S. HRG. 107–970

NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

OCTOBER 1, 2002

Serial No. J–107–106

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

88–475 PDF WASHINGTON : 2003

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

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NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES

TUESDAY, OCTOBER 1, 2002

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, Pursuant to notice, at 11:06 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Charles E. Schumer presiding.

Present: Senators Schumer, Hatch, and Sessions.

OPENING STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. The hearing will come to order. I will make a brief opening statement, Senator Hatch will, and then we will get right to our witnesses. So I want to welcome both of them and thank them for coming, and apologize to everybody for the time change at the last minute—unforeseen scheduling difficulties due to everything that is going on here.

Well, several weeks ago I returned from summer vacation with my family and I sat down to catch up on all the newspaper articles I missed. Among the clips that caught my interest was Linda Greenhouse's review of a book that had just come out. She wrote in the New York Times Book Review about a short, but important new work by a sitting Federal judge that was critical of the Supreme Court's federalism jurisprudence. After reading her review, I knew that we had to hear from Judge Noonan.

His book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*, has already made real waves in the legal community. You have an active Federal judge so mindful of his obligation as a lawyer to teach, to educate, and to work to reform the law that he published a thoughtful and nuanced treatise on a subject that we should all be paying attention to.

Since I came to the Judiciary Committee, I have been especially concerned about what is happening on our courts. Most troubling of all perhaps has been the striking trend of diminishing judicial deference to Congress' power to find facts and then legislate pursuant to those findings. This so-called, quote, "new federalism," unquote, jurisprudence—a term I know Judge Noonan prefers not to use—is frequently dense and inaccessible in terms of the way it is written and its material.

I am particularly impressed with how clear Judge Noonan rendered such an opaque subject. Once it is made transparent, it is

easy to see the devastating impact this string of cases has had on our power to protect people's rights through the courts.

There have been times in our history when the courts have been the bulwark against efforts to undermine constitutionally protected rights, and that is one of the reasons I respect and revere our judicial system. But I must say I am profoundly troubled by the extent to which the judiciary has abrogated Congress' powers in the past years.

Starting with *Lopez*, the Guns in School Zones Act case, running through *Morrison*, the Violence Against Women Act case, and including recently *Garrett*, the disability discrimination case, the courts, and most significantly and prominently the Supreme Court, have been steadily eroding Congress' power to legislate, with the effects felt and often suffered across the Nation.

While some of the federalism decisions from recent years have fairly noted Congress' failure to establish a nexus between a piece of legislation and a source of congressional power, several of the cases ignore serious study and diligent efforts by Congress to make the necessary findings and establish a proper constitutional exercise of power.

We hold hearings, and for some laws we hold years' worth of hearings. We take testimony from citizens, academics, State lawmakers, State attorneys general, and an array of other interested parties. In passing many laws that the courts have then struck down on federalism grounds, we have specifically solicited input and received a green light from the States on the question of whether there is a need for the national legislature to act.

Generally our actions are not attempts to violate or weaken the States' authority. They are products of what we were elected to do. Let me give you an example that has had a lot of personal meaning to me.

I was responsible for VAWA, the Violence Against Women Act, when I was in the House. Senator Biden, our colleague here on the Judiciary Committee, was the true leader on this and did great work in the Senate. I remember hearing after hearing after hearing that was held. I remember the research, the meetings, the phone calls, the discussions. I remember speaking with the victims, with State attorneys general, with local prosecutors.

Violence against women was and is a national problem and we need national intervention to work toward a national solution. We found that in many corners of this country, violence against women was swept under the rug. It was an issue that localities simply did not want to deal with.

I was personally offended when the Court struck down part of VAWA in the *Morrison* case. There are five Justices on this Court who all too often act as if there were no first branch of Government. They deem our findings in so many of these laws to be nothing more than mere anecdotes. But these anecdotes are the personal stories of real people, stories which, in the aggregate, define the national problems we need to solve.

In the case of VAWA, those personal stories were backed up by statistical evidence and a cry for congressional intervention from every corner. We had the power to act, we had the obligation to act,

and it was wrong for the Court to step in and stop us. It is a simple proposition, but we seem to have lost sight of that recently.

The fundamental role of Congress is to make laws. The executive branch implements them, and judges are nominated and confirmed to interpret and apply those laws. That is the brilliant balance that the Framers struck, and since *Marbury* v. *Madison* that has balance has worked almost exquisitely. But now, like at no time in our past, we are seeing a finger on the scale that is subtly but surely altering this balance of power between Congress and the courts.

As Justice Breyer wrote in his eloquent dissent in *Morrison*, the VAWA, quote, "Since judges cannot change the world, it means that within the bounds of the rational Congress, not the courts, must remain primarily responsible for striking the appropriate State/Federal balance." I couldn't agree more.

For better or worse, we are charged with making policy. The judiciary's role, while just as important, is quite different. It appears to me, with increasing frequency, the courts have tried to become policymaking bodies, supplanting court-made judgments for ours. That is not good for our Government and it is not good for our country.

Of course, one of the great ironies that looms over this debate is that it was the conservative movement that first took issue with what they perceived as the Warren Court's judicial activism and willingness to make social policy judgments from the bench.

For decades conservatives, often very convincingly, in my opinion, argued that elected officials, as opposed to unelected judges, should get the benefit of the doubt with respect to policy judgments, and that courts should not reach out to impose their will over that of elected legislatures.

Even many non-conservatives, myself included, have significant sympathy with that position. It is easy for judges to express their personal views and their opinions. While that might be appealing for some to do, it is not what the Founding Fathers intended.

Ironically, now we have the mirror image of this activism being practiced by the very conservative judges who initially criticized it. Ten years ago, Judge Robert Bork, a brilliant man, characterized the Warren Court as, quote, "a legislator of policy," unquote, which reasoned backward from its desired results when ruling to expand equal protection, the right to vote, criminal defendants' rights, and the right to privacy.

