New Judicial Federalism: The Rehnquist Court, Judicial Activism, and Devolution

Ole O. Moen
University of Oslo

Traditionally, American federalism has been defined by the qualifier "dual" before 1937, and "cooperative" after the famous "court-packing plan" of that year. However, over the last twenty-five years it has become increasingly common to speak of "regulated" or "regulatory" federalism.[1] What is implied in this term is the practice which was initiated in the budgetary field by the federal government in the 1960s of providing so-called "categorical grants-in-aid" with "strings attached" to the states, thus compelling the latter to implement federal regulations, especially in the fields of civil rights, poverty programs, and environmental regulation. These grants were channeled into specifically designated areas in con-

1. Theodore J. Lowi and Benjamin Ginsberg, *American* Government, brief 7th ed. (New York: W.W. Norton & Co., 2002) 61-62. For a specialized good early analysis of this topic, see Donald F. Kettl, *The Regulation of American Federalism* (1983; Baltimore: Johns Hopkins University Press, 1987) 33-41. For a thorough discussion of post-WW II development of federalism, see Timothy Conlan, *From New Federalism to Devolution: Twenty-five Years of Intergovernmental Reform* (Washington, DC: Brookings Institution Press, 1998). Another useful account is John A. Ferejohn and Barry R. Weingast, *The New Federalism: Can the States Be Trusted?* (Stanford, CA: Hoover Institution Press, 1997). For more general analyses of federalism, see: Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law*, 13th ed. (Westbury, New York: Foundations Press, 1997); Daniel J. Elazar, *American Federalism: A View from the State*, 3nd ed. (New York: Harper & Row, 1984); Samuel Hutchinson Beer, *To Make a Nation: The Rediscovery of American Federalism* (Cambridge, Mass.: Belknap Press of Harvard UP, 1993); Laurence H. Tribe, *American Constitutional Law*, 2nd ed. (Minneola, New York: The Foundation Press, Inc., 1988); Mark Tushnet, ed., *Comparative Constitutional Federalism: Europe and America* (New York: Greenwood Press, 1990).

trast to "block grants," which left far more to the discretion of state and local governments.[2]

President Lyndon B. Johnson launched the phrase "creative federalism" to describe the mid-1960s' variant of federalism, which was characterized by an expansive, activist federal government. President Nixon, in his first term in the White House, introduced the term "new federalism" in connection with his administration's "revenue sharing" policy, allegedly seeking to reduce federal "coercion" by allocating monies to the states as lump sums. However, it was President Reagan who made the term a household word in the 1980s, using it in his attempt to decentralize several programs, for instance in the area of welfare. These efforts were only moderately successful, because a divided and generally hostile Congress resisted most of his strategic moves in this area.

In contrast, after the Republicans assumed control of both chambers of Congress after the 1994 elections, the ideas implied in the concept "new federalism" enjoyed a totally different reception. Scaling back federal power was among the top items of Speaker Newt Gingrich's revolutionary program, "Contract with America." The debates over "unfunded mandates" and the resulting legislation restricting this practice were indicative of the novel spirit on Capitol Hill.[3] This "devolutionary" impetus was part of the conservative campaign against Big Government in general – and the federal branch, the "Beltway crowd," in particular – and was primarily critical of welfare spending (Medicaid being by far the most costly unfunded mandate) and expansive federal budgets in many fields.

A similar trend toward decentralization or devolution can be detected in the federal courts, including the U.S. Supreme Court, which in fact started this move at an earlier point in time than Congress. Again this meant a radical break with the recent past, as for nearly forty years after its famous "switch" in 1937, the Supreme Court had not invalidated a

2. In 1992, "categorical grants" made up 90.4% of federal transfers to the states, whereas "block grants" amounted to 8.3%, and "general purpose grants" made up a mere 1.4%. Milton C. Cummings and David Wise, *Democracy under Pressure: An Introduction to the American Political System*, 7th ed. (New York: Harcourt Brace Jovanovich College Publishers, 1993) 79.

3. *The Unfunded Mandates Reform Act of 1995* was the keystone in this drive, outlawing the practice of the federal government of designing expensive programs for the states to implement, but providing only a portion of the funding.

single piece of congressional regulation which was based on the Commerce Clause.[4] This essay will analyze the U.S. Supreme Court's handling of the federal question under the leadership of Chief Justice William H. Rehnquist, while also looking at some cases before the Court during the reign of his predecessor, Warren Earl Burger. It will do so by offering a close textual reading of Court opinions – majority, concurrent, and dissenting – in order to track the development of arguments underpinning or opposing this ideological paradigm shift in the Court's line of ruling. My analysis will rely mainly on my own interpretation of the Court record. My references to the evolving literature in the field will be limited, out of space consideration, but also because the present article is not meant to be an exhaustive treatise on the subject but rather a supplement to certain vital areas of recent scholarship in the field by offering an interpretation based on *le mot juste* – the Court's opinions at their nitty-gritty face value, often neglected in current writing on the Court – to reflect consistencies and detect inconsistencies in the justices' contributions to the evolving jurisprudence of federalism in the High Court.[5]

The New Deal "revolution" in the Supreme Court in this respect started with *NLRB v. Jones & Laughlin Steel Corp.* (1937), in which the Court approved of federal regulation of the workplace, but it was the Court decision in *United States v. Darby* (1941) – upholding the authority of the Fair Labor Standards Act of 1938 to impose minimum wage requirements on the lumbering industry engaged in interstate commerce – that provided the categorical stamp of the Court in this area. It was in his opinion for a unanimous Court in *Darby* that Associate Justice Harlan F. Stone included this famous statement pertaining to the Tenth Amendment: "The amendment states but a truism that all is retained which has not been surrendered."[6]

4. Art. I of the U.S. Constitution defines the make-up and powers of Congress. The "Commerce Clause" (Art. I, 8) reads: "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Typically, in the 1980s most standard constitutional law textbooks devoted about 15% to the issue of federalism, whereas forty years earlier the percentage had been 48%, according to one source. David Engdahl, *Constitutional Federalism,* Nutshell Series (St. Paul, Minn.: West Publishing Co., 1987) 3.

5. I have been surprised by the lack of accuracy in interpretations of and references to Court records in some articles and books written by reputed legal scholars, which I feel further justifies my closely text-based approach.

