arguably under pressure from Roosevelt's plan, with the case *West Coast Hotel v. Parrish*, in which the Court upheld a congressional law establishing a minimum wage.[147] In *West Coast Hotel*, the justices demonstrated a new willingness to accept an expansive congressional commercial power. This, combined with the serendipitous deaths and retirements of several justices that allowed Roosevelt to select appointees favorable to New Deal policies, ushered in a radically new Supreme Court, willing to go much farther in its acceptance of national power.[148]

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[143] Barbara A. Perry and Henry J. Abraham, "Franklin Roosevelt and the Supreme Court: A New Deal and a New Image," in *Franklin D. Roosevelt and the Transformation of the Supreme Court*, ed. Stephen K. Shaw, William D. Pederson, and Frank J. Williams (Armonk, New York: M. E. Sharpe, 2004), 15. The bill also required the Court to give notice to the attorney general before it issued injunctions on constitutional questions; it allowed the Chief Justice power to shift district and circuit judges depending on the work load, and it "provided for direct appeal to the Supreme Court of any decision against an act of Congress by a court of first instance," 482-483.
[144] Stephen K. Shaw, William D. Pederson, and Frank J. Williams, in Shaw, et al., eds., *Franklin D. Roosevelt and the Transformation of the Supreme Court*, 1.
[145] Perry and Abraham, "Franklin Roosevelt and the Supreme Court," 29.
[146] Kelly et al., *The American Constitution*, 484.
[147] *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937). This overruled a 1923 decision in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).
[148] Bork, *The Tempting of America*, 55.

Part of the new Court's acceptance of New Deal programs was based on the idea that the justices should show restraint and allow the other branches to interpret more expansively their powers.[149] Justice Frankfurter, appointed to the Court in 1939, exemplified this philosophy, arguing that

> one of the greatest duties of a judge [is] the duty not to enlarge his authority. That the Court is not a maker of policy but is concerned solely with questions of ultimate power, is a tenet to which all Justices have subscribed. But the extent to which they have translated faith into works probably marks the deepest cleavage among the men who have sat on the Supreme Bench.[150]

The notion that judges should not apply a stringent effects doctrine and assume that congressional legislation was justified, only striking down laws if they "unambiguously violated the Constitution," came to be the guiding belief of the post-1937 Court.[151] The result of this jurisprudence was greatly expanded congressional prerogatives, at the expense of States' power.

The Court followed this doctrine of judicial restraint towards congressional legislation throughout the 1940s, during which time the justices allowed for the dramatic extension of national power beyond what had previously been considered constitutionally allowable under the Commerce Clause. In *NLRB v. Jones and Laughlin Steel Corporation* (1937), the Court discarded the theretofore recognized distinction between local manufacturing and interstate commerce, upholding the National Labor Relations Act of 1935, which allowed the national government to intervene in labor-management disputes because they arguably could affect the

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[149] Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Modern Judicial Conservatism*, (Chicago: The University of Chicago Press, 2004), 24.
[150] Felix Frankfurter, *The Commerce Clause under Marshall, Taney and Waite* (Chicago: Quadrangle Books, 1937), 80-81.
[151] Keck, *The Most Activist Supreme Court*, 25.

flow of interstate commerce.[152] In *United States v. Darby* (1941), which upheld the Fair Labor Standards Act allowing the national government sweeping powers to regulate wages, hours, and type of permitted labor based on the fact that such things could potentially affect interstate commerce, Chief Justice Stone wrote regarding the Tenth Amendment:

> The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and State governments as it had been established by the Constitution before the Amendment or that its purpose was other than to allay the fears that the new national government might seek to exercise powers not granted, and that the States might not be able to exercise fully their reserved power.[153]

He continued, "The motive and purpose of a regulation of interstate commerce are matters for the legislative judgment upon the exercise of which the... courts are given no control."[154] This is a telling example of the post-1937 Court's changed attitude with regard to federalism. No longer, as in *Schechter*, was the Court questioning if the national government could involve itself in States' concerns; rather, the question became simply one of the extent of allowable involvement.

On the heels of this decision came the 1942 opinion in *Wickard v. Filburn*.[155] As discussed above, the Court in *Wickard* conceded that Congress, under the Commerce Clause, could regulate local production of wheat on private farms because such action in aggregate could have an effect on interstate commerce. The opinion was stunning in its breadth, especially in light of how unconstitutional it would have been considered only a few years before. The chief principle of *Wickard* was that the effects doctrine was largely without limits—if Congress could link an action, however tenuously or theoretically, to interstate commerce, the Supreme Court

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[152] *NLRB v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (1937).
[153] *United States v. Darby*, 312 U.S. 100, 124 (1941).
[154] Ibid., 115.
[155] *Wickard v. Filburn,* 317 U.S. 111 (1942).

would be unlikely to object. This was a fundamental alteration of the principles of federalism adjudication that had prevailed in the Court's decisions prior to 1937. Again, this illustrated a shift at the most basic level of the position of the Court towards questions of federalism: the expansion of the power of the national government was accepted, and questions only turned on the legitimacy of the degree of that involvement.

At the same time that the Court was limiting judicial review under the Commerce Clause, allowing Congress greatly expanded legislative flexibility, it began insisting that there were certain cases in which the presence of "discrete and insular minorities" represented a special interest that required much greater involvement on the part of the federal judiciary in State matters.[156] This new willingness on the part of the Court to involve itself in the States was seen in the case of *Palko v. Connecticut*. *Palko* demonstrated the inherent arbitrariness of the nascent incorporation doctrine assumed as fact in *Gitlow*.[157] In *Palko*, the Court held that double jeopardy, prohibited under the Fifth Amendment, was not among the rights applied to the States by the Fourteenth Amendment. The Court's reasoning was that some of the rights contained in the Bill of Rights were more fundamental than others, and that the Due Process Clause only applied the "more fundamental" rights to the States. Thus, the freedom of speech contained in the First Amendment was protected because in the Court's estimation it was part of the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions,"[158] whereas the right to trial by jury or indeed, the prohibition against double

[156] *United States v. Carolene Products Co.*, 304 U.S. 144, 155 (1938).
[157] *Palko v. Connecticut*, 302 U.S. 319 (1937).
[158] Ibid., 328.

jeopardy in the Fifth Amendment, were "not of the very essence of a scheme of ordered liberty."[159]

That *Palko* accepted the *Gitlow* assumption that incorporated the First Amendment, but refused to incorporate the Fifth Amendment, was indicative of the Court's general confusion and lack of principle regarding incorporation doctrine. Throughout the 1940s there was an almost constant debate about whether other segments of the Bill of Rights, originally intended to apply only to the national government, should be extended by the Court through the Fourteenth Amendment to apply to the States.[160] The staunchest supporter of incorporation of the Bill of Rights was Justice Hugo Black, who suggested that there had been " a current of opinion... that the Fourteenth Amendment was intended to make secure against State invasion all the rights, privileges and immunities protected from federal violation by the Bill of Rights."[161] Black argued that the Court had ignored this fact in "an effort to expand its own power," expanding and contracting "constitutional standards" (in this case, the Fourteenth Amendment) in order to have them "conform to the Court's conception of what at a particular time constitutes 'civilized decency' and 'fundamental liberty and justice'."[162] While Frankfurter and other members of the Court disagreed with Black's all-inclusive conception of the incorporation of the Bill of Rights, arguing that to do so would allow for "excessive judicial interference," in cases like *Adamson v. California* they conceded certain portions could be applied to the States by the Fourteenth

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[159] Ibid., 325.
[160] Keck, *The Most Activist Supreme Court*, 33.
[161] *Chambers v. Florida*, 309 U.S. 227, 235 (1940).
The referenced section of the Fourteenth Amendment being: "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."
[162] Keck, *The Most Activist Supreme Court*, 34; *Adamson v. California*, 332 U.S. 46, 69 (1947).

Amendment.[163] Incorporation of portions of the Bill of Rights to the States fundamentally altered the role of the Supreme Court in its arbitration between State and federal spheres of power. It granted the Court far more say in what a State could and could not do within its own borders.

From the New Deal to Rehnquist

Following the success of Roosevelt's New Deal revolution, the Court continued in much the same vein throughout the following decade. During this time period, the Court persisted in involving itself in State matters, and additional guarantees in the Bill of Rights were incorporated to the States, including the freedom to petition[164] and the Free Exercise[165] and Establishment[166] clauses. While incorporation certainly expanded the Court's involvement with the States throughout the 1940s and early 1950s, it was still hesitant to inject itself into matters that would come to define the imminent Warren Court's legacy; for example, in *Colgrove v. Green*[167] the Court refused to invalidate a State apportionment statute, a decision that would be overturned by *Baker v. Carr*[168] in 1962.

The ascension of Earl Warren to the position of Chief Justice in 1953 would not only exacerbate the profound effects of incorporation on federalism, but also dramatically alter the role of the Supreme Court in American political life more generally. This was due to several elements of the Court's jurisprudence. One of these elements was the continued expansion of

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[163] Keck, *The Most Activist Supreme Court*, 34.
[164] *Hague v. CIO*, 307 U.S. 496 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).
[165] *Cantwell v. Connecticut.*
[166] *Everson v. Board of Education*, 330 U.S. 1 (1947); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948).
[167] *Colgrove v. Green*, 328 U.S. 549 (1946).
[168] *Baker v. Carr*, 396 U.S. 186 (1962).

incorporation doctrine both before and during Warren's tenure.[169] Incorporation proceeded until the majority of the clauses in the Bill of Rights were applicable to the States.[170] The second major element of the Warren Court's jurisprudence that altered the relationship between the States and the nation, and between the Court and the States, was an ever-present willingness to utilize the doctrine of Substantive Due Process. The expansive definition that the Court gave to the Due Process Clause, and its eagerness to find new rights within that definition, transformed federalism.