Today, similar criticisms of the Court, acting as a social policymaker actively rejecting the will of Congress, exists, and with good reason. Judge Noonan doesn't want to call it activism. I am interested to hear why not. It seems to me that when the Supreme Court reaches out to strike down law after law, and does so based on trumped-up constitutional theories, that is judicial activism, and it is clearly not judicial activism at its best.

Many of us in the Congress are acutely concerned with the new limits that are now developing on our power to address the problems of those who elect us to serve. These decisions affect in a fundamental way our ability to address major national issues, like discrimination against the disabled and the aged, protecting the environment, and combatting gun violence.

If the trend continues, the Family Medical Leave Act may be the next to go. That is a frightening prospect for thousands upon thousands of Americans who rely on the Act to spend time with newborn children or ailing loved ones without fear that they will lose their jobs.

Again, the role of the Congress is to make laws. The role of the judiciary is to ensure the constitutionality of those laws. In part, the balance is guaranteed through the process of nominating and confirming Federal judges. This committee is currently considering judicial nominees who refuse to even discuss already decided Supreme Court cases, cases that could never even conceivably come before them if confirmed.

So it is refreshing, at least in my judgment, to see someone who is already a judge not hiding behind unpersuasive defenses but doing what all good lawyers do—examining the law and being critical where criticism is appropriate.

Judge Noonan, I know that you are here to teach us and to educate. I know that you do not want to, cannot, and will not engage in any partisan debate. So I am not going to get into any questions about nominees answering or not answering questions about their views on already decided Supreme Court cases.

I am just grateful that you have given us your thoughts on this important subject through your book. I am looking forward to exploring your ideas further through this hearing. I just want to add you have a worthy co-witness who doesn't see things the same way, and a fellow New Yorker, Professor Hamilton, and we are delighted that she is here, too.

I want to thank my good friend and colleague, Orrin Hatch. I think he is admired by every member of this committee. We sometimes go right at it, Orrin and I and every other member of the committee. But we know that his opinions are heartfelt, that he is a decent and honorable man, and somebody we can work with on many occasions.

Orrin, it is my pleasure to turn the microphone—I was going to say the gavel; we are not going to do that, hopefully, for a little while—over to you.

Senator HATCH. Thank you, Mr. Chairman. I appreciate your kind remarks.

I would like to applaud my friend from New York for holding this hearing, which I hope will be a high-minded discussion of the constitutional structure and theories that underlie the Supreme Court's recent jurisprudence in the area known as federalism, which includes cases interpreting the Commerce Clause and the doctrine of sovereign immunity.

Views of those cases defy partisan or political pigeon-holding. There are people on both sides of the political aisle who agree, and disagree, with the Supreme Court from time to time. There are subtleties that are not explained simply by whether a person generally favors State power over Federal power.

For instance, I have been critical of the Court's *City of Boerne* decision, not because I disagree with the notion of State or local control—I don't—but rather because I believe the First Amendment protects religious freedom against any government that seeks to interfere.

A majority of the Supreme Court happened to disagree with me and I respect that. That is our system of justice under the Constitution. For different reasons, I was troubled by the *College State Bank* case, which caused a great deal of uncertainty among the owners of intellectual property. So these issues are not a simple matter of politics.

A second point that must be made is that the Supreme Court's federalism decisions are often wildly exaggerated in the media. Most of the decisions have been pretty narrow, affecting only one part of a larger Act of Congress, and they have certainly not left people without legal remedies.

In the *Morrison* case, for example, the Court's decision left intact many important programs which I happened to cosponsor with Senator Biden aimed at reducing violence against women and had no adverse effect on the existing State laws designed to prevent and punish acts of violence.

In fact, I was a prime sponsor of the Religious Freedom Restoration Act which was in part stricken down by the *City of Boerne* case, and a prime cosponsor of the Violence Against Women Act.

I might say the sovereign immunity cases, while blocking private suits for money damages, leave open a number of possible remedies, including injunctions, that protect people in important ways. So I hope that our witnesses will illuminate these issues further.

It is a great pleasure to welcome these distinguished witnesses today, and I will start with Professor Marci Hamilton. She holds the Paul R. Verkuil Chair in Public Law at Benjamin N. Cardozo School of Law, Yeshiva University, where she specializes in constitutional law, particularly federalism and church/state issues.

She served as a law clerk to Chief Judge Edward R. Becker, of the United States Court of Appeals for the Third Circuit, and for Justice Sandra Day O'Connor of the Supreme Court. Perhaps most important for today's hearing, she was the lead counsel for the successful *City of Boerne*, Texas, in *Boerne* v. *Flores*, a seminal federalism case.

It is also a great pleasure to welcome Circuit Court Judge John Noonan, an outstanding Federal judge who has always been a renowned scholar teacher, and was so even before he took the bench. Judge Noonan's most recent book, *Narrowing the Nation's Power: The Supreme Court Sides with the States*, shows that he continues his great scholarship.

The book of his with which I am most familiar is *A Private Choice*, published in 1979, which is a scholarly condemnation of the Supreme Court's decision in *Roe* v. *Wade*. He demolishes virtually every conceivable argument on behalf of the liberty of abortion, concluding with a 12-point indictment of legalized abortion which begins as follows: "The liberty established by the abortion cases has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, and imposition of the personal beliefs of seven justices on the women and men of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country."

Professor Noonan drafted and lobbied for a constitutional amendment to overturn Roe and to return the power to outlaw abortions

to the States. His federalism approach influenced me when I cosponsored and was the prime sponsor of the human life amendment in 1981, which would have left the issue up to the respective legislatures, State and Federal, with a more restrictive law applicable.

I got a kick out of it because I remember about 20 percent of the anti-abortion side just savaging me, and in particular National Review. You will be interested to know, Judge Noonan, just about a year ago or somewhere around in there, National Review came out with almost the same recommendation that I made back in 1981, which I think would have helped to at least put this into the hands of the people. I have great respect for Judge Noonan's scholarly opinions on both *Roe* v. *Wade* and federalism, regardless of where one might be on the policy of any issue implicated.