6. 312 U.S. 100, 124 (1941). Whereas the first nine Amendments to the U.S. Constitution contained in the *Bill of Rights* list individual rights against government overreach, the 10th Amendment represents a protection of the states against overreach by the federal government: "The powers not delegated to the United States by

Although the issue was raised in court several times during the next decades – primarily by state governments – the Court's *Darby* stance was firmly upheld by a solid majority of the Court. However, in Republican circles and in the South the question was not forgotten. For instance, in 1962 presidential hopeful Nelson Rockefeller characterized the "death of federalism" as "highly exaggerated." Nonetheless, the Supreme Court held on to its firm line, and the reputable conservative constitutional scholar Philip Kurland took issue with Rockefeller's statement explicitly, stating flatly in his 1969 Cooley Lecture at the University of Michigan: "Federalism is dead."[7]

Changing the Tide

However, in the mid-seventies a minor revolution seemed to occur in this area of adjudication. An early indication that the Tenth Amendment was long in dying was given in the Court's ruling in *Oregon v. Mitchell* (1970), in which a coalition of five justices held that Congress had authority to establish eighteen as the voting age in federal elections by the Voting Rights Act Amendments of 1970, whereas it lacked power to set such a requirement for state elections due to the clear demands of the Tenth Amendment.[8] Justice Hugo Black provided the vital fifth vote for the latter holding, announcing the majority opinion of the Court. Observing that "the power granted to Congress was not intended to strip the States of their power to govern themselves," he contended that such a situation would "convert our national government of enumerated powers

the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Typically, in the 1980s most standard constitutional law textbooks devoted about 15% to the issue of federalism, whereas forty years earlier the percentage had been 48%, according to one source. David Engdahl, *Constitutional Federalism,* Nutshell Series (St. Paul, MN: West Publishing Co., 1987) 3.

7. Laurence Tribe, *American Constitutional Law* (Minneola, N.Y.: The Foundation Press, Inc., 1988) 20, n. 9. Thomas McIntyre Cooley (1824-1898), the first Chairman of the Interstate Commerce Commission, is best known for his *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States* (1868) and for advocating the near total freedom of the judicial branch from legislative interference.

8. 400 U.S. 112 (1970). Some case references below will be to Findlaw's web version (http://caselaw.lp.findlaw.com.). At this site, dissents are independently paginated, and will be referred to by the dissenter's name and page number, later by page number only, names being included when needed for clarity.

into a central government of unrestrained authority over every inch of the whole Nation" (128).

By the time the Court revisited the issue of minimum wages under the Fair Labor Standards Act in 1976, three new Justices had been added to the Court: Lewis F. Powell, Jr. (1972), William H. Rehnquist (1972), and John Paul Stevens (1975). In *National League of Cities v. Usery* (1976), the Nixon appointee Justice Rehnquist was able to marshal a 5-4 Court majority (Burger, Powell, Stewart, and Blackmun) for a novel view of the powers of the federal government in this area.[9] The FLSA had been amended in 1974 (the latest in a series of amendments) to extend the Act's minimum wage and maximum hour provisions to almost all employees of states and their political subdivisions.

The chief bone of contention was the gradual expansion by Congress of the Act's reach, a process having taken place by stages – in 1961, 1966, and 1974 respectively – the final one removing, according to Justice William H. Rehnquist, the exemption previously granted states and their political subdivisions, thereby weakening the Act as a protector of a state prerogative (*ibid.*). In 1968, in *Maryland v. Wirtz,* the Court had upheld the Act against a challenge by 28 states and a school district against the 1961 and 1966 expansions of the FLSA, which among other provisions included state-operated hospitals and schools in the "enterprise concept."[10]

Similarly, in *Fry v. United States* (1975), the Court – with only Justice Rehnquist dissenting and Justice Douglas voting to dismiss the case – had upheld The Economic Stabilization Act of 1970. In so doing, the Court had accepted the conclusion of Congress in passing the bill that "unrestrained wage increases, even for employees of wholly intrastate operations, could have a significant effect on commerce."[11] The Court had concluded that the Act was constitutional under the Commerce Clause and that "under the Supremacy Clause the State must yield to the federal mandate" (*ibid.*). In *Wirtz,* the Court had leaned heavily on the following dicta in *United States v. California* (1936):

9. 426 U.S. 833 (1976).

10. 392 U.S. 183 (1968). The decision was drafted by Justice John Marshall Harlan, whereas Justices William O. Douglas and Potter Stewart dissented and Justice Marshall took no part in the case.

11. 421U.S. 542. 548 (1975).

> [We] look to the activities in which the states have traditionally engaged as marking the boundary of the restriction upon the federal taxing power. But there is no such limitation upon the plenary power to regulate commerce. The states can no more deny the power if its exercise has been authorized by Congress than can an individual. (854)

In *National League of Cities v. Usery,* Rehnquist labeled this statement "simply wrong" and stated bluntly that *Wirtz* must be overruled. The decisive fifth vote for the majority opinion in *National League*, written by the Rehnquist, was provided by Justice Harry A. Blackmun, who was to become a central actor in this area of adjudication in the next dozen years. In his brief concurring opinion, Blackmun admitted that he was "not untroubled by certain possible implications of the Court's opinion," but considered the plurality opinion which he joined "a balancing approach," finding comfort in his conviction that the decision did not preclude federal regulation in fields such as environmental protection, hedging his bet by adding: "With this understanding on my part of the Court's opinion, I join it" (856).

Justice William J. Brennan, Jr., wrote a stinging dissent, joined by Justices White and Marshall, in which he found it

> surprising that my Brethren should choose this bicentennial year of our independence to repudiate principles governing judicial interpretation of our Constitution settled since the time of Mr. Chief Justice John Marshall, discarding the postulate that the Constitution contemplates the restraints upon exercise by Congress of its plenary commerce power lie in the political process and not in the judicial process. For 152 years ago Mr. Chief Justice Marshall enunciated that principle to which, until today, his successors on this Court have been faithful. (857)

National League of Cities did not, however, inaugurate a new era of consistent states' rights holdings by the Court, but was merely a first step in a new development which was still just in the bud. Nonetheless, in the course of the bicentennial year the Court passed several restrictive verdicts in the area of federal protection of civil rights. In *Washington v. Davis* (1976) it reversed its course on racial discrimination in a vocational context, requiring proof of discriminatory intent rather than discriminatory effect for a measure to be unconstitutional, which indicated a radical break with the Court's liberal decision in *Griggs v. Duke Power* (1971).[12] In the area of redistricting, the Court's holding in *Beer et al. v.*

12. *Washington v. Davis,* 426 U.S 229 (1976); *Griggs v. Duke Power Co.* 401 U.S 424 (1971).

United States (1976) represented a narrow reading of the Voting Rights Act of 1965 regarding federal requirements of redistricting plans.[13]

However, in several decisions the Court did clarify its position with regard to congressional power under the Commerce Clause. In its unanimous decision in *Hodel v. Virginia Surface Mining & Recl. Assn.* (1981), written by Justice Thurgood Marshall, the Court established a three-pronged test for such legislation.[14] First, there must be a showing that the challenged statute regulates the "States as States." Second, the federal regulation must address matters that are "indisputably attribute[s] of State sovereignty." And third, it must be apparent that the States' compliance with federal law would directly impair their traditional governmental functions.[15] These criteria came to serve as a litmus test in future cases.