The Warren Court involved itself in many federalism issues by way of the Due Process Clause of the Fourteenth Amendment, handing down opinions regulating State electoral processes and State policies on obscenity.[171] Perhaps the most well known decision of the Court under Warren is *Brown v. Board of Education of Topeka*, in which the justices unanimously found that the standard of separate-but-equal for racially segregated schools was unacceptable under the Fourteenth Amendment.[172] Chief Justice Warren's opinion noted that "education is perhaps the most important function of State and local governments."[173] This responsibility was so important, and the current state of things so egregious, the Court suggested, that the States could not be trusted to fulfill adequately their responsibilities in an acceptable manner. State doctrines of "separate but equal" deprived individuals of the equal protection of the laws that

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[169] This included the Establishment Clause, the rights of petition and assembly, the right to legal counsel, and the right against unreasonable searches and seizures. *Mapp v. Ohio*, 367 U.S. 643 (1961); *Ker v. California*, 374 U.S. 23 (1963); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Murphy v. Waterfront Commission*, 378 U.S. 52 (1964); *Pointer v. Texas*, 380 U.S. 400 (1965); *Griffin v. California*, 380 U.S. 609 (1965); *Duncan v. Louisiana*, 391 U.S. 145 (1968).

[170] The Second Amendment, Third Amendment, and Seventh Amendment have not been incorporated, nor has the grand jury indictment clause that is contained in the Fifth Amendment.

[171] Elections: *Baker v. Carr*, 369 U.S. 186 (1962); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); Obscenity: *Jacobellis v. Ohio*, 378 U.S. 184 (1964).

[172] *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

[173] Ibid., 493.

was guaranteed to citizens by the Fourteenth Amendment. The *Brown* decision elevated the federal government above the States in a policy area that had previously been under the States' control.

In *Brown v. Board of Education II*, the Court extended its ruling from the original *Brown*, mandating that States desegregate schools "with all deliberate speed."[174] The cases brought under *Brown* were remanded to the originating courts, whose judges were given the responsibility by the Supreme Court to develop remedies for based on the new ruling of unconstitutionality. Based on the doctrine of "all deliberate speed", the Court decided *Green v. New Kent County School Board*, which "changed the constitutional mandate from a prohibition to a requirement of racial discrimination in school assignment."[175] The system for integration in New Kent County, Virginia, the school district in question, was based on a non-racialized plan for intermixing. Since disparate proportions of black and white children still attended the two schools in the county, the Court held that the plan was unconstitutional, not under *Brown*, but under *Brown II*. The Court, in essence, made this decision based on the fact that the majority of justices felt that it was not doing enough; the way the Court felt that the district could make such intermixing happen appropriately was to choose individuals based on their race for inclusion in either school; they applied this kind of reasoning in other school segregation cases as well.[176]

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[174] *Brown v. Board of Education II*, 349 U.S. 294, 497 (1955); *Goss v. Board of Education of Knoxville, Tennessee*, 373 U.S. 683 (1963); *Griffin v. County School Board of Prince Edward County*, 375 U.S. 391 (1964); *United States v. Jefferson County Board of Education*, 372 F. 2d 836 (1966); *United States v. Montgomery County Board of Education*, 395 U.S. 225 (1969); *Bradley v. School Board City of Richmond*, 412 U.S. 92 (1973).

[175] Lino A. Graglia, *Disaster by Decree: The Supreme Court Decisions on Race and the Schools*, (Ithaca: Cornell University Press, 1976), 67.; *Green v. New Kent County School Board*, 391 U.S. 430 (1968).

[176] *United States v. Montgomery Board of Education*, 395 U.S. 225 (1969).

State laws were also at issue in *Griswold v. Connecticut* (1965).[177] Griswold and another director, both employed by the Planned Parenthood League of Connecticut, were convicted under a State law that forbade the distribution of information regarding contraception to married couples; the conviction was appealed on the grounds that the law violated a constitutional protection of marital privacy. In the opinion, Justice William O. Douglas, writing for the majority of the Court, declared the constitutional protection of a heretofore unrecognized right—the right to privacy. Douglas suggested that "specific guarantees in the Bill of Rights have penumbras, formed by emanations" which proved the existence of the unwritten right.[178] As a result, States could not make laws regarding married couples access to contraception because these individuals possessed a right to privacy as citizens of the United States. This reasoning was an outgrowth of the Substantive Due Process doctrine; the justices could now declare new rights based on a generalized constitutional principle as opposed to an explicitly textual basis.

The constitutionality of the behavior of State authorities was the question raised in the case of *Miranda v. Arizona*.[179] In this case, the Warren Court was asked to decide whether State police practices of interrogation violated the Fifth Amendment if the authorities did not inform the individuals of their rights. In the group of cases that were brought under *Miranda*, authorities had obtained confessions from individuals without providing such information. Chief Justice Warren wrote the opinion of the Court, which found that failing to inform suspects of their rights violated their right to protection from self-incrimination, and thus the Fifth Amendment. It was unconstitutional, the Court held, to not inform the accused of their rights; in fact, the Court listed specific guarantees, including the right to remain silent and the right to an attorney, that it felt

[177] *Griswold v. Connecticut*, 381 U.S. 479 (1965).
[178] Ibid., 515.
[179] *Miranda v. Arizona*, 384 U.S. 436 (1966).

police were constitutionally obligated to follow. After the *Miranda* ruling, any confession obtained by State and local police without following the specific guidelines laid out in the opinion became constitutionally inadmissible.

While many lauded the Warren Court for advancing the civil liberties movement through decisions like *Brown*, *Griswold*, and *Miranda*, and certainly even more felt concern over such situations, like segregation, which the Court sought to address, there existed a concern about the constitutional implications of the loose or non-existent textual basis of the Court's decisions. The extension of the incorporation doctrine and the recognition of new rights as a result of Substantive Due Process elevated national prerogatives above those of the States to a degree never before seen. Writing in dissent in *Reynolds v. Sims*, Justice John Marshall Harlan opined:

> These decisions... cut deeply into the fabric of our federalism... No thinking person can fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable... These decisions give support to a current mistaken view... that every major social ill in this country can find its cure in some constitutional "principle," and that this Court should "take the lead" in promoting reform when other branches of government fail to act... The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process... when... the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.[180]

Indeed, one of the many constitutional legacies of the Warren Court was the creation of a vastly different set of means by which to approach the relationship between the States and national powers. Decisions like *Brown*, *Griswold*, and *Miranda* made great inroads against traditional

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[180] *Reynolds v. Sims*, 377 U.S. 533, 624-625 (1964).

notions of federalism, ultimately with the Court taking over State legislative powers in the areas of racial equality, privacy, and criminal rights.

When President Richard Nixon nominated Judge Warren Burger to become the chief justice in June 1969, Burger inherited a Court with vastly new territory before it as a result of incorporation and the rise of the right to privacy.[181] In its first few years, the Burger Court showed some hesitation in endorsing and extending Warren Court precedents, although it did so in some cases.[182] "The new Justices," one scholar said, "have been forced to choose between their political conservatism, which urges wholesale reversal of Warren Court policy, and their judicial conservatism, which counsels reliance upon established precedent."[183] The Burger Court, for the most part, came to choose the second option. For example, the Court built on the precedent of *Griswold* in the case of *Eisenstadt v. Baird*, in which a six-justice majority found that State laws preventing the distribution of information about contraceptives to single individuals was unconstitutional.[184] The Court extended the right to privacy because, as the majority accepted the argument in *Griswold*, it could not find any rational basis in the Fourteenth Amendment for differentiating between married and single individuals. This perpetuation of a constitutional principle based on Substantive Due Process only served to further diminish the States' jurisdiction.

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[181] Henry Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, Maryland: Rowman & Littlefield Publishers, Inc., 1999), 253.

[182] *Evans v. Abney*, 396 U.S. 435 (1970) "represented... a blunting of the Warren Court's thrust in the area of race relations" ; *Dandridge v. Williams*, 397 U.S. 471 (1970) "enunciated the rule that, where the classification is nonracial, only those interest guaranteed by the Bill of Rights merit strict scrutiny, interests of an economic or social nature do not"; *Oregon v. Mitchell*, 400 U.S. 112 (1970) and *Hadley v. Junior College Dist.*, 397 U.S. 50 (1970) affirmed Warren Court State electoral decisions; in Richard Y. Funston, *Constitutional Counterrevolution*?, (New York: Schenkman Publishing Company, Inc., 1977), 328-331.

[183] Funston, *Constitutional Counterrevolution*?, 339.

[184] *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

The Burger Court decision that had perhaps the most far-reaching effect on restricting the sphere of State power was the case of *Roe v. Wade*, which again built on the concept of a right to privacy.[185] The case was brought as a challenge to a Texas abortion statute that prohibited abortions except to save the mother's life. Counsel for the petitioner argued that the now-established constitutional right to privacy encompassed the right of a woman to have an abortion, and that the Texas law was, as a result, unconstitutional. In a 5-4 decision, the Court found that the law was, indeed, unconstitutional. Furthermore, since the ruling found that there was a constitutional right to abortion (although the opinion prescribed different limits for the three trimesters), the laws of 46 States were affected by the ruling.[186]

While the Burger Court accepted the broad extension of the right to privacy over reproductive matters, they were less willing to accept its extension in other areas. This was particularly true when it came to the issue of homosexual conduct. In the case *Bowers v. Hardwick*, the Court found that the Constitution did not contain a right for individuals to engage in homosexual sodomy, and that State laws prohibiting such behavior were within the bounds of constitutionality.[187] While the Court accepted the right to privacy as a limiting factor on State legislation in cases like *Roe*, *Bowers* demonstrated that the justices did not accept privacy without limits; however, the distinction they drew between the two cases was not based on the constitutional text. The Court simply argued that in *Roe*, the Constitution could be read to contain a right to abortion, while in *Bowers* it could not be read to contain a right to homosexual sodomy. There was no explanation offered for the presence of one right and not the other besides the justices' own perceptions of fundamental rights. *Bowers* confirmed the inherent

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[185] *Roe v. Wade*, 410 U.S. 113 (1973).
[186] Jerry Goldman, *Roe v. Wade* (Oyez: The Oyez Project, 2005.) [Online] available from http://www.oyez.org/oyez/resource/case/334/; accessed 21 March 2005; Internet.
[187] *Bowers v. Hardwick*, 478 U.S. 186 (1986).

arbitrariness of the doctrine that the Court was using to expand federal prerogatives and restrict States' powers.