Fortunately for the country, Judge Noonan was confirmed back in 1985, when the single-issue extremist interest groups did not hold such sway over this committee. I recall that his nomination was attacked by a group called the Federation of Women Lawyer's Judicial Screening Panel, not for his views, the group said, but for the, quote, "intemperate zeal with which he holds and expresses them," unquote.

The group decried his, quote, "tone," unquote, saying that, quote, "[t]here is a certain passion, an emotional pitch, if you will, which pervades Professor Noonan's work on the subject of abortion," unquote, which the group said should force one to, quote, "pause and consider whether such fervor could magically disappear with the incantation of the oath of office," unquote.

Well, the Judiciary Committee and the Senate looked beyond such unwarranted attacks and chose instead to take this fine scholar at his word that he would enforce *Roe* v. *Wade* and all other controlling Supreme Court precedents. I would like today's record to reflect that Judge Noonan has not, from his perch on the Ninth Circuit Court of Appeals, overturned the Supreme Court's abortion decisions, despite the fears of his critics. He has done as he said, as any fine judge should.

The fact that Judge Noonan is here today at the invitation of this committee should be a profound warning of the price this committee pays, and forces the American people to pay, when it deprives the judiciary of the service of high-caliber legal thinkers on the basis of unfounded criticism made by the usual Washington single-issue interest groups.

You have to admit, Mr. Chairman, that the Ninth Circuit and the country are better off today for Judge Noonan's service, right?

Senator SCHUMER. I agree.

STATEMENT OF HON. ORRIN G. HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

Senator HATCH. OK, and we would be even better if we confirmed the highly qualified nominees currently pending for that court, Carolyn Kuhl and Jay Bybee.

Senator SCHUMER. Since I want balance on the court and Judge Noonan is so powerful, maybe we should have three or four liberals just to balance Judge Noonan.

Senator HATCH. That would be fine. That means that we would at least get eight or nine more conservatives before we got through. With the court having 24 people, 17 of them Democrats, and 13 or 14 appointed by Bill Clinton, you can imagine——

Senator SCHUMER. It is the only one left.

[Laughter.]

Senator HATCH. I will tell you, he never gives up, he never gives up. He is just a miserable, wretched New Yorker, is all I can say.

[Laughter.]

Senator HATCH. I never give up either. I am a miserable, wretched Utahn.

Senator SCHUMER. One of those lovely people from Utah.

Senator HATCH. That is right.

Judge Noonan is an example of what I have been saying about well-qualified judges. They take seriously their responsibilities of adhering to the Constitution and following precedent. Judge Noonan clearly disagrees with the Supreme Court both on *Roe* and on the issue of State sovereign immunity. In fact, he has written powerful books challenging the basis for those decisions. Nevertheless, as a lower court judge, he has no qualms whatever about being bound by these very precedents.

Again, I want to thank the chairman for holding and the witnesses for participating in this forum for discussing the role of the Supreme Court, federalism, and State sovereign immunity.

Thank you, Mr. Chairman.

[The prepared statement of Senator Hatch appears as a submission for the record.]

Senator SCHUMER. Thank you, Senator Hatch, and we very much appreciate your being here.

Senator Sessions has been such a great participant in all these hearings.

Would you like to make an opening statement, Senator, briefly?

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you, Mr. Chairman. I am looking forward to this and you really wish you could spend more time being prepared for these significant constitutional issues.

I haven't written a book on the subject. I have lived with the Commerce Clause as a prosecutor and State attorney general, and dealt with sovereign immunity. I think those are historic doctrines that are quite valid, and I believe the Constitution clearly requires an interstate commerce nexus for most activities of the Federal Government.

I believe historically there has been no doubt that there is a doctrine of sovereign immunity that protects States from destruction. The power to sue is the power to destroy, so the State has a right to limit how much it subjects itself to attack financially.

So I look forward to the hearing today.

[The prepared statement of Senator Sessions appears as a submission for the record.]

Senator SCHUMER. Thank you, Senator.

Now, let me introduce our first witness, Judge John T. Noonan, Jr. Judge Noonan is a senior judge on the United States Court of

Appeals for the Ninth Circuit, Orrin Hatch's favorite circuit. He was appointed to the bench by President Ronald Reagan in 1985. Judge Noonan received both his B.A. and law degree from Harvard University. He also earned a Doctorate of Philosophy from Catholic University.

Judge Noonan began his legal career at the National Security Council. He then moved on to private practice before joining the faculty at Notre Dame Law School. Judge Noonan later taught at Boalt Hall School of Law at the University of California-Berkeley.

Among several other works, Judge Noonan is the author of the recently published book entitled *Narrowing the Nation's Power: The Supreme Court Sides with the States*, where he presents his own view of how the Supreme Court in recent decisions has shifted the balance of power in the country away from Congress toward the States and toward the Court itself.

Judge Noonan, your entire statement will be read into the record and you may proceed as you wish.

STATEMENT OF HON. JOHN T. NOONAN, JR., JUDGE, UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, SAN FRANCISCO, CALIFORNIA

Judge NOONAN. Thank you very much, Senator Schumer and Senator Hatch, for your welcome. I was glad to respond to your joint invitation, with the emphasis that it would be a fully bipartisan affair.

I note that the legislation that was held unconstitutional in the Supreme Court decisions we are addressing was passed by large bipartisan majorities and signed by both Republican and Democratic Presidents. The issues raised by the decisions are not partisan political issues. They cut more deeply into the structure of our American Government.

I have submitted a seven-page statement. I am just going to hit the highlights, first summarizing the propositions that are established by the recent decisions of the Supreme Court.

First, all the States have entered the Union—and I quote the Court now—entered the Union "with their sovereignty intact." That has been put forward four times by the Supreme Court since 1991.

Second, the immunity of the States from suits by individuals from damages is not a judge-made rule of common law, but is a constitutional principle embodied in, but larger than, the 11th Amendment.

Third, under its power to regulate commerce, Congress does not have the power to pierce the immunity of the States.

Fourth, under the power to enforce the 14th Amendment "by appropriate legislation," as section 5 of the Amendment puts it, Congress must now conform to criteria set by the Court in *City of Boerne* and its sequelae.