The Pendulum Swings Back

Eight years later the Court came very close to overruling its decision in *National League of Cities*, indicating that its holding in that case was insecure. In *EEOC v. Wyoming* (1983), Blackmun switched sides to support a 5-4 majority opinion penned by Justice William J. Brennan, Jr., holding as valid the reach of The Age Discrimination in Employment Act of 1967 to cover state and local governments under the Commerce Clause.[16] Two years later the trend came full circle, in *Garcia v. San Antonio Transit Authority*.[17] Again Justice Blackmun provided the pivotal fifth vote for the Court's opinion, this time writing the opinion himself. In fact, by switching sides from his stance in *National League of Cities*, he single-handedly effected a U-turn by the Court on this issue, now explicitly overruling the *National League* decision: "This analysis makes clear that Congress' action in affording SAMTA [San Antonio Metropolitan

13. 425 U.S.130 (1976).

14. 452 U.S. 264 (1981). Although the Court decision was unanimous, the Chief Justice and Justices Powell and Rehnquist felt the need to write separate concurrent opinions.

15. *National League of Cities v. Usery*, 426 U.S. 833, 852 (1976); *Hodel*, 452 U.S. 264, 287-88 (1981).

16. 460 U.S. 226, 244 (1983).

17. 469 U.S. 528 (1985).

Transit Authority] employees the protections of the wage and hour ... provisions of the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause."[18]

Pointing to his concurrence in *The National League of Cities*, Justice Blackmun admitted that the Court in that case had "underestimated the national political process for the continued vitality of the States," the Court in fact trying "to repair what did not need repair." What had caused him to change his view was the efforts by inferior courts to implement the Supreme Court's 1976 decision, which had "proven impracticable and doctrinally barren." The central point was the Court's attempt, in *National League of Cities*, to establish a distinction between those activities which were "traditional" tasks of city governments and operations which were not. This dividing line had proven untenable (*ibid.*).

Sandra Day O'Connor's spirited dissent was couched in a language flavored by martial metaphors: "The Court today surveys the battlefield of federalism and sounds a retreat ... I would prefer to hold the field and ... render a little aid to the wounded." Her criticism was primarily based on references to the *Federalist Papers*. The gist of her argument was clear: "The true 'essence' of federalism is that the States as States have legitimate interests which the national government is bound to respect even though its laws are supreme."[19]

O'Connor claimed that the powers delegated to the central government were "few and defined," and that the modern use of the commerce power had come to undermine the traditional concept of dual federalism. She deplored the development which had taken place in this area in recent decades, apparently seeing 1954 – the year of the major school desegregation decision, *Brown v. Board of Education* – as an important milestone on this route: In 1954, the idea had still been alive that national action was exceptional, an intrusion which was to be justified by some special necessity. She objected to the majority's equating the states with private litigants before the Court, emphasizing that the autonomy of a state is an essential constituent of federalism. Like Rehnquist, she was firm in her belief that the Court would "in time again assume its constitutional responsibility."

18. *Ibid.* 555-556.
19. *Ibid.* 580-581.

Backlash

The issue of age, which had been the pivotal point in *E.E.O.C. v. Wyoming* (1983), was revived in *Gregory v. Ashcroft* (1991), where the key issue was whether the federal Age Discrimination in Employment Act of 1967 (ADEA) applied to state judges. Article V, 26 of the Missouri Constitution had a mandatory retirement age for most state judges.[20] The Court held, in an opinion by Justice O'Connor (5-4), that the Missouri law did not violate the ADEA nor the Equal Protection Clause of the 14th Amendment, since ADEA does not apply to appointed state judges.[21] The Court skirted the constitutional issue by mooring its judgment in the "plain-statement" rule most recently articulated in *Atascadero State Hospital v. Scanlon* (1985): "If Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'"[22]

The ruling was constitutionally anchored to the Guarantee Clause of the U.S. Constitution (Art. IV, 4): "The United States shall guarantee to every State in this Union a Republican form of Government." The Missouri law was held to "go to the heart of representative government," as a severe restriction of the Equal Protection Clause, according to the Court majority, which now adhered to the so-called political function argument. It is interesting that the Court majority – which recently had been adamant about separating the courts from the legislative branch in other cases, had advocated judicial restraint, and was allegedly wary of entering the "political thicket" – now accepted the argument by Missouri Governor John Ashcroft that a judge was an appointee at the policymaking level. The bottom line was, therefore, that the state judges were exempted and, consequently, that the ADEA was severely curtailed in its reach.

In the following term – in *New York v. United States* (1992) – the Court took a decisive retroactive quantum leap in its interpretation of federalism.[23] Apparently, Justice O'Connor now had her mind set on changing

20. 501 U.S. 452 (1991).

21. The Equal Protection Clause reads: "[nor shall any State] ... deny to any person within its jurisdiction the equal protection of the laws."

22. 473 U.S. 234, 242 (1985).

23. 505 U.S.144 (1992). This could be seen as a result of the addition to the bench of a staunch conservative states' rights proponent, Clarence Thomas, to replace the liberal pro-federal government judge, Thurgood Marshall, who was still serving when *Gregory v. Ashcroft* was decided.

the course of post-WW II jurisprudence in the field of federalism. New York State had challenged the federal Low-Level Radioactive Waste Policy Amendments Act of 1985 regulating the operation of disposal sites for low-level radioactive waste. The Act contained three kinds of incentives to encourage states to build receptacles for such waste: (1) monetary incentives, (2) access incentives, and (3) a take-title provision. Whereas the entire Court upheld the former two measures, the 5-4 conservative majority found the take-title provision unconstitutional.

In short, the controversial measure specified that a state or a "regional compact" that failed to provide for the disposal of internally generated waste by a particular date "must take title to and possession of the waste ..." (144). Justice O'Connor focused on the circumstances under which Congress may use states as implements of regulation. The Tenth Amendment occupied center stage in her analysis, which hinged on the question of state sovereignty. In her view there were two ways of validating an act of Congress in a case involving the division of authority between federal and state governments: Either it could be authorized as an expression of a power delegated to Congress under Article I of the Constitution (congressional powers), or the Court could determine to what extent it invaded "the province of state sovereignty reserved by the Tenth Amendment." The two sets of inquiries were "mirror images of each other":

> In the end, just as a cup may be half empty or half full, it makes no difference whether one views the question at issue in this case as one ascertaining the limits of the power delegated to the Federal Government under the affirmative powers of the Constitution or one of discerning the core of sovereignty retained by the States under the Tenth Amendment. (159)

O'Connor admitted that the relationship between state and federal powers had changed in favor of the latter, especially under the Necessary and Proper Clause, but she claimed that the constitutional structure underlying and limiting that authority had not.[24] Here she seemed to erect a wall of separation between two watertight compartments, as it were,

24. Art. I, Section 8, reads in part: "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers ..." This clause is generally known as the "Necessary and Proper Clause," but it is also called the "Flexibility Clause" because of its wide applicability.

leaving little room for overlap of authority. However, her key point is whether an incident of state sovereignty under the Tenth Amendment represents a limitation on an Article I power. O'Connor argued by analogy that, although Congress may regulate publishers engaged in interstate commerce, it is constrained by the First Amendment guarantee of the freedom of speech. The Tenth Amendment likewise restrains federal power, said O'Connor, adding an interesting qualification to her statement for an allegedly strict constructionist, "but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, ... is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States" (157).