The Burger Court also continued deciding in school desegregation cases where the Warren Court had left off. In *Swann v. Charlotte-Mecklenburg Board of Education*[188] and *Davis v. School Commissioners of Mobile County*,[189] the Court, in the tradition of *Brown II* and *Green*, unanimously decided that racial integration meant racial balance, and districts would have to bus students cross-district to achieve this marker of desegregation. This required many districts to revamp their integration programs, and some districts that had no busing were required to find the capital to acquire and start such a program.[190] The difficulty with such decisions, on the constitutional level, was that every decision had to be considered by the judiciary on an *ad hoc* basis, because the overarching principles were nebulous at best; not only that, but decisions about local and State functions came more and more within the purview of the federal judiciary, not those directly responsible for the programs.[191] These cases represented a further appropriation of discretionary and regulatory power by the federal government and judiciary at the expense of state prerogatives.

When William H. Rehnquist was sworn into office in early 1972, he arrived after the most dramatic remaking of the Court's role in the twentieth century. With the long and convoluted history of federalism that lay behind, it still remained uncertain as to where the Court would go next when it came to States' rights. What role Justice Rehnquist would have in

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[188] *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971).
[189] *Davis v. School Commissioners of Mobile County*, 402 U.S. 33 (1971).
[190] Graglia, *Disaster by Decree*, 142.
[191] Ibid., 145.; *Richmond School Board v. Board of Education*, 412 U.S. 92 (1973); *Wright v. Council of City of Emporia*, 407 U.S. 451 (1972); *United States v. Scotland Neck Board of Education*, 407 U.S. 484 (1972).

shaping the Court's role in regards to federalism would prove to be of great significance.

Chapter Three
Rehnquist, the Rehnquist Court, and Federalism

On January 7, 1972, William H. Rehnquist was sworn in as the 104th member of the United States Supreme Court.[192] He would serve as an associate justice for fourteen and a half years before being elevated to the chief justiceship. During his tenure as an associate justice he displayed in his opinions, and especially in his dissents, a strong commitment to principles of federalism. This commitment continued to inform his understanding of cases and constitutional provisions once he ascended to the position of Chief Justice. Indeed, the echoes and repercussions of these early commitments constitute what some see as the most striking and controversial legacy of the Rehnquist Court.

As has been argued, federalism has been perhaps the most enduring theme of American constitutional life, from the time of the Founding, through the Civil War and New Deal, and down to the present. The centrality of the debates over the nature and extent of the federal structure of the constitutional order hardly began with the advent of Rehnquist as a Supreme Court justice, nor will it end with the conclusion of his tenure in the center chair. Yet an analysis of his personal commitment to those fundamental principles of sovereignty as divided between nation and States is essential to understanding the important ideological role federalism has played in his jurisprudence of judicial restraint for over three decades; so, too, is it essential to understanding his later intellectual leadership as Chief Justice during which time the effort to restore federalism to its central constitutional place has become the focus of public debate about the role of the federal judiciary more generally. In order to explore thoroughly whether what is

[192] Abraham, *Justices, Presidents, and Senators*, 270.

underway is a true "federalism revolution."[193], it is essential to have an understanding of the elements of the Court's recent federalism jurisprudence that Rehnquist brings with him to the chief justiceship concerning the Constitution, original intention, and State sovereignty. As Chief Justice, Rehnquist's understanding about the role of original intention in interpreting the Constitution, and what this means for the courts and Congress, are essential components of a complete picture of both his own and his Court's federalism jurisprudence.

Constitutionalism, Originalism, and Federalism: Rehnquist's Early Years

Rehnquist's understanding of the original design of the Constitution has been foundational to his understanding about the nature and extent of the judiciary under it and the role of the courts in arbitrating between the powers of the States and the powers of the nation. At the heart of this understanding is a stated interest in the original intentions of the Founders, which Rehnquist declares to be the basis for his understanding of the Constitution as it pertains to federalism. It is this constitutional understanding that grounds his approach to the questions and challenges of federalism and which has largely defined his judicial career.[194]

Between 1972 and 1986, when he served as an associate justice, the United States Supreme Court addressed a number of federalism issues. In case after case where problems of State sovereignty were at issue, Rehnquist wrote both majority opinions and dissents, all of which contribute to a better understanding of the specific tenets of his own notions of federalism that have become so contested during his chief justiceship. The themes that emerge in his opinions in federalism cases prior to 1986 in many ways foreshadow the focus and direction of the Court in regard to federalism under his later leadership.

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[193] Fallon, "Conservative Paths," 430.
[194] McDowell, "Language and the Limits of Judging," 244.

At the heart of Rehnquist's commitment to federalism is not merely an implicit assumption but an explicit declaration that there is a principled, constitutionally mandated way to deal with questions regarding where to draw the line between national power and State sovereignty. He believes that since "the Constitution and the laws embody the intentions of those who wrote and ratified them, judges are *morally* obligated to defer to those intentions by the principle of popular government; similarly, they are *constitutionally* obligated to defer to those intentions by the principle of limited government secured by the written law."[195] In almost every case, Rehnquist connects his notions of the relationship between the nation and the States to constitutional history and the intentions of the Founders. For him, the principle of federalism, properly understood, is as it was, defined in the Constitution and by the Founders' original meaning.

Rehnquist's understanding of the Constitution as a fundamental law of limited and enumerated powers is crucial to grasping his arguments and ideas concerning questions of federalism. Not only does he resist the notion that one can impart extra-textual meaning into constitutional clauses, he also has been a proponent of the idea that each clause has a specific and knowable meaning. It has been this significance of the constitutional text that he declared required emphasis when weighing the interests of the States and the nation.

Adhering to constitutional text, Rehnquist believes, is what gives a Court's decisions legitimacy. Rooting judicial decisions in the Constitution's language also prevents the Court from overstepping its boundaries in relation to the States and in its function as a co-equal branch of the federal government. In one case, for example, Rehnquist poetically refers to the "constitutional shoals" which he argues "confront any attempt" on the part of the judiciary to

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[195] Ibid.

impart rights, privileges, and liberties to the Constitution that are not found in the text.[196] Indeed, the distinction that Rehnquist draws suggests in no uncertain terms that rights, liberties, and privileges that are socially popular cannot simply be judicially transferred wholesale into the Constitution based on this popularity—they must enjoy clear textual support in the original Constitution itself or be put there by subsequent amendment. The text of the Constitution has a determinable meaning and is not merely an empty vessel.

For Rehnquist, the meaning of the Constitution as it pertains to federalism is not based merely on the idea that the letter of the text defines the meaning of written law.[197] He believes that correctly understanding the Constitution requires not only an accurate reading of the text, but a well developed understanding of the intentions of the Founders and ratifiers who framed and adopted that text. In his view, it is not enough to understand that the Constitution's language itself dictates certain limits to State or national powers on its face; the original intention or meaning is also essential to a correct understanding of the constitutional provision at issue.

Rehnquist's constitutionalism is rooted in his belief that it is "impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."[198] He generally adheres to this idea throughout his opinions, noting the original reasons for adopting particular constitutional language and arguing that this language has to be interpreted in light of the meaning that it had when it was first enacted. The persistent and pervasive theme of his constitutional jurisprudence is that "the Framers inscribed common principles that control today.

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[196] *Paul v. Davis*, 424 U.S. 693, 693 (1976).
[197] Unlike, for example, the more strictly textualist notions of Justice Antonin Scalia, which focus solely on the text. See: Antonin Scalia, *A Matter of Interpretation*, ed. Amy Gutmann (Princeton: Princeton University Press, 1998).
[198] *Wallace v. Jaffree*, 92.

Any deviation from their intentions frustrates the permanence of that charter and will only lead to ... unprincipled decisionmaking."[199]

For him, the Constitution and its language mean very specific things for judges on the Court:

> Any document—particularly a constitution—is built on certain postulates or assumptions; it draws on shared experience and common understanding. On a certain level, that observation is obvious. Concepts such as "State" and "Bill of Attainder" are not defined in the Constitution and demand external referents. But on a more subtle plane, when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter and to give each provision within that document the full effect intended by the Framers. The tacit postulates yielded by that ordering are as much engrained in the fabric of the document as its express provisions, because without them the Constitution is denied force and often meaning.... The Court's literalism, therefore, cannot be dispositive ... and we must examine further the understanding of the Framers and the consequent doctrinal evolution of concepts of State sovereignty.[200]

For example, this understanding is the reason that Rehnquist is usually hesitant to accept challenges under Section 1983 of the United States Code.[201] In such cases, he rejects the idea

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[199] Ibid., 113.

[200] *Nevada v. Hall*, 440 U.S. 410, 433-434 (1979).

[201] Section 1983 of the U.S. Civil Code provides for civil action for deprivation of rights : "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

that the Fourteenth Amendment allows the Court to apply Section 1983 to State cases.[202] It seems to him absurd that the "Fourteenth Amendment's Due Process Clause should *ex proprio vigore* extend … a right to be free of injury wherever the State may be characterized as the tortfeasor", if for no other reason than such reasoning could allow any action by a State actor to be challenged in federal court, which was clearly not the purpose of the Amendment.[203] In Rehnquist's view, broadening the jurisdiction of the Court and the scope of the Constitution in this way is untenable. His resistance to a wide expansion of the Court's power based on a loose reading of the Fourteenth Amendment also explains his resistance to the concept of Substantive Due Process; he rejects the idea that the Due Process Clause of the Fourteenth Amendment provides a guarantee of substantive, albeit unenumerated, rights, and is not simply a procedural safeguard.