What is now required as a matter of constitutional law is a record of evidence that has been taken by Congress. The evidence must be more than allegations and it must be more than anecdotes. The evidence must establish the existence of a pattern of evil, a national pattern, and then the response of Congress must be proportionate and it must be congruent.

Now, as corollaries of those decisions, Congress cannot enact preventative legislation under the 14th Amendment. It cannot prohibit States from discrimination that is actually irrational, but might be supposed to reflect some rational stereotype. The holders of patents, copyrights, and trademarks cannot seek damages from a State institution infringing on their rights, as Congress has flunked the *Boerne* criteria in its legislation protecting those rights.

That is the judicial landscape. I will add a brief commentary. First, as to the intact sovereignty of the 50 States, I quote the Supreme Court in 1816: The Constitution "is crowded with provisions which restrain or annul the sovereignty of states in some of the highest branches of their prerogatives." Of course, there is provision after provision in the Constitution which does infringe or annul State sovereignty. It is not intact. That cannot be the case.

Second, as to the basis for State immunity, at common law, as we know from Blackstone's famous commentaries, the king was immune from suit because it was important, as Blackstone says, to convey to his people that the king was a superior being.

We took into the United States, in at least some of the States, that common law principle. But that it was a constitutional principle has very little support, and the text of the 11th Amendment does not mention immunity, and it does not mention sovereignty.

The basic cases of the Marshall Court establishing our federalism show that sovereignty of the States can be invaded again and again on behalf of Federal legislation, and there is no convincing reason put forward now to create State immunity. It would be ridiculous for a State to invoke it to avoid paying its bonds. It is not a good principle for a State, to put it mildly, to escape liability for its torts. As for the dignity of a State, a State is not a human being who does have dignity, and a State is not a king who has to be considered a superior being.

Now the breadth of the States' immunity is far broader than it was when it was the royal immunity. First, it is extended to all enterprises that act on behalf of a State. State universities, State university presses, State university laboratories, and a large variety of other boards, commissions, and agencies now enjoy this immunity.

In 1789, the States did not have these multiple arms, and now in the recent *Ports Authority* case of this past term immunity has been extended to all suits started by individuals against the States before administrative agencies of the Federal Government. In 1789, these independent agencies, set up by Congress to carry out the laws, did not exist. But now agencies enforce the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, the Solid Waste Disposal Act. All of these agencies are now barred by *Ports Authority* from holding administrative hearings on the complaints of a citizen against an agency or activity of a State.

The Violence Against Women Act was done in because it was said not to regulate commerce. Robbery and extortion are not commercial activities, but no one has doubted that the Hobbs Act, which prohibits robbery and extortion, is constitutional.

The traditional understanding of the power of Congress is that it is complete in itself and may be exercised to its utmost extent. The power under Article I has been now denied in *Seminole Tribe* as penetrating State immunity. It has not been explicitly decided

by the Supreme Court whether the bankruptcy law of the United States can trump State immunity. If *Seminole Tribe* is followed, the bankruptcy law will be subject to the immunity of States.

The Court has not decided explicitly whether the exercise of the war powers under Article I can trump State immunity. But there are now two cases, one from Puerto Rico that was reversed in the First Circuit, and another from Indiana, where the States have made that defense that they are immune from the war powers.

Finally, and most importantly, I think, for Congress, the criteria of *Boerne* and its sequelae are binding on every Federal court. The Federal District Court in Guam as much as the Supreme Court itself must now measure Federal law if it is challenged in terms of these criteria.

As a consequence, every Federal judge is made a monitor of Congress. The Federal judge will scrutinize a law enacted under the 14th Amendment for the evidence establishing a pattern of the existing national evil the law is supposed to cure. The Federal judge will determine if the law is a proportionate and congruent response.

Before a case reaches the Supreme Court, a variety of Federal judges will exercise this function of monitoring. Congress is subjected to review at least as much as a Federal administrative agency, perhaps more so, for the reasonableness of its response, and the burden is put on the U.S. Government to show that an evidentiary record was made and that the response of Congress was proportionate and congruent.

The standard set by *City of Boerne* and its sequelae is new, and it is high. It represents a substantial increase in judicial supervision of Congress. It effects a shift in power from the Congress to the judges, and its invention could be understood as an invasion by the judiciary of the sphere given by the Constitution to the Congress.

[The prepared statement of Judge Noonan appears as a submission for the record.]

Senator SCHUMER. Thank you very much, Judge Noonan, for your strong, intelligent testimony.

Now, we are going to hear from Professor Marci A. Hamilton. Professor Hamilton is the Paul R. Verkuil Professor of Public Law at the Benjamin N. Cardozo School of Law. She earned a B.A. at Vanderbilt University, master's degrees at the University of Pennsylvania, and finally her law degree at the University of Pennsylvania Law School, where she graduated magna cum laude and was editor-in-chief of the law review.

Professor Hamilton clerked for Judge Edward R. Becker, of the U.S. Court of Appeals for the Third Circuit, and she also clerked for Justice Sandra Day O'Connor on the Supreme Court. Professor Hamilton publishes extensively and speaks frequently in the area of constitutional law, and is often involved in Supreme Court litigation addressing cutting-edge constitutional law issues.

Most particularly for our purposes, she litigated the case that the judge just referred to, *City of Boerne*, in which the Supreme Court found that Congress exceeded its power in passing the Religious Freedom Restoration Act. I should note that I was the lead sponsor of that in the House. Many of my laws are being struck down by

the courts. This is a case that gets substantial treatment in Judge Noonan's book.

Your entire statement, Professor Hamilton, will be read into the record and you may proceed as you wish.

STATEMENT OF MARCI A. HAMILTON, PAUL R. VERKUIL CHAIR IN PUBLIC LAW, BENJAMIN N. CARDOZO SCHOOL OF LAW, YESHIVA UNIVERSITY, NEW YORK, NEW YORK

Ms. HAMILTON. Thank you, Mr. Chairman and Senator Hatch, for including me in this hearing today. These are very important issues. They are being debated in the press, they are being debated in the academy, and I will respectfully disagree with Judge Noonan's reading of the Constitution.