O'Connor furthermore saw the take-title provision as different from the other incentives. Whether one considers the take-title provision as lying outside Congress' enumerated powers or as infringing upon the core of state sovereignty reserved by the Tenth Amendment, she found the provision inconsistent with the federal structure of government established by the Constitution. Unlike the other incentives, it did not represent the conditional exercise of any congressional power enumerated in the Constitution. Instead, the Act simply "commandeer[ed] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program," O'Connor observed, quoting for support the Court in *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.*[25]

O'Connor was willing to grant Congress considerable power to regulate matters directly in relation to individual citizens and also to preempt contrary state regulation, but not to regulate states as states or compel states to legislate. Here she resorted to the *Federalist Papers* to bolster her bottom line, in keeping with much of her analysis, which for a great part relied on pre-constitutional original-intent arguments:

> States are not mere political subdivisions of the United States. State governments are neither regional offices nor administrative agencies of the Federal Government. The positions occupied by state officials appear nowhere on the Federal Government's most detailed organizational chart. The Constitution instead "leaves to the several States a residuary and inviolable sovereignty," *The Federalist* No. 39, p. 246 (C. Rossiter ed. 1961), reserved explicitly to the States by the Tenth Amendment. (188)

25. 176-177; 452 U.S. 264, 288 (1981).

In his long dissent, Justice White took an unkind view of O'Connor's factual account of the case, pointing out that the federal government had, in a considerable degree, left to the states to work out plans for disposal of this dangerous waste by way of cooperation. In fact, the 1985 Act was a clear-cut issue of cooperative federalism in which the states had bargained among themselves to achieve compromises for Congress to sanction, White contended: "Unlike legislation that directs action from the Federal Government to the States, the 1980 and 1985 Acts reflected hard-fought agreements among States as refereed by Congress" (194). White was troubled by the majority's "rule and illogical distinction in the types of alleged incursions on state sovereignty," which he contended were not supported by the cases referred to in the majority's analysis. It was primarily the Court's distinction between the federal statute's regulation of states and private parties – as opposed to a regulation solely of state activities – that he found "unsupported by [the Court's] recent Tenth Amendment cases." He could hardly find any trace of this distinction in the "spirited exchange" between the Court majority and the dissenters in *National League of Cities* or *Garcia.* In fact, he claimed that in "no case has the Court rested its holding on such a distinction" (202, 201).

Criticizing the Court's reliance on *Hodel* and *FERC* for support of its thesis regarding the "commandeering principle" – which in fact meant hitching it to "a solitary statement in dictum" in the former case – White reminded the Court that "just last Term ... JUSTICE O'CONNOR wrote for the Court that '[w]e are constrained in our ability to consider the limits that the state-federal balance places on Congress' power under the Commerce Clause."[26] And for good measure he quoted more of the Court's holding in *Garcia*, the case that he saw as obviously controlling in this instance:

> [We] are convinced that ... the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process, rather than one of result. Any substantive restraint on the exercise of the Commerce

26. *Gregory v. Ashcroft,* 501 U.S. 452, 464 (1991), referring to *Garcia,* 528. One can detect a similar change in O'Connor's position in affirmative action cases, where she, in *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989) had admitted special congressional powers – beyond those of state and local governments – under § 5 of the 14th Amendment, which she snapped away in *Adarand Construction Co. v. Pena,* 115 S. Ct. 2097 (1995), placing Congress on a par with state governments also in this regard.

> Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process, rather than to dictate a "sacred province of state autonomy." (206)

Strangely enough, White's most fundamental criticism of the Court's opinion was buried in a footnote. Here he took the Court majority to task for its selective use of precedent, in particular its pre-Civil War emphasis at the expense of the virtual revolutions which had taken place after the Civil War and in the wake of the New Deal, stating that "the Court's civics lecture has a hollow ring at a time when action, rather than rhetoric, is needed to solve a national problem." In fact, he was saying that the Court was turning the clock back, neglecting the modern development of federalism; that is, the Court's stance was outright reactionary:

> With selective quotations from the era in which the Constitution was adopted, the majority attempts to bolster its holding that the take title provision is tantamount to federal "commandeering" of the States .... I do not read the majority's many invocations of history to be anything other than elaborate window dressing. Certainly nowhere does the majority announce that its rule is compelled by an understanding of what the Framers may have thought about statutes of the type at issue here. Moreover, I would observe that, while its quotations add a certain flavor to the opinion, the majority's historical analysis has a distinctly wooden quality. One would not know from reading the majority's account, for instance, that the nature of federal-state relations changed fundamentally after the Civil War. That conflict produced in its wake a tremendous expansion in the scope of the Federal Government's lawmaking authority, so much so that the persons who helped to found the Republic would scarcely have recognized the many added roles the National Government assumed for itself. Moreover, the majority fails to mention the New Deal era, in which the Court recognized the enormous growth in Congress' power under the Commerce Clause. (207, n. 3)

In his brief dissenting statement, Justice Stevens was similarly critical of the Court's constitutional historiography. Contrary to the majority's interpretation of the Constitution in a confederate direction, he pointed to the clear expansion of federal power under the Constitution compared to its function under the Articles of Confederation: "Nothing in the history suggests that the Federal Government may not also impose its will upon the several States as it did under the Articles. The Constitution enhanced, rather than diminished, the power of the Federal Government." He went so far as to hold that even if the Act had not been passed, the Court would have power to command a state to take remedial action if its radioactive

waste created a nuisance to another state, adding an interesting categorical punch line: "If this Court has such authority, surely Congress has similar authority."[27]

Aggressive Court Activism

In 1995 another controversial case involving federal authority under the Commerce Clause was brought before the Court. The question addressed in *United States v. Lopez* (1995) involved the Gun-Free School Zones Act of 1990, which forbids "any individual knowingly to possess a firearm at a place that the individual knows, or has cause to believe, is a school zone ..." Chief Justice Rehnquist held, for a five-four majority, that "the Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce" and thus exceeded the authority of Congress to regulate "Commerce ... among the several States ..."[28]

Rehnquist noted the high degree of deference to Congress implied in the previous decisions by the Court, whose track record he thought amounted to the virtual establishment of a federal police power of the kind reserved to the states. In the broad language of these opinions he sensed a possibility of additional expansion. To accept this development would be to conclude that the Constitution's enumeration of powers "does not presuppose something not enumerated ... and that there never will be any distinction between what is truly national and what is truly local" (19). In particular, he emphasized what he saw as a tenuous link between gun control and commerce, and in his opinion the acceptance of this Act would establish a full-fledged federal police power in areas outside its enumerated powers. By finding the Act unconstitutional, Rehnquist signaled a decisive and new curtailment of congressional powers under the Commerce Clause.

27. *Ibid.* 211, 213.

28. *United States v. Lopez,* No. 93-1260. Rehnquist's majority opinion was supported by Justices O'Connor, Scalia, Thomas, and Kennedy, the latter two also writing separate opinions, O'Connor joining that of Kennedy. Justices Stevens, Souter, and Breyer wrote dissenting opinions, the former two also joining that of the latter, along with Ginsburg.