While Rehnquist does not completely reject certain notions of rights protected under the Fourteenth Amendment, he clearly delineates the specific rights that he believes are explicitly protected by text and intention. Indeed, he argues that neither those who adopted the Fourteenth Amendment, nor prior Court precedent, allows for any sort of loose conception of due process rights to bind the States.[204] He is reluctant to constitutionalize rights that were previously not

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[202] *Paul v. Davis*, 424 U.S. 693 (1976); *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981).
The most pertinent sections of the Fourteenth Amendment are Sections 1 and 5, which read respectively:
Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. 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.
Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.
[203] Ibid., 693.
[204] Ibid.

included in the Constitution, and which are not explicitly to be found in its text. "The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law'," he argues.[205]

Another major area in which Rehnquist has resisted expansionist tendencies is under the Commerce Clause. He recognizes that the Commerce Clause legitimately allows Congress certain spheres of influence; however, he opposes the expansion of these spheres beyond the limits of a reasonable definition of commerce, and he strongly opposes the use of the Commerce Clause as an engine for extending the authority of the judiciary.[206] He suggests that, just as is the case with substantive due process, using the Commerce Clause as a means to expand judicial power requires an illegitimate interpretation of the text and intention of the clause.[207] Furthermore, he questions the extent to which the language of the clause can be broadened to allow Congress to act.[208]

Rehnquist's reasoning in Commerce Clause cases uniformly relies upon his principles of federalism and his constitutionalism rooted in the authority of original meaning. This is not to say that he does not believe Congress's power through the Commerce Clause cannot be expanded at all. An amendment to the Constitution can legitimately alter the meaning of the text; however, the Court cannot appropriate for itself Congress' legislative role and independently declare a new meaning for the text. Rehnquist does not accept the notion that

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[205] *Baker v. McCollan*, 443 U.S. 137, 145 (1979).
[206] *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981).
[207] The Commerce Clause is found in Article 1, Section 8, Clause 3 of the Constitution, which States that: "The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States... To regulate commerce with foreign nations, and among the several States, and with the Indian tribes."
[208] *Fry v. United States*, 421 U.S. 542 (1975); *National League of Cities v. Usery*, 426 U.S. 833 (1976).

justices can find additional constitutional principles and implications in words that have never been understood to have these extra meanings; to do so, he believes, is overstepping the boundaries established for the role of a judge.

For Rehnquist, the argument for congressional authority and the authority of the Court is based on a strict set of circumstances explicitly prescribed in the text of the Constitution. For example, Rehnquist concedes that the Fourteenth Amendment certainly expands Congress's power, and that Section 5 of the amendment limits the Eleventh Amendment.[209] He bases this belief on both the text of the Fourteenth Amendment and the intention of those who adopted it.[210] On the same basic premise, Rehnquist rejects the claim that federal courts may *presume* that constitutional provisions abridge the immunity granted to the States by the Eleventh Amendment, and therefore use the Commerce Clause to justify an expansion of the federal government into State affairs.[211] In this way, the language of the Constitution limits congressional power, just as the Court's power is also limited.

Rehnquist's philosophy of federalism resists the broadening of principles that will allow for overbroad national involvement and control of State affairs or an over-extended reach of the federal judiciary into State matters. This resistance is rooted in his belief that fundamental notions of comity, a mutual respect between sovereign entities, should control the relationship between the national government and the State governments.[212] He accepts the notion of

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[209] The Eleventh Amendment States "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."
[210] The particularly relevant section of the Fourteenth Amendment is Section 5, which reads, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."
[211] *Edelman v. Jordan*, 662.
[212] *Fair Assessment in Real Estate Association v. McNary*,103,112 (quoting *Younger v. Harris*, 401 U.S. 37 (1971), at 44).

"sovereign immunity" of States as an integral part of the federalist system created by the Constitution,[213] and considers "the fundamental principle of comity between federal courts and State governments" as "essential to 'Our Federalism.'"[214] Furthermore, this same sort of principle makes him hesitant to expand judicial power beyond the specific limits allowed by those federal laws that do apply to the States.

Rehnquist stresses the independent nature of State courts and the limited capacity of the federal judiciary to interfere with the ability of States to grant relief to their citizens. He urges a "proper regard for the relationship between the independent State and federal judiciary systems".[215] To his way of thinking, this process is "consistent with the concepts of federalism."[216] His argument turns on the notion that the State governments and their judiciaries should be given a wide, and indeed constitutionally protected, latitude to resolve State matters in their own way. He deplores intrusion into the function of State and local governments by the federal judiciary in a manner that he sees as inconsistent with these concepts; for example, rejecting the claim that the "scope of federal equity power... should be extended to the fashioning of prophylactic procedures for a State agency."[217] Again, he rests this claim on the "principles of federalism" he finds in the Constitution.[218]

A survey of Justice Rehnquist's majority opinions and dissents during his early years on the Court reveals a strong conviction about the essential role of constitutional text in arbitrating between national power and the sovereignty of the States. Moreover, it is clear that in his view constitutional language needs to be understood not simply on its face, but within the context of

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[213] Ibid., 433.
[214] *Fair Assessment in Real Estate Association v. McNary*, 103.
[215] *Steffel v. Thompson*, 401 U.S. 66, 479 (1974).
[216] Ibid., 484.
[217] *Rizzo v. Goode*, 423 U.S. 362, 378 (1976).
[218] Ibid., 380.

the original intentions by which the textual provisions were framed and adopted. Rehnquist's federalism, then, is at its most basic level a constitutional principle rooted in the original understanding of the Constitution, intended by the Founders to be explicitly central to the political life and decision-making of the republic. Furthermore, the Court has to have a full understanding of these fundamentally intertwined notions of constitutionalism, originalism, and federalism, in order to appreciate and understand the intricacies of comity, and thus function appropriately in its role. During his years as associate justice, Rehnquist "disappointed the hopes and fears of neither his nominator, nor his supporters, nor his opponents," becoming the "leader of the right, or conservative, wing of the Court... frequently joined in general by Chief Justice Burger and Justice O'Connor."[219]

The implications of Rehnquist's commitment to federalism, however, would not be fully realized until after he ascended to the Chief Justiceship. Understanding the way that Justice Rehnquist conceives of the constitutional relationship between national power and State sovereignty allows for a more complete understanding of the intellectual dynamics that have shaped the Court's federalism decisions since his promotion to the center chair in 1986. In decisions like *Deshaney v. Winnebago County Social Services*[220], *Gregory v. Ashcroft*[221], *New York v. United States*[222], *United States v. Lopez*[223], *City of Boerne v. Flores*[224], and *Printz v. United States*[225], *Alden v. Maine*[226], the Rehnquist Court has handed down opinions that have

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[219] Abraham, *Justices, Presidents, and Senators*, 270.
[220] *Deshaney v. Winnebago County Social Services*, 489 U.S. 189 (1989).
[221] *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
[222] *New York v. United States*, 505 U.S. 144 (1992).
[223] *United States. v. Lopez*, 514 U.S. 549 (1995).
[224] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[225] *Printz v. United States*, 521 U.S. 898 (1997).
[226] *Alden v. Maine*, 527 U.S. 706 (1999).

demonstrated a fundamental shift, apparently led by the Chief Justice, regarding the Court's approach to federalism.

The Making of the Rehnquist Court

President Reagan announced the nomination of Associate Justice Rehnquist for the position of chief justice in June 1986.[227] After a somewhat bruising confirmation process, he was confirmed by the Senate on August 14th and took his place as Chief Justice with the other seven members of the court: Lewis F. Powell, Harry A. Blackmun, William J. Brennan, Jr., John Paul Stevens, Thurgood Marshall, Byron R. White, Sandra Day O'Connor. They were soon joined by Antonin Scalia, who filled the ninth seat, the vacant associate justiceship left by Rehnquist.[228] As a general rule, Rehnquist, Scalia, O'Connor, and White came down on the conservative side, while Brennan, Marshall, Blackmun, and Stevens predictably came down on the other.[229] The largely swing vote of Justice Powell, who was conservative on crime, but not much else, provided the necessary 5-vote majority for either side in many cases.[230] Initially, this particular makeup made for a voting record not much different from the preceding Burger Court—"conservative on crime, but liberal on civil rights and civil liberties".[231]

Several months after Rehnquist's confirmation, however, Justice Powell announced his intention to resign. The new appointment to fill his position had the potential fundamentally to

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[227] Abraham, *Justices, Presidents, and Senators*, 291.
[228] Ibid., 292; Kelly et al., *The American Constitution*, *xxvi*.
[229] David G. Savage, *Turning Right: The Making of the Rehnquist Supreme Court*, (New York: John Wiley & Sons, Inc., 1992), 151.
[230] Ibid., 127.; Powell wrote the opinion in *McCleskey v. Kemp*, 481 U.S. 279 (1987), which rejected a statistical study regarding race disparities in death penalty cases as a support for the unconstitutionality of particular conviction. Powell was the fifth vote upholding *Roe v. Wade*, 410 U.S. 113 (1973), and both concurred and dissented in the affirmative action case *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).
[231] Savage, *Turning Right*, 127.

affect the Court, consolidating a truly conservative five-vote majority. The confirmation of Reagan's initial nominee for the position, Judge Robert H. Bork, was defeated. The president's following nomination of Judge Douglas Ginsburg was also unsuccessful.[232] Eventually, the moderately conservative federal appeals judge, Anthony Kennedy, filled the position.[233] Arguably, the Court now had a reasonably solid conservative majority.

In 1990, Justice William Brennan announced his retirement. President George H. W. Bush, wanting to avoid the confirmation difficulties that he had witnessed firsthand as Reagan's vice-president, nominated Judge David Souter who he considered to be moderate enough to make it through the confirmation process, but still conservative enough to be reasonably dependable.[234] Souter, in fact, proved himself to be far less conservative than expected, and is one of the solidly liberal members of the Rehnquist Court, willing to interpret quite broadly the Court's power.[235] A year later, Clarence Thomas was nominated to fill position of the retiring Justice Thurgood Marshall, and, despite a rocky confirmation process, took his place on the bench and has become one of the Court's members most strongly committed to judicial restraint.[236]

The making of the Rehnquist Court into its current form was almost complete. In 1993, President Bill Clinton nominated Judge Ruth Bader Ginsburg after Justice Byron White announced his retirement. When Justice Harry Blackmun announced his decision to leave the Court in 1994, Judge Stephen G. Breyer filled the open position.[237] Both justices were decidedly

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[232] Keck, *The Most Activist Supreme Court*, 164.
[233] Peter Irons, *Brennan vs. Rehnquist: The Battle for the Constitution* (New York: Alfred A Knopf, 1994),106.
[234] Keck, *The Most Activist Supreme Court*, 164-165.
[235] Abraham, *Justices, Presidents, and Senators*, 309.
[236] Keck, *The Most Activist Supreme Court*, 165.
[237] Abraham, *Justices, Presidents, and Senators*, 324.

left-of-center, and generally aligned themselves with Justices Stevens and Souter.[238] Rehnquist, Thomas, and Scalia were predictably to the conservative side of the majority of cases, while O'Connor and Kennedy also moved to the right, although less predictably. In this configuration, the Rehnquist Court would continue for more than a decade with no further appointments.