Here, I would like to make just three points. The Framers went to the Convention to fix the Articles of Confederation. The problem was that the States had been incapable of conducting war and international trade by themselves. The answer was to add a national government, but there was no question that the States would continue to also be governments, to be sovereign. The innovation of the Framers was to create a dual sovereign system. It was a brilliant innovation which would create two governments that could simultaneously serve the greater interests of the people.

Alexander Hamilton, who is quoted at the beginning of Judge Noonan's book, assumed that Congress would not be interested in the arenas that were assumed to be left to the States. He thought that Congress would have no interest in those arenas because it would only want to govern the truly national issues. Congress would be interested in war, federal taxation, and spending.

But as it turned out, Congress, when it was not prohibited from expanding its interests, was willing to venture into any territory. So during the 20th century when the Supreme Court refused to draw the lines that the Constitution requires between the Federal Government and the State Government, Congress came to have plenary power. There was no arena that Congress would not enter. The reactions by Judge Noonan, Linda Greenhouse for the New York Times, and others are a reaction to that status quo.

What the Court has done with its federalism decisions, which are not that many, actually—is to remind us of the fundamental constitutional arrangement. The courts have always been in the business of interpreting the lines of power in the Constitution. They have always determined the separation of powers. They have always been in the business, at least since incorporation of the Fourteenth Amendment, of interpreting church/state relationships of power.

The burden rests on the detractors of the Court to explain why it is that with respect to federalism the courts are supposed to stand aside and let the Federal Government take over the power that was lodged in the States at the time of the framing. As a matter of constitutional history, I simply cannot agree that the Court has gone the wrong way. To the contrary, I think it was much too little and much too late.

Now, it is a mistake to assume, as all of the Court's critics do, that federalism will only serve conservative interests. Rather, federalism leaves the States to experiment, to work out different ap-

proaches to achieving the public good, e.g., in arenas like assisted suicide or even the medical use of marijuana.

Federalism does not take policy away from the people. Rather, it only changes the locus of decisionmaking. The question in the federalism cases is only does the Federal Government get to decide this or do the States get to decide this? It does not shut down any particular policy.

The pragmatic upshot of the federalism decisions is that lobbyists may not have one office anymore. They may not assume that D.C. is the only location for them. Rather, they now have to have 51 offices, 50 States plus a Federal office.

There is no constitutional right to lobby only one entity. So the objection that now the 50 States are in charge of a policy and therefore lobbying will have to be taken there just doesn't carry any water.

There is an underlying assumption in the criticism—and this is definitely true with respect to Linda Greenhouse's criticisms and with respect to many in the academy—that one simply can't trust the States. They are supposedly bad actors and the Federal Government is the savior for all civil rights.

But what the Supreme Court noted in both the *Garrett* decision, invalidating aspects of the Americans With Disabilities Act, and in the *Kimel* decision, invalidating aspects of the Age Discrimination in Employment Act, is that in both of those arenas the States were already protecting rights.

For example, with respect to disability discrimination, the vast majority of States were invalidating disability discrimination when *Garrett* was decided. So the notion that civil rights are being suppressed by the federalism decisions is not factually true. The federalism cases are, rather, sending these decisions to the States rather than letting them sit solely with the Federal Government.

Let me just close by saying that I see three pragmatic results of the federalism cases. One is that, in fact, very little of Congress' enormous power has been diminished and the reactions have been overreactions. The case that I don't see in Judge Noonan's book and I don't see in the general criticisms of the court is *Condon* v. *Reno*, where the Supreme Court upheld the Drivers' Privacy Protection Act against a federalism challenge. Why? Because the States were acting as economic actors in a market of information. So when the States act as part of the economy and not out of their sovereign ability to regulate, the Federal Government still has a great deal of power.

Second, the lobbyists now are going to have to go to the States. As I said earlier, that is a pragmatic result and it was already happening. It is not a huge change in the landscape.

Finally, the focus of Congress may be permitted to be shifted a bit away from having to address every conceivable issue that a constituent or a lobbying group can imagine. In a time of international terrorism and an economy in need of attention, letting the States carry some of the policy water seems to me to be a relief for an overburdened Congress and not bad news.

I would be pleased to take questions.

[The prepared statement of Ms. Hamilton appears as a submission for the record.]

Senator SCHUMER. Well, thank you very much, Professor Hamilton. Again, your testimony, I thought, was incisive and intelligent. You are a worthy counter to Judge Noonan and I am glad you are my constituent.

Ms. HAMILTON. Thank you.

Senator SCHUMER. Let me start off with you, since we finished with you. First, you did make something of an exception for economic issues, which is where most of the lobbyists pay their attention to. There are a few lobbyists who are involved in the others, but that is where they all are.

For instance, let me give you an example and just ask you to comment on this. Traditionally, insurance has been regulated by the States. You can make an argument that each individual has an insurance policy and it is not that much in the throes of commerce.

But in the last few years, the heads of the insurance industry have come to us and said we need a Federal law because to go to each of the 50 States is no longer feasible or practical in this new economy, the reason being that new products come up so quickly, No. 1, that by the time they get approval from most of the States, there is another new product. Second, it has become a world market and they have foreign competitors and have to go to foreign places and it really puts them at a competitive disadvantage.

Would you say that that is sort of acceptable Federal legislating, even though traditionally it has never been part of the Federal Government? We have left insurance to the States. What would be your feelings about that?

I would just say it is a greater consequence than just sending the lobbyists to the States.

Ms. HAMILTON. Where you have an arena where the externalities are such that the individual States can't efficiently govern the market, that is probably the best argument for saying that the Federal Government needs to intervene.

So I think in the case of the insurance industry, about which I know very little, the question would be whether or not it is true, in fact, that the market can't work through a 50-State system.

Senator SCHUMER. It works, but it works more——

Ms. HAMILTON. Inefficiently.

Senator SCHUMER. More inefficiently.

Ms. HAMILTON. If it is inefficient, I think that is an argument to go to the Federal level.