In some ways reminiscent of Justice Blackmun's brief concurring note in *National League of Cities* (1976), Justice Kennedy felt a need to write a separate opinion to qualify his consent to Rehnquist's statement for the Court. He emphasized the monumental changes in the Court's perception of the Commerce Clause from *Standard Oil of New Jersey v. United States* (1911), through the New Deal decisions, 1937-1942, and their progeny down to *Perez v. United States* (1971): "These and like authorities are within the fair ambit of the Court's practical conception of commercial regulation and are not called into question by our decision today." He then further stated explicitly that "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy" (Kennedy 7, 8).

However, having made these concessions to federal authority, Kennedy observed that of the fundamental structural elements in the Constitution – separation of powers, checks and balances, judicial review, and federalism – only concerning the last link in the chain does there seem to be "much uncertainty respecting the existence, and the content, of standards that allow the judiciary to play a significant role in maintaining the design contemplated by the Framers." He found this somewhat ironic since federalism was the "unique contribution of the Framers to political science and political theory." This principle was established to serve freedom, said Kennedy, seeing in federalism clear evidence of the profound insight of the Framers: "In the compound republic of America, power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments" (9).

Whereas Kennedy's concurrence was moderate, apparently seeking to walk the line between post-New Deal jurisprudence regarding the Commerce Clause and the more radical view espoused by the Chief Justice, Justice Clarence Thomas' concurrence was, in contrast, a programmatic exercise in judicial activism based on the doctrine of original intent:

> Although I join the majority, I write separately to 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. (Thomas 1)

Justice Thomas' statement in *Lopez* was reminiscent of his marathon concurrency in the redistricting case *Halder v. Hall* (1994) – his conservative legal manifesto of sorts – in which he had been willing to dismiss decades of precedents in the Court's record of redistricting decisions: "In my view, our current practice should not continue. Not for another Term, not until the next case, not for another day."[29] In that case Justice Stevens had dryly dismissed Justice Thomas' long-winded exposition in an almost overbearing manner: "It is therefore inappropriate for me to comment on portions of ... his opinion that are best described as an argument that the statute be repealed or amended in important respects."[30]

Basing most of his arguments on an original-intent defense – the *Federalist Papers* and very early Court decisions – Justice Thomas was not shy about placing a tall order: "My review of the case law indicates that the substantial effects test is but an innovation of the 20th century."[31] Furthermore, he took Breyer to task for allegedly misinterpreting *Gibbons v. Ogden* (1824), which meant that Thomas was willing to take on a considerable chain of precedents, a position which does not seem to square too well with his claim to judicial restraint and deference to the political branch frequently paraded in his opinions. Thomas stated point-blank that the federal government has no authority to regulate within the field of reserved powers, its domain being limited to those powers surrendered to it by the states. Admitting "that many believe that it is too late in the day to undertake a fundamental reexamination of the past 60 years," he nonetheless announced: "In an appropriate case, I believe that we must further reconsider our 'substantial effects' test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce clause jurisprudence."[32]

Symptomatically, none of the dissents addressed Thomas' arguments at all. In his brief, separate opinion, Justice Stevens underlined his agreement with Breyer's interpretation of the legal problem at issue, but felt a need to add a paragraph on congressional authority in this area, which

29. *Halder v. Hall,* No.91-2012 (1994), 30 of 46.

30. *Holder v. Hall,* 46.

31. Thomas 14. The "substantial economic effect" test was developed most explicitly by Justice Holmes in the so-called Shreveport Rate Case, *Houston E. and W. Texas Railway Co v. U.S.,* 234 U.S. 342 (1914).

32. Thomas 18, fn. 8; Thomas 2.

ended in this matter-of-fact observation: "Whether or not the national interest in eliminating that market [for gun providers] would have justified federal legislation in 1789, it surely does today" (Stevens 2).

Justice Souter, in his dissent, started by reminding the Court that deference to rationally based legislative judgments "is a paradigm of judicial restraint" (Souter 1). Referring to the pre-New Deal period of judicial activism in the Court's history, which he characterized as "an untenably expansive conception of judicial review," Souter admonished the Court to adhere to "the modern respect for the competency and primacy of Congress in matters affecting commerce developed only after one of the Court's most chastening experiences." Souter pointed to the momentous significance of the Interstate Commerce Act of 1887, which had opened up a new age of congressional reliance on the Commerce Clause for authority to exercise general police powers at the national level. He saw the twentieth-century record of the Court in this area of law prior to 1937 as an era little worthy of praise, a period when the Court based its decisions on "highly formalistic notions of 'commerce' to invalidate federal social and economic legislation." Revisiting the Court's familiar distinction between manufacturing and commerce by recounting a series of decisions reflecting the Court's substantive due process activism, Souter underscored the point that it was not merely coincidental that the "sea changes" in the Court's conceptions of its authority under the Due Process and Commerce Clauses had occurred virtually together, in the year 1937. This event had signaled a switch away from the Court's prior reliance on laissez-faire ideology, pegged to the Contract Clause of the Constitution, to a modern perception of congressional authority required to meet the overarching constitutional duty to "promote the general welfare."[33] The rational basis review standard had reigned supreme throughout all those years following the famous "switch." It was Souter's fear that this practice was now being undermined by the Court majority; he saw the Court's distinction between what was "patently commercial and what is not" as disconcertingly similar to the former distinction between what affects commerce directly and indirectly, respectively

33. Souter 3, 4. This duty of the federal government is explicitly expressed in The Preamble of the U.S. Constitution. In addition, Art. 1, Section 8, charges Congress specifically with the duty to "provide for the ... general Welfare of the United States."

(which might be seen as an updated version of the manufacture vs. commerce polarity, as it were).

Souter's chief concern was to distinguish statement rules applied in statute interpretation to establish congressional intent, when this was not clearly expressed, from the question of standard of judicial review: "Indeed, to allow our hesitance to affect the standard of review would inevitably degenerate into the kind of substantive policy review that the Court found indefensible 60 years ago" (9):

> But review for congressional wisdom would just be the old judicial pretension discredited and abandoned in 1937, and review for deliberateness would be as patently unconstitutional as an Act of Congress mandating long opinions from this Court. Such a legislative process requirement would function mainly as an excuse for covert review of the merits of legislation under standards never expressed and more or less arbitrarily applied. Under such a regime, in any case, the rationality standard of review would be a thing of the past. (12)

Exit *Stare Decisis?* [34]

Justice Breyer's appended a 17-page list of literature to support his dissent. In his view, the Court's "critical distinction between 'commercial' and noncommercial 'transaction[s]'" would mean that there is a distinction between two local activities – "each of which has an identical effect on interstate commerce" – if one is deemed commercial and the other is not. He rejected this position on the basis of the warning sounded in *Wickard v. Filburn* (1942) not to turn questions of congressional power upon formulas which would give "controlling force to nomenclature such as 'production' and 'indirect' and foreclose consideration of the actual effects of the activity in question upon interstate commerce."[35]

The Court's undermining of a legal field which "until this case, [had] seemed reasonably well settled," could put in jeopardy more than 100 sections of the U.S. Code – including at least 25 criminal statutes – which use the phrase "affecting commerce" to define their scope (17). Thus, Breyer saw the Court's decision as a very serious violation of the *stare*

34. *Stare decisis* – "let the decision stand" – to abide by, or adhere to decided cases, i.e. follow precedent.
35. *Wickard v. Filborn,* 317 U.S. 111, at 120 (1942); *Lopez,* Breyer 14, 15.

decisis principle. Upholding the Act under scrutiny would "interpret the Clause as this Court ha[d] traditionally interpreted it, with the exception of one wrong turn [*National League of Cities v. Usery* (1976)] subsequently corrected."[36] In short, Breyer and his supporters rejected – as a severe break with constitutional traditions long established – the judicial activism introduced in this area by the Court majority and its return to a pre-New Deal line of reasoning.