Federalism Under the Rehnquist Court

It certainly appeared to Court watchers that the Rehnquist Court was poised to enact a conservative revolution in the law. This was clearly disadvantageous in the eyes of some; those who feared a right-leaning Court were most concerned about issues of abortion rights and a more limited expansion of civil liberties. The federalism cases that have come before the Rehnquist Court can be divided into two categories, institutional federalism cases and rights-based federalism cases.

Institutional federalism cases are those that deal primarily with the legislative power of Congress and its relationship to the States, while rights-based federalism cases are those that concerned individuals' civil rights claims against the States. Generally, in both types of cases Justices Rehnquist, Thomas, and Scalia support State prerogatives and in the majority of institutional federalism cases, Justices O'Connor and Kennedy usually join them. It is these cases that constitute a federalism revival and have come to define the Rehnquist Court's legacy.

In rights-based federalism cases, Justices O'Connor and Kennedy are less reliable in their commitment to State sovereignty, and as a result, the federalism triumvirate of Rehnquist, Scalia, and Thomas rarely achieves their desired majority. While this institutional versus rights-based

[238] Ibid., 320.

split is not absolutely without exception, it does serve as a general rule for understanding the significant drifts from federalism doctrine that have occurred in certain cases.

A. The Institutional Federalism Cases

The first harbinger of the new federalism of the Rehnquist Court is the case of *Deshaney v. Winnebago County Social Services*[239], in which Rehnquist writes the opinion for the six-justice majority including himself and Justices White, Stevens, O'Connor, Scalia, and Kennedy. Joshua DeShaney suffered physical violence at the hands of his father that left him permanently mentally handicapped. His mother sued the Winnebago County Department of Social Services, alleging that the department had deprived the child of his "liberty interest in bodily integrity, in violation of his rights under the substantive component of the Fourteenth Amendment's Due Process Clause, by failing to intervene to protect him against his father's violence."[240] In the opinion, the Court rejects this claim, holding that a State's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause of the Fourteenth Amendment. In his opinion, Rehnquist writes

> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means. Nor does history support such an expansive reading of the constitutional text.[241]

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[239] *Deshaney v. Winnebago County Social Services*, 489 U.S. 189 (1989).
[240] Ibid., 189.
[241] Ibid., 195.

While the facts of the case are, as Rehnquist notes, "undeniably tragic", the purpose of the Due Process Clause is to "protect the people from the State, not to ensure that the State [protects] them from each other."[242] He continues

> The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes... The people of Wisconsin may well prefer a system of liability that would place upon the State and its officials the responsibility for failure to act in situations such as the present one. They may create such a system, if they do not have it already, by changing the tort law of the State in accordance with the regular lawmaking process. But they should not have it thrust upon them by this Court's expansion of the Due Process Clause of the Fourteenth Amendment.[243]

Deshaney v. Winnebago is the first major example of a Rehnquist Court decision that takes the more limited view of the Due Process Clause that has long been championed by Rehnquist.

In *Gregory v. Ashcroft*[244], two Missouri State judges challenged the State constitution's requirement that mandated State court judge retirement at age seventy, claiming as grounds the 1967 Federal Age Discrimination in Employment Act (ADEA) and the Equal Protection Clause of the Fourteenth Amendment. A seven-justice majority, which includes Rehnquist, White, Stevens, Scalia, Kennedy, Souter, and O'Connor, rejects both of these claims, with Justice O'Connor writing the opinion. From the outset of her opinion, O'Connor insists that the constitutional arrangement between the States and the nation "establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle."[245] It is this arrangement, she argues—or more accurately, the tension within this arrangement—that guarantees the liberty and security of the people.

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[242] Ibid., 196.
[243] Ibid., 196, 203.
[244] *Gregory v. Ashcroft*, 501 U.S. 452 (1991).
[245] Ibid., 457.

The Court has already heard and accepted the validity of the ADEA under the Commerce Clause[246]; however, in this particular case allowing a congressional law to overturn the sovereign will of the people of Missouri "would upset the usual constitutional balance of federal and State powers."[247] Therefore, the ADEA cannot overwrite this portion of the State constitution; furthermore, even if it can, the judges do not fall under its jurisdiction because they are "appointees on the policymaking level."[248] O'Connor notes that while the Court accepts the ADEA as a valid exercise of Congress's power under the Commerce Clause, "the principles of federalism that constrain Congress' exercise of its Commerce Clause powers are attenuated when Congress acts pursuant to its powers to enforce the Civil War Amendments," and that the Court cannot assume that Congress intended for State court judges to be included under the ADEA.[249] While she suggests that the Equal Protection Clause has the potential to apply in this case, because of the nature of the law, she finds that it did not.

Justices White and Stevens agree with the judgment but think Justice O'Connor's unwillingness to include State judges under the ADEA establishes a weak principle.

> The majority... chooses not to resolve that issue of statutory construction. Instead, it holds that, whether or not the ADEA can fairly be read to exclude State judges from its scope, "[w]e will not read the ADEA to cover State judges unless Congress has made it clear that judges are included."... I cannot agree with this "plain Statement" rule, because it is unsupported by the decisions upon which the majority relies, contrary to our Tenth Amendment jurisprudence, and fundamentally unsound.[250]

Those who dissent believe this sort of jurisprudence places an undue burden on Congress, and that courts must be able to infer certain things from legal text. Additionally, Justices Marshall

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[246] *EEOC v. Wyoming*, 460 U.S. 226 (1983).
[247] Ibid., 460.
[248] Ibid., 467.
[249] Ibid., 468.
[250] Ibid., 474.

and Blackmun disagree that judges are not included under the ADEA, "because appointed judges are not accountable to the official who appoints them and are precluded from working closely with that official once they have been appointed, they are not "appointee[s] on the policymaking level."[251] Thus, a reasonable reading of the ADEA should allow for the inclusion of State judges.

In *New York v. United States*[252], the Court finds that one of the provisions of the Low-Level Waste Act violates the Tenth Amendment, while it accepts two others. The act imposed "upon States, either alone or in 'regional compacts' with other States, the obligation to provide for the disposal of waste generated within their borders."[253] Justice O'Connor again writes for the majority, stating that the constitutional question in this case is "as old as the Constitution: it consists of discerning the proper division of authority between the Federal Government and the States."[254] O'Connor then presents a brief history of the Founding, citing the principles of federalism established then as central to the current case. She finds that Congress may use the powers at its disposal, including its spending and interstate commerce powers, to encourage States to comply with proposed regulations; however, she argues that

> the take-title provision offers state governments a "choice" of either accepting ownership of waste or regulating according to the instructions of Congress...Either type of federal action would "commandeer" state governments into the service of federal regulatory purposes, and would, for this reason, be inconsistent with the Constitution's division of authority between federal and state governments.[255]

Justices White, Blackmun, and Stevens concur in part and dissent in part from the majority. White, writing for the dissenters, affirms the parts of the act that the Court held up, but

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[251] Ibid., 488.
[252] *New York v. United States*, 505 U.S. 144 (1992).
[253] Ibid., 144.
[254] Ibid., 149.
[255] Ibid., 175.

disagrees with the reasoning for striking down the third provision. He argues that the act is much more a compact of "cooperative federalism" then the majority acknowledges.[256] Furthermore, he argues that in the past the Court has not looked with such strict scrutiny upon various actions of Congress under the Commerce Clause.

What is interesting about *Gregory* and *New York* is that in neither did the majority establish a fundamental rule regarding federalism as such. Rather, in each case the Court limits or strikes down in whole or in part a federal law without suggesting that this action has any broader implications for later adjudication between States' powers and the nation's authority. While both cases demonstrate a resistance on the part of the majority of the Court to a broad construction of congressional powers, neither decision accomplishes a fundamental shift in the balance of power between the States and the nation. Looking at these decisions, it is clear that the members of the Rehnquist Court most concerned with federalism, Rehnquist, Scalia, and Thomas, cannot carry a majority willing to deal with the most fundamental precedent cases that have expanded the federal and judicial role in federal-state relations.

The Court certainly is unwilling to accept any and all federal incursions on State power, and the majority does continue to limit the ability of Congress to regulate within and among the States under the Commerce Clause. In *United States v. Lopez*[257] the Court finds that the 1990 Gun-Free School Zones Act, which forbade individuals from knowingly carrying a gun in a school zone, is unconstitutional because it exceeds the power of Congress to legislate under the Commerce Clause. Joined by O'Connor, Scalia, Kennedy, and Thomas, Chief Justice Rehnquist writes the opinion, suggesting that to understand the constitutionality of the case, one must start

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[256] Ibid., 193.
[257] *United States. v. Lopez*, 514 U.S. 549 (1995).

with "first principles," that "the Constitution creates a Federal Government of enumerated powers."[258] He agrees that

> *Jones & Laughlin Steel*, *Darby*, and *Wickard* ushered in an era of Commerce Clause jurisprudence that greatly expanded the previously defined authority of Congress under that Clause. In part, this was a recognition of the great changes that had occurred in the way business was carried on in this country. Enterprises that had once been local or at most regional in nature had become national in scope. But the doctrinal change also reflected a view that earlier Commerce Clause cases artificially had constrained the authority of Congress to regulate interstate commerce.[259]

However, "even these modern-era precedents which have expanded congressional power under the Commerce Clause confirm that this power is subject to outer limits."[260] What are these limits? There are three broad principles, Rehnquist suggests. Congress "may regulate the use of the channels of interstate commerce;" it may "regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and it may regulate "those activities that substantially affect interstate commerce."[261]

Rehnquist insists that the Gun-Free School Zones Act does not fall under any of these categories. "Even *Wickard*," he argues, "which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that the possession of a gun in a school zone does not."[262] While he concedes that Congress is not required to show expressly the way in which a particular thing under regulation affects interstate commerce, Rehnquist notes that when the effects are not readily apparent, such justification might be necessary to prevent the Supreme Court from finding such a law invalid. He rejects the

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[258] Ibid., 552.
[259] Ibid., 556.
[260] Ibid., 556-557.
[261] Ibid., 558-559.
[262] Ibid., 560.

government's argument that "costs of crime" validates the exercise of their power, as such an argument could validate the national government intervening in anything remotely related to criminal problems. With this argument, Rehnquist contends, it is "difficult to perceive any limitation on federal power."[263]

Justices Kennedy and O'Connor, concur, stating

> The history of our Commerce Clause decisions contains at least two lessons of relevance to this case. The first, as Stated at the outset, is the imprecision of content-based boundaries used without more to define the limits of the Commerce Clause. The second, related to the first but of even greater consequence, is that the Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.[264]

Justice Thomas also concurs, urging that the justices "observe that our case law has drifted far from the original understanding of the Commerce Clause. In a future case, we ought to temper our Commerce Clause jurisprudence in a manner that both makes sense of our more recent case law and is more faithful to the original understanding of that Clause."[265] Justice Breyer, joined by the four dissenters, argues that education could affect an individuals place in the economy, the overall economy, and thus commerce, and while this is not given as a stated justification for the Gun-Free School Zone Act, it nevertheless justifies it.