There is no arena that the Constitution identifies as solely relegated to the States. What we have, rather, is traditional areas that the States have had the first power over. And those arenas are not really regulated arenas like insurance, but rather land use is one of them. Local crime and incarceration is another issue. So there are arenas where I think it would be easy for me to say, yes, I think they belong to the States.

Senator SCHUMER. I had a little debate once with Justice Scalia in one of those Fred Friendly things. It was at Constitution Hall, in fact, in Philadelphia, and he was making the argument that the Brady law is something that should be left to the States; let each State determine its waiting period.

The counterargument, of course, is what happens when one State has strict regulations against guns, including a waiting period?

Gun-runners go buy the guns, say, in South Carolina, which has no—well, they do, but go to a State that has no waiting period and then just run them up here. Sure, New York State could set up a toll booth at the Lincoln Tunnel and require everybody to open their trunk and see if they have guns, but that would slow commerce immeasurably.

Do you agree with the sentiments, at least, that were expressed that day by Justice Scalia that a waiting period should be left to the States? That is a traditional area, crime, which you mentioned just a minute ago, and yet there are commercial, if you will, or interstate commerce implications.

Ms. HAMILTON. The courts addressed the Brady Act in *Printz*. To the extent that the Federal Government is directing or commandeering the way that the States regulate, then I think it is unconstitutional. If the Federal Government is, however, carrying out those policies itself, it is a very different issue. So I agree with the *Printz* decision. I think it was unconstitutional for Congress to direct the states to carry out its policies.

Can the Federal Government regulate gun usage? I think there are arenas where it can, but direct regulation of the States is definitely——

Senator SCHUMER. What about mandating a waiting period everyplace in the whole country?

Ms. HAMILTON. It depends on who carries out monitoring the waiting period. If the Federal Government tries to coopt the State government to do its bidding, then it is unconstitutional.

Senator SCHUMER. But you would let the Federal Government then enforce it?

Ms. HAMILTON. There is nothing in the briefing in that case or in the reasoning to say "no."

Senator SCHUMER. I am going to give you some of the rhetoric you have thrown at us and ask you comment on that, and then I will proceed to Judge Noonan.

This is an article you wrote called "federalism and September 11th: Why the Tragedy Should Convince Congress to Concentrate on Truly National Topics." Here is one of your quotes: "While Congress was piddling around with duplicating State laws in a remarkable number of categories, apparently no one in the Capital was studying seriously what America would do if attacked by anthrax or smallpox," unquote.

You go on to describe our actions in writing the laws we passed, the laws that the Supreme Court invalidated, to be, quote, "like a child who cannot decide which toy to pick at the toy store," and you said we are avaricious in expanding our powers.

Now, most of my constituents—clearly, not all; you are one of them—want the Congress to help with national problems like violence against women and discrimination against seniors and the disabled. We have seen the slow progress made at State levels there.

They basically don't have much of a predilection; they want to get the job done. I rarely find that when there is a real problem out there, people say, well, you shouldn't do it, the States should do it, or the States shouldn't do it, you should do it.

I think your statements are pretty tough.

Ms. HAMILTON. Yes.

Senator SCHUMER. I mean, I would like to use them in buttressing my arguments because I think it shows something of a contempt for Congress. So why don't you elaborate a little bit on that? I mean, to say that Congress wasn't focusing on terrorism because it was dealing with other issues doesn't strike me as quite fair.

Ms. HAMILTON. My focus there is on the point I was making earlier, which is that Congress does tend to run toward what I have called in other writings look-good, feel-good legislation.

Senator SCHUMER. Why do you think Congress does that?

Ms. HAMILTON. Because it had no limits on its power from 1936 to 1995.

Senator SCHUMER. Do you think it has anything to do with constituent demands and inability of the States to deal with those issues?

Ms. HAMILTON. With all due respect, the people are not the Constitution. Demands by a majority, or even by a vocal minority, cannot trump the requirements of the Constitution. Constituents, I think, have been misled into believing that Congress has an answer to every social problem. And, in fact, it doesn't.

As to the charge that the States are not able to serve these interests, it is just not empirically true. The vast majority of States, as I said earlier, do have disability legislation. Many have age discrimination legislation. In fact, in my experience in litigating these issues, the States are the most likely to jump ship from the litigation challenging such litigation and to side with the Federal Government for political reasons.

Senator SCHUMER. With the Violence Against Women Act, there were very few State laws in this regard. I mean, is your criteria whether the States are able to do this or not? It is a constitutional criteria, I presume.

Ms. HAMILTON. There are constitutional criteria. The question is whether or not it is a truly local concern. With respect to the Violence Against Women Act, it had a fundamental flaw. The error that was identified in the hearings was that local government was not protecting the rights of the victims, and that is a very serious problem and no one believes that more than I do.

But the provision at issue regulated the perpetrators and bypassed the local governments. Had the law been crafted to regulate the States, I think VAWA might have survived under section 5. But it wasn't a regulation of the States. Therefore, section 5 of the 14th Amendment was an inadequate source of congressional power. Finally, the argument that the violent act was affecting commerce was too attenuated.

Senator SCHUMER. Didn't you just argue the opposite when it came to, I think it was the Brady case? There, the Congress was going through the States and you said, no, it should do it itself.

Ms. HAMILTON. The question is whether or not the Congress is directly regulating the regulation of the States. That is what happened in *Printz*. It was commandeering State actors to act for the Federal Government.

Senator SCHUMER. You were just saying the opposite in terms of Violence Against Women, I thought.

Ms. HAMILTON. No.

Senator SCHUMER. Explain to me the difference.

Ms. HAMILTON. The Violence Against Women Act was unlike the Brady Gun Act because in the Violence Against Women Act what was being regulated was not the States, but rather the perpetrator. The civil remedy was to be had from the perpetrator, so it was not a regulation of the States.

Section 5 of the 14th Amendment permits direct regulation of the States if they are violating the Constitution, but that is not what VAWA did.

Senator SCHUMER. OK. Well, I am going to ask Judge Noonan a few questions. I don't quite agree with you on all of this. Actually, I am reminded that my time is up. I have a whole bunch of questions for Judge Noonan, but let me call on Senator Sessions and then we will come back to me for a second round.