In the succeeding term, another aspect of congressional authority to regulate commerce – the so-called Indian Commerce Clause – came under Court scrutiny in *Seminole Tribe of Florida v. Florida et al.* (1996).[37] The Indian Gaming Regulatory Act (IGRA) had been passed by Congress to serve as a statutory basis for the operation and regulation of Indian gambling activities, which had spread like wildfire in recent years.[38] The Act authorized tribes to sue states in federal courts in order to compel state compliance with the Act by entering good-faith negotiation with the tribes. Florida had not done so, nor had the state consented to be sued. The principal issue to be resolved was to what extent a state is immune from such suits under the 11th Amendment, and the subsidiary question to be answered was the reach of the Indian Commerce Clause in light of the Court's perception of the former question.[39] Chief Justice Rehnquist, writing for the majority, revisited the Court's 1989 decision in *Pennsylvania v. Union Gas Co.,* which had in effect upheld the right of Congress to abrogate the states' 11th Amendment immunity pursuant to its power under the (Interstate) Commerce Clause.[40]

In *Pennsylvania*, Justice Byron White had provided the fifth vote for Justice Brennan's majority opinion judgment, but had arrived at that conclusion by reasoning which was at variance with that of the Brennan plu-

36. Breyer also bolstered his opinion with a reference to Justice Holmes' statement in *Swift & Co. v. United States* (1905) that Congress should be permitted "to act in terms of economic ... realities."*Swift & Co. v. United States*, 196 U.S. 375, 398 (1905), quoted in *North American Co. v. SEC*, 327 U.S. 686, 705 (1946); *Lopez* 18.

37. 517 U.S. 44 (1996). The so-called Indian Commerce Clause is the last segment of the Commerce Clause.

38. 25 USCS 2701 et seq.

39. The 11th 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."

40. 491 U.S. 1 (1989).

rality. This fact was made a central point in Rehnquist's opinion, which expressly overruled *Union Gas Co.* The Rehnquist majority admitted the clear intent of Congress in IGRA to abrogate the states' sovereign immunity, but held that the Indian Commerce Clause did not authorize Congress to curtail the states' sovereign immunity. In short, although Article I grants Congress total authority to regulate commerce, the 11th Amendment acts as a limit on its power to abrogate state immunity because Article III limits the authority of federal courts to allow a tribe to sue a state in federal court (20). Consequently, IGRA could not grant jurisdiction over a state that did not consent to suit. Furthermore, by adopting what would appear to becircular argumentation, the Chief Justice stated that the age-old doctrine of *Ex Parte Young* (1908) – which had been a federal tool to get at states which violated federal law, by going after state employees – could not be used because the federal government had provided an elaborate scheme for enforcement under IGRA.[41]

The Chief Justice rested his case heavily on a more than one-hundred-year-old controversial decision by the Court, *Hans v. Louisiana* (1890), which in his view clearly established the doctrine of state immunity from suit.[42] With regard to the principle of precedent, Rehnquist stated that the Court had always treated *stare decisis* as a "principle of policy ... and not as an 'inexorable command,'" articulating clearly his justification for overriding precedent: "When governing decisions are unworkable or badly reasoned, 'this Court has never felt constrained to follow precedent.'"[43]

Although Justice Stevens endorsed Justice Souter's dissenting opinion – describing it as a "strikingly uniform scholarly commentary" – he felt a need to write a separate dissent because of "the shocking character of the majority's affront to the coequal branch of our Government" (Stevens 1). In fact, said Stevens, the issue before the court had been "addressed squarely by a total of 13 Justices, 8 of whom cast their votes with the so-called 'plurality'" (20). The consequences of the Court majority's deci-

41. *Ex Parte Young,* 209 U.S. 123 (1908); *Seminole,* 47.

42. 134 U.S.1 (1890). Souter, in his dissent, dissected the *Hans* decision carefully, salvaging the parts he found useful and thus upholding it in a reverent bow to the principle of stare *decisis.*

43. Rehnquist here cited *Payne v. Tennessee,* 501 U.S. 808 at 828, 827 (1991) and *Smith v. Allwright,* 321 U.S. 649, 665 (1944). *Seminole,* 18.

sion to overrule *Union Gas* could not be overstated, said Stevens, who saw this as a sharp break with the past: "This is a case about power – the power of the Congress of the United States to create a private federal cause of action against a State, or its Governor, for the violation of a federal right." Even Justice Iredell's dissent in *Chisholm v. Georgia* (1793), which provided the blueprint for the 11th Amendment, "assumed that Congress had such power" (1). His main point of attack, however, was on the majority's reliance on a common law traditional background which he did not at all consider a *bona fide* part of the constitutional framework. In an unusually extensive and detailed analysis of the historical context, Justice Stevens emphasized that the Court, both in *Chisholm v. Georgia* and *Hans. v. Louisiana,* had ascertained that federal courts possessed only such jurisdiction as Congress had provided and that the Judiciary Act of 1789 did not extend to suits against un-consenting states, not that Article III did not authorize such extension.

Justice Souter similarly observed that "the Court today holds for the first time since the founding of the Republic that Congress has no authority to subject a State to the jurisdiction of a federal court at the behest of an individual asserting a federal right" (Souter 1). He also emphasized the majority's admission that the Court, in *Hans v. Louisiana,* had had no occasion to decide whether Congress could abrogate a State's immunity from federal question suits (26). He further disputed Rehnquist's historical rendition of the Court's 11th Amendment interpretation in favor of state immunity. Since the *Hans* Court had held such suit to be barred by "a nonconstitutional common-law immunity," the modern Court had – rightly, in his view – ignored the post-Hans dicta in that sort of cases and exercised the jurisdiction that the plain text of Article III provides (27, 31).