Lopez illustrates a fundamental difference between the members of the majority and those who dissent in such cases. It is clear that many of the jurisprudential differences turn on each justice's degree of willingness to accept congressional latitude in passing legislation. The dissenters take a more expansive view of Congress's constitutional role, while the majority reads a more limited role from the text. What is more, those who dissent also fashion a much broader

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[263] Ibid., 564.
[264] Ibid., 574.
[265] Ibid., 584.

interpretation of the role and responsibility of the Court in defining the federal-state relationship, while the majority suggests that the constitutional text limits their role.

In *Seminole Tribe v. Florida,*[266] the Court holds that Congress illegitimately used its power under the Commerce Clause to abrogate the States' sovereign immunity under the Indian Gaming Regulatory Act. The case again finds Rehnquist, Scalia, Thomas, Kennedy, and O'Connor in the majority, with Ginsberg, Stevens, Breyer, and Souter in dissent. The divergence of opinion between the majority and the dissenters turns on the question of whether Congress' abrogation is a valid exercise of their power.

Rehnquist writes the opinion of the Court, while both Stevens and Souter write dissents. Both are strikingly strong-worded in their dislike for, or support of, the expansion of the judicial role in determining the constitutional nature of Congress' power as it regards the States. Rehnquist writes

> The dissent, to the contrary, disregards our case law in favor of a theory cobbled together from law review articles and its own version of historical events. The dissent cites not a single decision since *Hans* (other than *Union Gas*) that supports its view of State sovereign immunity, instead relying upon the now-discredited decision in *Chisholm v. Georgia*... Its undocumented and highly speculative extralegal explanation of the decision in *Hans* is a disservice to the Court's traditional of adjudication.[267]

Justice Stevens counters:

> In my judgment, it is extremely doubtful that the obviously dispensable involvement of the judiciary in the intermediate stages of a procedure that begins and ends in the Executive Branch is a proper exercise of judicial power... It may well follow that the misguided opinion of today's majority has nothing more than an advisory character. Whether or not that be so, the better reasoning in Justice Souter's far wiser and far more scholarly opinion will surely be the law one day.[268]

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[266] *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).
[267] Ibid., 68-69.
[268] Ibid., 99-100.

There is clearly a very strong difference of opinion on the Court between those who repeatedly position themselves in the majority and those who enter opinions in dissent in federalism cases. The Court continues to find itself at odds. In *Alden v. Maine*[269], the Court revisits the question of a State's sovereign immunity against suit, again dividing 5:4, with the majority holding that Congress cannot use its power from Article I to remove a State's sovereign immunity from private suits in its own courts.

Not every institutional federalism case, however, finds the Court dividing along its usual lines. Indeed, the Court again finds that Congress exceeded its powers as against the States in *City of Boerne v. Flores*[270], this time with regard to the Fourteenth Amendment. In *City of Boerne*, the Court holds that Congress exceeded its Fourteenth Amendment enforcement powers by enacting the Religious Freedom Restoration Act, part of which subjected local ordinances to federal regulation. Rehnquist, Stevens, Scalia, Kennedy, Thomas, and Ginsburg form the six-person majority; O'Connor, Souter, and Breyer dissent. The majority argues that

> It is for Congress in the first instance to "determin[e] whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment," and its conclusions are entitled to much deference... Congress' discretion is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison*, to determine if Congress has exceeded its authority under the Constitution. Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.[271]

Stevens joins the majority not on these grounds, but because he believes the RFRA constitutes an establishment of religion and therefore, is a violation of the First Amendment. Justice O'Connor's dissent, in which both Justice Breyer and Justice Souter concur, is based on her opinion that the Court does not then, nor has in the past, given

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[269] *Alden v. Maine*, 527 U.S. 706 (1999).
[270] *City of Boerne v. Flores*, 521 U.S. 507 (1997).
[271] Ibid., 536.

enough weight to the Free Exercise Clause of the First Amendment. She cites the debates of the Founding period to argue that religious liberty was perceived much more expansively in relation to law than the Court currently allows for. Justices Scalia and Stevens, in response to this point of dissent, argue that it is the people, not the Court, who are given the responsibility to determine the outcome of concrete cases regarding religious expression. *City of Boerne* is an example of an institutional federalism case in which the Rehnquist Court does not divide along its traditional lines.

Rehnquist and the Court do return, however, to the 5-to-4 split in the cases of *Printz v. United States*[272] and *United States v. Morrison*.[273] Both hold that Congress lacks the authority to enact the particular pieces of legislation in question. In *Printz*, the Court finds that Congress cannot use the Necessary and Proper Clause to compel local law enforcement officers to perform background checks on handgun purchases until the federal government can institute an appropriate system to do the same.[274] The Court invalidates the Violence Against Women Act of 1994 in *Morrison*, holding that neither the Commerce Clause nor the Fourteenth Amendment offers sufficient justification. In each, members of the majority refer to the notion of the original understanding of Congress' powers. Citing the Commerce Clause decision in *Morrison*, Justice Thomas cautions against what he and the majority see as the fundamental weakness of the Court's Commerce Clause jurisprudence.

> By continuing to apply this rootless and malleable standard, however circumscribed, the Court has encouraged the Federal Government to persist in its view that the Commerce Clause has virtually no limits. Until this Court replaces its existing Commerce Clause jurisprudence with a standard more consistent with

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[272] *Printz v. United States*, 521 U.S. 898 (1997).
[273] *United States v. Morrison*, 529 U.S. 598 (2000).
[274] This was a provision of the Brady Handgun Violence Prevention Act.

> the original understanding, we will continue to see Congress appropriating State police powers under the guise of regulating commerce.[275]

Clearly, the Rehnquist Court has been willing to place limits on Congressional power, yet in none of the cases has the Court considered the fundamental cases like *Wickard* that led to the original expansion of congressional power outside what was arguably originally intended by the framers of the Constitution. Indeed, the Court has not always found against congressional powers. In *Nevada Department of Human Resources v. Hibbs*,[276] the justices hold that an individual can sue a State for money damages in federal court for violations of the Family and Medical Leave Act of 1993. Here, Rehnquist breaks from his usual compatriots in institutional federalism questions, Scalia, Kennedy, O'Connor, and Thomas, to write the 6-to-3 opinion which finds that such a measure is warranted because the legislation is simply prophylactic and Congress has specifically stated its intention to remove the States' sovereign immunity in this area. "In sum," Rehnquist concludes, "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic legislation."[277] In *Reno v. Condon*,[278] the Court unanimously finds the Driver's Privacy Protection Act, which limits a State's capacity to release drivers' personal information and is enacted under the Commerce Clause, is not a violation of constitutional principles of federalism, as the lower courts had held. South Carolina, which allowed the release of such information on specific grounds, alleged Tenth and Eleventh Amendment violations. Rehnquist notes that, while the Court found action by Congress under the Commerce Clause unconstitutional in the past, the principle that operated in those cases does

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[275] Ibid., 627.
[276] *Nevada Department of Human Resources v. Hibbs*, 538 U.S. 721 (2003).
[277] Ibid., 735.
[278] *Reno v. Condon*, 528 U.S. 141 (2000).

not apply in this one, because in past cases the Court "held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism contained in the Tenth Amendment."[279] This case, he argues, falls solidly under the jurisdiction of interstate commerce, and thus is appropriately to be regulated by Congress.

The Rehnquist Court's record in institutional federalism cases demonstrates a decided effort to prevent the overbroad expansion of national power in the form of congressional prerogatives. The federalist triumvirate of Rehnquist, Scalia, and Thomas spearheads this effort, with O'Connor and Kennedy usually comprising the necessary five votes. Such a majority, however, has not been found in rights-based cases.

B. The Rights-Based Federalism Cases

Rights-based cases have found the Court quite differently divided. In *Planned Parenthood v. Casey*, for example, a 5-4 Court affirms the *Roe* decision, the single greatest decision altering federal-State relations handed down by the Burger Court.[280] The state of Pennsylvania passed a law containing numerous provisions regulating abortion procedures, including parental consent for minors, a 24 hour waiting period, a guarantee of informed consent, and that the husband be informed of his wife's intention to abort. The statute was challenged on the grounds that it infringed on the rights guaranteed in the *Roe v. Wade* decision.

A 5-4 majority upholds *Roe*, although it does away with the three-trimester proscription it contained. The majority argues that the history of abortion after *Roe* legitimated its affirmation.

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[279] Ibid., 149.
[280] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

> We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and, coming as it does after nearly 20 years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedential force that must be accorded to its holding. And we have concluded that the essential holding of *Roe* should be reaffirmed.[281]

Although the Court upholds the majority of the Pennsylvania provisions, allowing that the State has a legitimate and "substantial interest in potential life," and striking down only the marital consent provision, as it can pose an "undue burden" to women involved in abusive relationships, its affirmation of *Roe* is itself a broad denial of State sovereignty.[282] Justices White, Scalia, Thomas, and Chief Justice Rehnquist dissent on these grounds and argue that stare decisis does not bind the Court when a case of constitutional import is wrongly decided; but the majority holds that both "principles of institutional integrity and the rule of stare decisis" demand that the Court uphold *Roe*.[283]

The decision to uphold *Roe*, and indeed *Roe* itself, Justice Scalia argues in his scathing dissent, is ultimately "standardless" because the Constitution "says absolutely nothing about it."[284] "*Roe* was plainly wrong—and even more so (of course) if the proper criteria of text and tradition are applied."[285] In essence, he suggests, the majority of the Court is rejecting the constitutional text as the ultimate authority on constitutional matters and replacing it with their personal feelings about "liberty" and "the concept of existence, of meaning, of the universe, and

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[281] Ibid., 871.
[282] Ibid., 877, 888-895.
[283] Ibid., 845-846.
[284] Ibid., 988, 980.
[285] Ibid., 983.

of the mystery of human life."[286] In Scalia's view, the judicial overreaching in both *Roe* and *Casey* is inexcusable, especially since the Court's decision supplants the right to broker "political compromises" that the States should retain.[287] Justice Scalia and those who join his dissent believe that *Roe* clearly violates the principles of federalism that are intended to allow for compromises within and disparity between the various States.