Senator SESSIONS. Thank you, Mr. Chairman. This is a very interesting hearing. It deals with the fundamental structure of our Government.

I would agree with you, Professor Hamilton, that the Supreme Court is not—let's see if I correctly interpret you that the Supreme Court is not coming up with some new doctrine in *Lopez* and some other cases, but in fact is just recognizing a doctrine that hasn't recently been talked much about and in some cases almost ignored.

Ms. HAMILTON. Absolutely.

Senator SESSIONS. But it would not be quite as ignored, Judge Noonan, as I think you suggest. The Hobbs Act, which I used to prosecute, does allow the Federal Government to prosecute offenses that deal with extortion and robbery, those kinds of crimes. But the title of it, Section 1951, is "Interference with Commerce by Threats of Violence or Robbery or Extortion."

The prosecution of theft of a stolen motor vehicle is not just the fact that the Federal Government does not prosecute the theft of a stolen motor vehicle in Federal court. It prosecutes the interstate transportation of a stolen motor vehicle. It does not prosecute prostitution, but it prosecutes interstate transportation of a person for the purposes of prostitution.

Wouldn't you agree that our criminal law, as a Federal judge—and you have seen it—is consistently stating within the statute itself an interstate commerce nexus?

Judge NOONAN. Are you asking me, Senator?

Senator SESSIONS. Yes, sir.

Judge NOONAN. Yes, I certainly would agree. Of course, if you transport that reasoning to the Violence Against Women Act, the position of Congress was that a crime like rape interfered with the movement of women in business in the United States, that this was an interference with commerce just as much as robbery and extortion are interferences with commerce under the Hobbs Act, or as prostitution in interstate commerce is a form of interference in commerce.

The Supreme Court, as I understood it, said, well, the activity being regulated is not commercial. No, it isn't commercial. Prostitution in its basic form is not commercial; it is commercially exploited. Robbery and extortion are not commercial; they are preying on commerce. But that is what Congress said about violence

against women: it is preying on commerce. So I feel the analogy was pretty strong.

Senator SESSIONS. Well, I think about the *Lopez* case. Congress has re-passed the *Lopez* statute and utilized the traditional language that the firearm had traveled in or was a part of interstate commerce, adding an element of the offense which must be proven beyond a reasonable doubt that commerce did occur, before you can make that a Federal crime.

Do you think that will save the statute or do you think it makes any difference in your analysis?

Judge NOONAN. Well, I really don't want to pronounce on constitutionality of legislation that is on review. But I will say this to you, Senator: *Lopez* is not mentioned in my book. It did not fall within the kind of focus I was making on decisions that eroded the power of Congress. *Lopez* is something that I certainly thought was perfectly appropriate.

Senator SESSIONS. So you would agree with that one?

Judge NOONAN. I did.

Senator SESSIONS. With regard to your question, Mr. Chairman, about insurance regulation, I share some of those same concerns. But I would ask Professor Hamilton, when we are dealing with major national or even international insurance corporations that do business in every State, isn't that perfectly what the Founding Fathers were concerned about and would not, if Congress chose to act, clearly be within the Commerce Clause?

Ms. HAMILTON. I think that is right. If we are dealing with a business that is running across State borders, that is the kind of commerce they had in mind.

Senator SESSIONS. But the Constitution does require, unless there is some other provision allowing regulation, that Congress can act in matters affecting interstate commerce. So that is a limiting power on the sovereignty of the Federal Government, is it not?

Ms. HAMILTON. Well, what the Court held in *Lopez* is there must be a showing of substantial effect on interstate commerce. With the insurance industry, I suppose that would be hard not to show, but there are industries where it is more difficult to show that there is a substantial effect on commerce.

Senator SESSIONS. I think there may be a time in various industries that were at one time basically local become so national that it would be appropriate for us to regulate what we have not regulated before. Traditionally, though, we have insurance departments in every State and they have done this and it is a sort of acknowledgement of one area of expertise and the Federal Government does not move in there, and I think that is significant.

Professor Hamilton, isn't it true that there is only a small fraction of the total U.S. work force that would be affected by the Supreme Court's sovereign immunity decisions? In other words, basically it involves only that small fraction who would be working for a State government, but the Federal laws that protect them otherwise apply.

Ms. HAMILTON. The Commerce Clause can be used to regulate private interstate industry. The federalism cases only go to State actions and the question of the Federal Government regulating the

States. Sovereign immunity only protects against monetary damages when you have State-affected entities. So it is a very small proportion.

Senator SCHUMER. How many?

Ms. HAMILTON. How many?

Senator SCHUMER. 3.7 percent. What is that, 5, 6 million people—no. The total work force is, what, 120 million?

Senator SESSIONS. 3.6 percent is what I have.

Ms. HAMILTON. We have to be very careful because the states are immune under the 11th Amendment from damage actions brought by citizens. But, of course, the States can be forced to pay through Federal Government actions. The Department of Justice can go after any State it so desires. The 11th Amendment does not stand in the way of those suits.

Senator SCHUMER. Does that include universities, all the categories Judge Noonan mentioned, not just State governments?

Senator SESSIONS. I think so. Of course, States have extraordinary civil service regulations that usually go beyond the private sector at any rate. I don't hear many people wanting to quit the Federal or State government, frankly.

Are you saying, Judge Noonan, that you don't think there is a legitimate basis for the claim of sovereign immunity for State government, or just creatures of the State governments like universities? Do you believe the whole doctrine is without basis? How would you summarize your view on that?

Judge NOONAN. Well, let me distinguish. As a judge of the United States addressing a case, I am bound by the Supreme Court of the United States that tells me it is now a constitutional principle that the States have sovereign immunity.

If I take off my judicial robes and look at it as a historian, I would say sovereign immunity was something that existed at common law as a common law principle. It could be trumped by statute and it was not a part of the Constitution, except to the extent that the 11th Amendment said an out-of-state citizen could not sue a State. To that extent, it is a constitutional principle. So there is a distinction there between what is now held as doctrine and what I think a historian would say the facts are.