Souter offered a broad and thorough, longitudinal analysis of the status of common law in an American context and was in full agreement with Stevens regarding its inapplicability within a constitutional framework. Basing his conclusion on a broad survey of writings by the Founders and by authoritative constitutional scholars and Court records, Justice Souter passed a harsh judgment on the majority's verdict:

> Thus, the Court's attempt to convert isolated statements by the Framers into answers to questions not before them is fundamentally misguided.42 The Court's difficulty is far more fundamental, however, than inconsistency with a particular quotation, for the

> Court's position runs afoul of the general theory of sovereignty that gave shape to the Framers' experience. An inquiry into the development of that concept demonstrates that American political thought had so revolutionized the concept of sovereignty itself that calling for the immunity of a State as against the jurisdiction of the national courts would have been sheer illogic.[44]

The Commerce Clause Revised and Diversified

The Court majority seemed to be eagerly looking for a case which could extend further its new doctrine of the narrow reach of the Commerce Clause and the solidity of the 11th Amendment bar against federal powers. *Prinz v. United States* (1996) appeared to offer such an opportunity. The key question in this case was whether Congress, by imposing an interim burden on local chief legal executive officers under the Brady Handgun Violence Prevention Act to perform a background check on prospective gun purchasers, was overreaching its authority under the Commerce Clause.[45]

The battle lines drawn up in the preceding cases reappeared. In his concurrency, Justice Thomas ceremoniously reiterated his call in *United States* v. *Lopez* for a total revision of the Court's post-New Deal line of decisions based on the Commerce Clause. Writing the opinion of the Court, Justice Scalia focused on the Supremacy Clause's explicit mention of judges, thus setting them aside from members of the executive and legislative branches of the states. Again he emphasized the voluntary nature of the states' need to implement federal laws, among other arguments hinging his case on President Wilson's "requesting" rather than "commandeering" the collaboration of state governors to implement his

44. *Seminole*, 53-54. {Footnote 42 reads: See *The Federalist* No. 82, at 553 (A. Hamilton) (disclaiming any intent to answer all the "questions of intricacy and nicety" arising in a judicial system that must accommodate "the total or partial incorporation of a number of distinct sovereignties"); S. Elkins and E. McKitrick, *The Age of Federalism* 64 (1993) [New York: Oxford University Press] (suggesting that "[t]he amount of attention and discussion given to the judiciary in the Constitutional Convention was only a fraction of that devoted to the executive and legislative branches," and that the Framers deliberately left many questions open for later resolution)}.

45. *Prinz, Sheriff/Coroner, Raviolli County, Montana v. United States* (1996); No. 95-1478. This temporary duty imposed on local officials by The Brady Act (1993) was a tide-over provision while a national instant background check system was being developed, to be in place on Nov. 30, 1998.

selective draft law during WW I. Many of the arguments of the majority in *New York v. United States* were restated by Scalia in *Prinz*. The dissent's attempt to distinguish *Prinz* from *New York* by arguing that in the former case the act was aimed at individual state officials – not states as states – was rejected by Scalia as an interpretation that "disembowels" the verdict in the latter case, and hence the Eleventh Amendment (11). His concluding statement reads:

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policymaking is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty ... (12)

Stevens, writing the four-member dissent, objected vehemently to the majority's narrow reading of the Supremacy Clause and statutes where the federal government was relying on state judges and their clerks to carry out federal tasks, pointing out that judges historically performed many characteristically executive functions – and still do to some extent – that executive agencies would otherwise carry out. However, Stevens' major attack on the Court's opinion was that it was lacking in the affirmative and was basically made up of responses to the dissent's arguments and also relied heavily on dicta, thus lacking in positive constitutional authority: "Absent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it" (19). And, admittedly, Scalia's opinion has a number of vague formulations and partial concessions which are somewhat atypical of his generally cocksure manner of writing.

In his brief separate dissent, Justice Breyer interpreted the paucity of precedents to indicate a scant need for pronouncements in this field and argued that the Court should therefore adhere to its modern line of decisions, thus deferring to precedence. Souter, in his dissent, relied on originalist support, referring to *The Federalist* Nos. 27, 36, 44, and 45, thus leaning on both Alexander Hamilton and James Madison. State officials

are bound by their oath of office to the U.S. Constitution to have "an essential agency in giving effect to the Federal Constitution," the former designating the state agency an "auxiliary" which "will be incorporated" into the nation's operation.[46]

The next stage in the Court's process of redoing the Constitution offered itself in *United States v. Morrison et al.* (2000), which involved a rape case from the Virginia Polytechnic Institute under the Violence against Women Act, which provides a federal civil remedy for the victims of gender-motivated violence.[47] Chief Justice Rehnquist delivered the opinion of the Court (5-4) majority. Basing its holding on its reasoning in *Lopez,* the Court again addressed the question of whether this crime "substantially affect[ed] interstate commerce." In *Lopez,* Justice Kennedy had held that the Court's decision did not alter its "practical conception of commercial regulation" and that the link between gun ownership and "a substantial effect on interstate commerce was attenuated" (6, 7).

In contrast to *Lopez*, however, *Morrison* provided ample support of the claim that gender-motivated violence substantially affected interstate commerce. However, introducing *Lopez* as the new constitutional authority, Rehnquist now stated that "Congress' findings are substantially weakened by the fact that they rely so heavily on a method of reasoning that we have already rejected as unworkable if we are to maintain the Constitution's enumeration of powers," thus rejecting more than half a century of Court holdings in this area, the Court now in fact substituting its new doctrine for more than five decades of progressive jurisprudence in the field (7).

In his dissent, Justice Souter took exception to the Court's arguments, claiming that the Court's "nominal adherence to the substantial effects test is merely that" and that the Court in fact was supplanting rational analysis with a new criterion of review. He identified this new turn of events as having started in *Lopez* and now being extended by a "self-fulfilling prophecy" in *Morrison.* This also meant power-grabbing on the part of the Court – in stark contrast to its claim of upholding the separation of powers – since the majority here had introduced a new "method of

46. Madison, *The Federalist* No. 44, 307; *Hamilton,* No. 27, 175; *Printz,* 24.
47. 42 U.S.C. §13981.

reasoning" based on "a uniquely judicial competence" (16). Souter rejected vehemently the Court's claim that the enumeration of powers implies that certain categories of subject matter are beyond the reach of the Commerce Clause, as a *non sequitur* to its correct observation that some powers are withheld by the states. The consequence of the Court's position was a limitation of Congress' power to regulate commerce by effectively abandoning the "substantial effects" test. In so doing, Souter claimed, the Court was reaching back to the line of reasoning employed by the Court prior to *NLRB v. Laughlin Steel Corp.* (1937), with its formalistic distinction between "manufacturing" and "commerce," etc.[48]

Moreover, Souter saw the Court's "effort to carve out inviolable state spheres" within the spectrum of activities substantially affecting commerce as incompatible with *Gibbons v. Ogden* (1824), thus undermining the majority's original-intent argument.[49] Tying his opinion to the New Deal "switch in time" decision, Souter stated: "The federalism of some earlier time is no more adequate to account for those facts today than the theory of laissez-faire was able to govern the national economy 70 years ago," a reference back to Justice Holmes famous dissent in *Lochner v. New York* (1905) about the relevance of Herbert Spencer's theories known as social Darwinism.[50]