In *Romer v. Evans*, a 6-3 Court strikes down an amendment to the Colorado State Constitution that denies legal protection from discrimination to homosexual and bisexual individuals, arguing that it is a violation of the Equal Protection Clause.[288] In the opinion, Justice Kennedy argues that while the Court in the past has upheld laws under the Equal Protection Clause that targeted specific groups, in this case the law is unconstitutional because the majority felt that the law cannot be said to "advance a legitimate government interest."[289] "If the constitutional conception of 'equal protection of the laws' means anything," he argues, "it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."[290]

In the dissent, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, objects to the majority's decision, which they believe is founded more on theories of justice than what they understand to be the appropriate basis for Supreme Court decisions—the text of the Constitution and prior Court opinions. They particularly question how the majority can make such claims of constitutionality without dealing with, and ultimately rejecting, the Burger Court's decision in *Bowers v. Hardwick*, which denies the constitutionality of precisely the sort

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[286] Ibid., 851.
[287] Ibid., 995.
[288] *Romer v. Evans*, 517 U.S. 620 (1996).
[289] Ibid., 632.
[290] Ibid., 634.

of reasoning that the Court is employing. Without an explicitly constitutional basis for their argument, the dissent suggests, the Court is simply picking and choosing based on whim or personal preferences what statutes they believe a State is entitled to enact.

In both *Casey* and *Romer*, the fundamental issue of the sovereignty of the States is at question. In each, the majority of the Court finds that they, rather than the State, are the appropriate determiners of State interest. The federalist minority on the Court cannot persuade their colleagues that in these cases, no less than in the institutional cases discussed before, the principles of federalism equally apply.

When *Dickerson v. United States*[291] came before the Supreme Court in April of 2000, it was the expectation of many that *Miranda v. Arizona* was likely to be overturned.[292] Indeed, the Chief Justice has long made quite clear that he is opposed to expanding the power of the federal government without clear textual provision for such action in the Constitution, and *Miranda* appears to be just such an expansion. The Court of Appeals held that a confession given by Charles Dickerson before he received his Miranda warnings was admissible because it was voluntary and made admissible by the passage of a congressional measure[293] that legislatively overruled the *Miranda* requirement for voluntary confessions. *Dickerson* challenges the authority of Congress to pass such a law, essentially raising again the question of whether *Miranda* warnings were a guarantee inherent to the Constitution.

In an opinion startling to many familiar with the Chief Justice's constitutional views, Rehnquist writes the Court's 7-2 opinion upholding *Miranda* and striking down the congressional caveat. "*Miranda*" he argues, "has become embedded in routine police practice to

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[291] *Dickerson v. United States*, 530 U.S. 428 (2000).
[292] Christopher H. Schroeder, "Causes of the Recent Turn in Constitutional Interpretation," *Duke Law Journal* 51 (2001-2002): 312.
[293] 18 USC Section 3501.

the point where the warnings have become part of our national culture"—and this, Rehnquist suggested, was "reason enough" not to overrule it. Interestingly, a similar type of reasoning is one of the methods of argument used by the majority in *Casey* to justify the affirmation of the *Roe* decision, an argument that Rehnquist rejects.[294] Furthermore, the opinion argues that the *Miranda* warnings are not simply one way to justify a broader constitutional requirement, as the dissent insists, but rather that they are themselves constitutionally mandated, at least in the sense that Congress cannot then overrule them simply by passing a piece of legislation. Such a statement on the part of Chief Justice Rehnquist, who so often emphasizes his concern with the explicit text of the Constitution, is puzzling indeed.[295]

Lawrence v. Texas overrules the Burger Court's decision in *Bowers v. Hardwick* and holds that the constitutional right to privacy extends to homosexual conduct.[296] Two Texas residents, John Lawrence and Tyron Garner, were convicted under a State law criminalizing intimacy between same-sex couples, and brought a challenge against the legislation. Again, the majority in this case finds that it is the Court, rather than the State, who is the most appropriate determiner of the State's interest. "The Texas statute," the opinion states, "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."

The *Lawrence* decision is significant on two fronts in relation to the Rehnquist Court's federalism jurisprudence. First, it once again involves the Court passing judgment on the appropriate interests of a State; and, second, it expands the right to privacy, a right not found explicitly in the text of the Constitution. The three dissenters, Scalia, Rehnquist, and Thomas, object to the decision on both of these grounds. Neither provides a constitutionally sound basis

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[294] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).
[295] *Dickerson* could be classified as comprising both institutional and rights-based federalism concerns; for its affirmation of *Miranda*, it is classified here as a rights-based case.
[296] *Lawrence v. Texas*, 539 U.S. 558 (2003).

for the judgment, they argue, especially one that establishes a precedent so antithetical to State prerogatives.

Indeed, principled constitutional reasoning for the Court's foray into a matter traditionally left to the States is sorely lacking. Scalia writes in his blistering dissent, "Nowhere does the Court's opinion declare that homosexual sodomy is a "fundamental right" under the Due Process Clause; nor does it subject the Texas law to the standard of review that would be appropriate (strict scrutiny) if homosexual sodomy *were* a 'fundamental right.'"[297] The Court, he argues, must provide more concrete standards than simply the justices' "moral disapproval" of particular laws if the sovereignty of the States is at issue.[298] Advancing anything other than a specific constitutional basis for such momentous decisions is untenable.

The most recent ruling in the line of significant failures of the Rehnquist Court to restore federalism is the 5-4 decision in *Roper v. Simmons*. In this case, the Court holds the death penalty unconstitutional for juveniles, thereby invalidating laws establishing the penalty in nineteen States.[299] In particular, the majority overturns *Stanford v. Kentucky* (1989), in which the entire Court held that such a penalty was not unconstitutional because there was no national consensus on whether such treatment was "cruel and unusual punishment,"[300] thereby making it a matter appropriately regulated by the States.[301] In *Roper*, the Court holds that such a punishment is now "cruel and unusual" for several reasons: the majority of State legislatures

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[297] Ibid., 586.
[298] Ibid., 601.
[299] Jane Roh, *Supreme Court Rules Death Penalty for Youths Unconstitutional* (Fox News Online, 2 March 2005.) [Online] available from http://www.foxnews.com/story/0,2933,149080,00.html; accessed 26 March; Internet.
[300] From the Eighth Amendment, which reads, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."
[301] *Stanford v. Kentucky*, 492 U.S. 361 (1989).

have prohibited it, the justices feel the punishment was disproportionate in the case of juveniles; and international consensus is against this type of punishment.

Justices Scalia, Rehnquist, and Thomas dissent. In this case, Justice O'Connor joins them, although she writes a separate dissent, basing her argument on the inability of the majority to adequately ground their argument that *all* juveniles are undeserving of this punishment, and suggesting that it is reasonable to expect State parties involved in judgment of juveniles to be able to assess the severity of a particular juveniles crime. In his dissent, Scalia quotes Alexander Hamilton's discussion of Supreme Court power in *The Federalist*, in which Hamilton remarked that the judiciary would have "neither FORCE nor WILL but merely judgment."[302] Removing the right to decide the acceptability of such a punishment from the States on the grounds the majority presented, he argues, is the function of just such a will, and in violation of the fundamental principles of federalism and separation of powers espoused by the Framers of the Constitution.

The *Roper* case is the most recent substantial evidence that a majority of the justices on the Rehnquist Court is prepared to continue to restrict State sovereignty when it involves questions of individual rights.[303] This is in keeping with the general trend of the Court to divide over institutional federalism cases and rights-based federalism cases. Although justices Rehnquist, Scalia, and Thomas are, on the whole, predictably federalist in their arguments, they are unable to convince a sufficient number of the other members of the Court in rights-based cases that their concerns about the erosion of State sovereignty are warranted.

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[302] Alexander Hamilton, *The Federalist* No. 78, 464. (emphasis in the original)
[303] *Roper v. Simmons*, 125 S. Ct. 1183 (2005).

Limits of the Rehnquist Court's Federalism Revolution

Even the most cursory glance at the record of the Rehnquist Court in institutional and rights-based federalism cases reveals why underlying cases like *Wickard* are never reconsidered. The votes simply are not there. Thus, something other than a true restoration of federalism has been the end of the effort. A footnote midway through Rehnquist's *Lopez* opinion offers one of the more illuminating explanations of this failure. "Although I might be willing to return to the original understanding," Rehnquist writes, "I recognize that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years. Consideration of stare decisis and reliance interests may convince us that we cannot wipe the slate clean."[304] The Rehnquist Court's federalism, then, has not been a revolution, but rather a stop-gap measure, and an incomplete one at that.

The Rehnquist Court has not enacted a revolution in favor of State sovereignty. If anything, the record shows that the decisions in institutional federalism cases are little more than efforts to follow more closely the text of the Constitution. Furthermore, in rights-based federalism cases, the sovereignty of the States is rarely if ever a serious consideration for the majority of the justices. In the final analysis, such considerations are more a function of a commitment to judicial restraint than they are a commitment to federalism for federalism's sake.

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[304] *United States. v. Lopez*, 600.