Likewise, Justice Breyer pointed out that all the way since its decision in *NRLB v. Jones & Laughlin Steel Corp.* (1937) the Court had held that "only the interstate commercial effects, not the local nature of the cause, are constitutionally relevant" (Breyer 23). *Lopez* represented a break with this line, said Breyer, by introducing a novel concept, placing critical constitutional weight upon "a different, less obviously relevant feature (how 'economic' it is)." He dismissed the Court's method of separating the state and federal spheres as under-inclusive and claimed that it would be impossible for the courts to develop "meaningful subject-matter categories" that would exclude certain areas from congressional control without vitally maiming the Commerce Clause as a regulatory tool. He

48. *U.S. v. E.C. Knight Co.*, 156 U.S.1 (1895); *In re Huff*, 197 U.S. 488 (1905); *Adair v. U.S.* 208 U.S. 161 (1908); *Hammer v. Dagenhart*, 247 U.S. 251 (1918); *Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935); *Morrison*, 17-18.

49. 22 U.S.1 (1824)[9 Wheat, 197].

50. *Printz*, 21. In *Lochner*, Holmes had stated: "The 14th Amendment does not enact Mr. Spencer's Social Statics," 11 of 12.

laid this authority at the door of Congress, which is charged with the responsibility of protecting states' rights, citing The Unfunded Mandates Reform Act of 1995 as proof of the viability of "cooperative federalism" on this point. Thus, he not so indirectly accused the Court majority of judicial activism, contrary to its often-repeated claim to the contrary.[51]

A Political Agenda?

The claim that more factors than meet the eye may go into the Justices' considerations of principles when deciding cases seemed to be borne out in *Rush Prudential HMO, Inc. v. Moran et al.* (2002), involving the question whether the federal Employment Retirement Income Security Act (ERISA) preempts the Illinois HMO Act. This was really a test case of the states' right to pass patients' bill of rights statutes; some forty-two states had done so, and Illinois and Texas had encountered conflicting Appeals Courts verdicts. The *Rush* case involved a patient who had sought alternative surgical treatment after her HMO had failed to provide a review of its denial of such treatment, a requirement prescribed in the Illinois HMO Act.

What was particularly intriguing in this case was the seemingly tables-turned position held by the liberal and conservative factions of the Supreme Court. An uncommon constellation of votes appeared: The most fervent defenders of states' rights – the Chief Justice, Thomas, Scalia, and Kennedy – supported an opinion penned by Justice Thomas arguing that ERISA did preempt the field, whereas O'Connor joined the traditional defenders of the federal government's right to regulate in such matters in holding that it did not.[52]

In his dissent, Thomas claimed that by enacting ERISA, Congress had provided an exclusive remedy, which preempted state remedies in the

51. Breyer supported his argument on this point by several references to constitutional scholars, for example: Vicki Jackson, "Federalism and the Uses and Limits of Law: *Printz* and Principle?" *Harvard Law Review* 111 (1998): 2180, 2231-2245; Stephen Gardbaum, "Rethinking Constitutional Federalism," *Texas Law Review* 74 (1996): 795, 812-828, 830-832.

52. The states' rights argument of the majority takes on a somewhat strange color when one is reminded that 36 states had written *amici curiae* briefs in support of the Act.

same field: "Such exclusivity of remedies is necessary to further Congress' intent in establishing a uniform federal law of employee benefits so that employers are encouraged to provide benefits to their employees. To require plan providers to design their programs in an environment of differing state regulations would complicate the administration of nationwide plans, producing inefficiencies that employers might offset with decreased benefits."[53] This argument smacks suspiciously of policy-making, which Thomas is wont to abhor as a Court exercise and has traditionally assigned to the sphere of legislators. The dissenters' position in this case seems out of character in that it departs from the persistent devolutionary line of decisions by the majority – which has regarded the states as experimental laboratories within the federal system – and may be seen as evidence of its pro-business leaning.

Justice Souter's opinion for the majority offered a Court record of case history in this obscure area of law which was radically at variance with that presented by Thomas. His main point was that the HMO Act of 1973 established HMOs as a new kind of health care delivery system, and that "the very text of the Act" assumes that state insurance laws will apply to HMOs and that "ERISA's mandate that 'nothing in this subchapter shall be construed to exempt or relieve any person from any State which regulates insurance,' ... ostensibly forecloses preemption" (6). Consequently, Souter considered the majority's interpretation to represent the consistent line taken by the Court previously, thus observing the rule of *stare decisis*.

Conclusion

On the basis of the above, it can be safely asserted that by the time the Rehnquist Court closed its first session in the new millennium, it had come a long way towards restoring the Tenth Amendment to significance, had revitalized the Eleventh Amendment and made it into a bastion of state sovereignty, and had curtailed the reach of the Commerce Clause so as to severely maim it as a plenary power repository for Congress. I would argue that the Court had in fact carried out a constitutional rewrite.

53. *FMC Corp. v. Holliday*, 498 U.S. 52, 60 (1990) (13 of 24).

In so doing, the Court had demonstrated a consistent line of judicial activism, enhancing the role of the Court at the expense of Congress, on the one hand – thus upsetting the checks and balances at the federal level – and, on the other, promoting the powers of the states in relation to the federal government, thus tilting the vertical balance of power.

Beyond a reasonable doubt, the Court had been quite persistent in its activism since its ideological balance had tilted decidedly to the conservative side by the arrival of Justice Anthony M. Kennedy in February of 1988, establishing a stable conservative majority in most areas of jurisprudence. This conservative bloc has been accused by critics of judicial activism of the kind the bloc rejects in its rhetoric – amounting to a rewriting the Constitution – which is lawmaking plain and simple. Its decision in *Rush* seems to support this criticism. Traditionally the federal government has been more liberal in most areas of law, and by shifting the balance of power to the states a conservative agenda, including a pro-business position, has been served. In *Rush,* however, the state law was more liberal that the federal – that is, less protective of business interests – and therefore the minority's pro-business stance may have taken the upper hand. Obviously, although conservative in its political leaning, in legal terms the Court has cut a clearly radical track record by what some critics call its "reactionary" decisions.

This discrepancy between preaching and practicing is also apparent in its general rhetoric – in which there is a considerable portion of "newspeak," to use an Orwellian term – a practice it shares with the entire conservative movement in contemporary American society. Terms such as "liberty," "equality," "color-blindness," and "the four corners of the statute" have taken on new meanings in these new political environs. With like-minded people in control of all three branches of government, the scene is set for the conclusion of a broad-based political and constitutional revolution that may put its stamp on the life of the nation for years to come. The appointment of one or two young members of the Supreme Court by the incumbent president could preserve the end result of this metamorphosis of the American political system for a very long time.[54]

54. The struggles over confirmation of federal judges in the Senate in recent years are well described in Herman Schwartz's recent book, *Right Wing Justice: The Conservative Campaign to Take Over the Courts* (New York: Nation Books, 2004).