Epilogue: Federalism and the Limits of Judicial Power

There are those who allege that the very fact that the Rehnquist Court has struck down so many congressional laws makes it by definition an activist court. Thomas M. Keck calls this Court "the most activist supreme court in history", citing the 40 federal statutes invalidated on constitutional grounds.[305] Larry Kramer describes the Court as "aggressive" in its enforcement of limits on Congress.[306] "Hence, while reaffirming [the Supreme Court's] supremacy in the domain of individual rights, the present Court has gone beyond the activism of the Warren and Burger Courts by simultaneously discarding or constricting the doctrines and principles that served after 1937 to limit the Court's authority in other areas."[307]

Cass Sunstein contests the basis for the Rehnquist Court decisions striking down congressional laws—"originalism, as a guide to constitutional interpretation... should be rejected on the ground that it does not promote democracy, rightly understood. It is therefore an unacceptable form of maximalism—judicial hubris masquerading as judicial modesty."[308] Mark Tushnet describes the Court as ushering in a "new constitutional order" by enforcing "a reduction in the scope of national power"[309] Tushnet thinks that the distinction made between conservatives and liberals on the Court as supporting restraint or activism, respectively, is a

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[305] Keck, *The Most Activist Supreme Court*, 40.
[306] Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004), 225.
[307] Ibid.
[308] Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (Cambridge, MA: Harvard University Press, 1999), 262-263.
[309] Mark Tushnet, *The New Constitutional Order* (Princeton: Princeton University Press, 2003), 141.

highly misleading characterization.[310] On the Rehnquist Court, he argues, "*everyone* is a judicial activist," as is the Court itself, having "invalidated laws whose constitutionality was clear under long-established doctrine" and "asserted... a primary role in enforcing the legal boundaries Congress has to respect."[311]

At their core, all of these critiques of the Rehnquist Court turn on the notion that the Court's invalidation of a multiplicity of federal laws is the hallmark of judicial activism. In order to accept that these actions constitute activism, one must also accept that the Supreme Court is not the final body charged by the Constitution with the interpretation of that document, and more specifically, that adhering to the text of the same constitutes an overly narrow and thus, in its own way, activist approach to judging. To concede this argument, however, requires a concomitant acceptance of the idea that the constitutional text should not be the sole guide for the judge, and more importantly, that the Supreme Court cannot claim final authority in the interpretation of the constitutional text.

Accepting this claim concerning the role of the Supreme Court, however, necessitates rejecting that the separation of powers is an integral part of the American constitutional system. As Rehnquist himself explains in *United States v. Morrison*, to take such a position is to ignore the crucial role of this structure, something that he is unwilling to do.

> As we have repeatedly noted, the Framers crafted the federal system of government so that the people's rights would be secured by the division of power. Departing from their parliamentary past, the Framers adopted a written Constitution that further divided authority at the federal level so that the Constitution's provisions would not be defined solely by the political branches nor the scope of legislative power limited only by public opinion and the legislature's self-restraint. It is thus a "permanent and indispensable feature of our constitutional system" that "the federal judiciary is supreme in the exposition of

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[310] Mark Tushnet, *A Court Divided: The Rehnquist Court and the Future of Constitutional Law* (New York: W. W. Norton and Company, 2005), 11.
[311] Ibid.

> the law of the Constitution." No doubt the political branches have a role in interpreting and applying the Constitution, but ever since *Marbury* this Court has remained the ultimate expositor of the constitutional text.[312]

The Supreme Court fulfills a very particular and very important role in the American constitutional system. To argue that the Court fulfilling that constitutionally defined role is somehow an overbroad use of its power is to unreasonably promote the constitutional authority of the other branches and advocate an unbalanced constitutional structure.

The Rehnquist Court's Federalism Jurisprudence

In many ways, the Rehnquist Court's jurisprudence has shown itself to be the opposite of the new jurisprudence of the Court that was ushered in after 1937. *National League of Cities v. Usery* was the only Court ruling after 1937 and before the Rehnquist Court to invalidate an exercise of the commerce power on Tenth Amendment, State sovereignty grounds.[313] The fundamental message of the 1937 Court's doctrine was that economic regulation and expansion of Congress's power under the Commerce Clause was constitutionally acceptable almost without limits, while rights claims, for the most part, were the purview of the federal judiciary. Today, the Rehnquist Court operates in a manner that has only modified part of that arrangement, attempting to limit the power that Congress may wield under the Commerce Clause while accepting the argument that many rights are too constitutionally significant to be left to the care of the States.

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[312] *United States v. Morrison*, 616.
[313] Curt A. Levey, "Acid Test of Federalism," *Legal Times*, 29 March 1999: 17.

Felix Frankfurter wrote that the Commerce Clause "has throughout the Court's history been the chief source of its adjudications regarding federalism."[314] In the case of the Rehnquist Court, the Commerce Clause has been the chief source of its adjudications resulting in the allegation of a federalism revolution. In *The Federalist*, James Madison wrote of the Commerce Clause: "The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose and from which no apprehensions are entertained."[315] Indeed, the Commerce Clause was not understood nor enacted as an engine of overarching congressional power, but rather a clause allowing for what was agreed to be a very specific and necessary function of the national government—keeping order in commerce between the various States. In a sense, this is the original understanding that Rehnquist and the Rehnquist Court majority have been trying to return to the clause.

The overall effect of this effort, however, appears to be at best a moderate alteration in the understanding of acceptable limits of congressional power. The Court has started to apply a more stringent effects doctrine, akin to that used by the pre-1937 Court, which encompasses a stricter notion of what may justifiably be understood as commerce. Prior to the Rehnquist Court, legislation that either involved commerce or interstate matters was allowed to stand; the current Court has only attempted to require that both elements be present for a law to stand. However, the Court has in no way seriously considered the validity of significant precedent cases like *Wickard* that establish the basis for an expansive effects doctrine, and as a result "it is entirely unrealistic to think that the Court can place real limits on the commerce power by tightening the affects doctrine" as it would "require overruling many decisions" that even the most committed

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[314] Felix Frankfurter, *The Commerce Clause* (Chapel Hill: University of North Carolina Press, 1937), 66-67.
[315] James Madison, *The Federalist* No. 45, 290.

federalism champions on the Court have showed little interest in doing.[316] Indeed, some would argue that allowing the effects doctrine to stand, in and of itself, is out of step with the original meaning of the constitutional text.

> The Court's repeatedly shifting construction of the Commerce Clause indicates that it does not speak with the voice of the Constitution, but rather reflects a given majority's personal predilections. To return to the 1787 meaning of "commerce" as the interchange of goods, of "among" as "between" the States, and to discard the "affects" commerce, would offer a more secure mooring and effectuate the Founders' design.[317]

Be that as it may, the plain fact of the matter is that the Rehnquist Court does not appear likely to deal with expansive effects doctrine precedents, let alone return the Commerce Clause to the limited definition presented above. In this way, the federalism revolution has been, quite simply, a revolution that wasn't.

That the fluctuating federalist majority on the Court that regularly holds together in institutional federalism cases falls apart so often in rights-based cases suggests something significant about the controlling interests of the swing voters in the two types of cases, Justices O'Connor and Kennedy. It seems clear that for these two justices, a federalism interest is more about restricting Congress and less about protecting the sovereignty of the States. That is to say, their first commitment is not to State sovereignty as such. Since they often support federalism claims in institutional federalism cases, it seems clear that their interest is buttressed more by a concern with overly expansive congressional power, and less by an interest in the States themselves having a constitutional prerogative against that power. By virtue of the philosophy of these two pragmatists, the most abiding federalism interest of the meager majority of the

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[316] Lino Graglia, "United State v. Lopez: Judicial Review under the Commerce Clause," *Texas Law Review* 74 (1995-1996): 768.
[317] Raoul Berger, "Judicial Manipulation of the Commerce Clause," *Texas Law Review* 74 (1995-1996): 717.

Rehnquist Court as a whole is not much more than keeping Congress from moving beyond the expanded powers it currently possesses.

This is not what Chief Justice Rehnquist would desire to be the jurisprudential bent of his Court. In rights-based cases he is almost always the member of the minority who advocates the sovereignty of the States as the controlling concern. This commitment to federalism is not simply one of federalism for federalism's sake. Rather, Rehnquist champions federalism in rights-based cases because such a position opposes the expansion of extra-textual rights, such as the right to privacy. He believes that the meaning of the constitutional text cannot simply be defined by whatever the justices current views are of correct law and morality, and although the majority of the Court rarely agrees, supporting State sovereignty is one way that Rehnquist can advocate judicial restraint.

There have been anomalies in Rehnquist's cases over the years, particularly his surprising opinion in *Dickerson v. United States*.[318] A careful assessment of the realities of that case, however, provides an interesting and ultimately satisfying explanation for this otherwise odd opinion. The final split, 7-2, indicates that the case clearly was going to be decided in favor of *Miranda* with or without the Chief Justice's vote. The motivation for Rehnquist to join the majority, then, can be surmised to be not simply to lend another vote to the decision, but to assure that the opinion did not establish the *Miranda* guarantees, clearly not contained in the text of the Constitution, as fundamental constitutional rights. Furthermore, Rehnquist's other motivation was the preservation of the "permanent and indispensable feature of our

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[318] *Dickerson v. United States*, 530 U.S. 428 (2000).

constitutional system," that of the supremacy of the Supreme Court "in the exposition of the law of the Constitution."[319] As one commentator aptly noted,

> What seems to have motivated Rehnquist was not loyalty to *Miranda's* protections but rather institutional protectiveness. *Miranda*, his opinion noted, is a constitutional decision of the Supreme Court; if an act of Congress could overrule *Miranda*, the Supreme Court's authority over other issues would not long survive unchallenged.[320]

Dickerson represents not so much an anomaly in the Chief Justice's jurisprudence as it does a shrewd attempt to craft an opinion that firmly establishes an important textual provision of the Constitution—the supremacy of the Supreme Court in matters of constitutional law—in a less than ideal circumstance.

A commitment to judicial restraint and textualism marks the opinions in the institutional federalism cases that the Rehnquist Court has considered. It is these cases, and indeed, these cases alone, that have engendered the label of federalism revolution, as the rights-based federalism cases demonstrate a continuing judicial bias toward national involvement. In these institutional cases, both Rehnquist and the Rehnquist Court have shown themselves to be operating on a certain level of practicality: some things, like increased expansion of congressional powers, may be slowed; other things, including assumptions made by precedent cases on which the entire national administration is built, are not so movable. The Rehnquist Court may have slowed by degrees the general expansion of congressional power, but despite Chief Justice Rehnquist's best efforts, the expansion of judicial prerogative to declare new meanings of the constitutional text remains.

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[319] *United States v. Morrison*, 616.

[320] Editorial, "*Miranda* Rights Reread," *The Nation* June 29, 2000; [Online]; available from http://www.thenation.com/doc.mhtml%3Fi=20000717&s=editors; accessed 26 March 2005.

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