Senator SESSIONS. I will ask you if you are aware of any case, State or Federal, that allows a State to be sued without a State statutory provision allowing that.

Judge NOONAN. I think that is the way the law operates, yes.

Senator SESSIONS. So I guess all I am saying is it is not a radical thing, would you say, Professor Hamilton, for the Supreme Court to affirm this principle of sovereign immunity? In fact, it has remained virtually inviolate throughout the history of our Nation. It would be an activist decision to eliminate it, would it not?

Ms. HAMILTON. It would be a constitutional amendment to eliminate it, and for the Court or the Congress to engage in that kind of activity without going through Article V is a problem. Sovereign immunity is solid in the Constitution. It is part of protecting the States against those entities that would rob their coffers, essentially, and it is necessary.

Senator SESSIONS. Thank you.

Judge NOONAN. Well, if you look at my book, Senator Sessions, you will see a series of decisions by the John Marshall Court which really established our federalism in which the States were brought to book. They include cases like *Worcester* v. *Georgia*, which is a case directly against the State of Georgia. So sovereign immunity in the modern sense is not part of our constitutional heritage.

Senator SCHUMER. Thank you, Senator Sessions.

Let me go to Judge Noonan now. Judge, as I mentioned in my opening remarks, when a court invents new theories to strike down law after law, that looks to me like judicial activism. When a court uses one approach to constitutional interpretation when it comes to a certain set of cases, then uses the opposite approach to constitutional interpretation for another set of cases, that looks to me like outcome-driven decisionmaking. To me, that is judicial activism.

You were, I think, quite brave and quite right to publish this book and you make some bold comments and we are all better for having you prick our thinking, but you stop short of calling the Supreme Court jurisprudence activism. Why? Isn't that exactly what it is?

Judge NOONAN. Well, I don't call it that because I think this is what judges do all the time. They interpret. They are not parrots. They are applying their reason to the Constitution and to the facts before them.

"Activist" is used as an abusive term, used at least originally by people criticizing judges who were characterized as liberal, and now it could be used with equal propriety as an abusive term of conservative judges. But it really is just a word that can be found useful in talking about almost any judge. I would rather get rid of it.

I think judges respond to situations otherwise than as machines, otherwise than as parrots. I note so often, if I may take the liberty with this committee, that people are asked, will you observe the Constitution? Of course, every judge will, but to observe it requires reasoning. It requires more than just taking the words and just parroting them.

Senator SCHUMER. Of course, and things change, cases evolve. Doctrines may stay the same, but you are going to have new fact patterns all the time.

Let me ask you this. In *City of Boerne*, the Supreme Court articulated a standard that I never really heard before. It held that Congress could properly act pursuant to its power under the 14th Amendment only if it could demonstrate, quote, "the congruence and proportionality of its remedy to specific past discrimination."

This new requirement, it seemed to me, was invented from whole cloth that has no basis in prior decisions or in the Constitution, and it effectively changed the rules for proper congressional action without giving Congress notice or an opportunity to meet the new test.

The Court has since applied this new test to invalidate important legislation that was passed long before the *City of Boerne* decision. It prevented the States from violating copyrights and patents, and discriminating on the basis of age, disability, and gender. Despite ample legislative history detailing the need to remedy these viola-

tions, the Court used its new test and found the laws to be unconstitutional as applied to the States.

In my mind, legislating shouldn't require a crystal ball to see what roadblock the Supreme Court might next throw up. So how is Congress supposed to protect the laws we write to protect the citizens of this country from a Court which appears more concerned with protecting the States than the people of those States?

Judge NOONAN. Well, that is, you might say, a fundamental question. I think you have to respond to what you have in front of you, surprising as it is. I frankly don't think the series of decisions that begin with *Boerne* could have been anticipated.

Senator SCHUMER. I was here. I wrote some of the laws they threw out.

Judge NOONAN. As Justice Breyer said in his dissent in the *Ports Authority* case, there is no clear end in sight. You can't say now where it will end. So I think you have to legislate with those cases in mind and with such devices that have not yet been held unconstitutional by the Supreme Court. Of course, there are some ways of legislating that have not been addressed by the Court.

Senator SCHUMER. You also have sort of a sqwishy notion of congruence and proportionality which is awfully hard to figure out. It almost seems instinctive to me—I may be wrong on this—that that kind of judgment test belongs more in a Congress than in a court.

Judge NOONAN. I think there is a particular difficulty because while you can have some sense of what proportion is, congruence seems to mean it is fitting. What is fitting? That seems to be very much a legislative judgment.

In the *Boerne* opinion itself, sometimes the two terms are used conjunctively and sometimes disjunctively. It is "congruent and proportionate" or "congruent or proportionate." But as the course of adjudication has gone on, there are two tests, not alternate tests.

Senator SCHUMER. Do you want to comment on that, Professor Hamilton, with your long involvement in *Boerne*?

Ms. HAMILTON. The *Boerne* decision actually reflects a culmination of the preceding section 5 cases. I understand that it came as a surprise to some, but if one read(s) back through the Civil Rights Act cases, what the Court is essentially saying is that Congress has a power to regulate the States under section 5, but that power is not unlimited. The open question was how the limits would be articulated.

The proportionality rule comes straight out of the law of remedies. The Court held that section 5 provides a remedial power, that Congress can fix constitutional evils in the States. I have written an article about it. I have actually written more than one thing about it, but if you look to the law of remedies, congruence and proportionality are always used to try to fit the remedy to the problem.

Senator SCHUMER. Give me an example of congruence, because I share Judge Noonan's——

Ms. HAMILTON. Congruence means the law is aimed at the evil that has been identified. This is something the Court does in the First Amendment all the time. It is nothing new to legal analysis. These may be two new words in the federalism doctrine, but they do not change the actual operation of the courts.

Senator SCHUMER. But you would then not be terribly reluctant to have the courts say that the findings of Congress that this was congruent, just to take two concepts that you have advocated, are wrong. We could have a lot of findings and say this is congruent, this fits, and you put us in almost a box. You say, well, a court could come along and rule, well, it is really not congruent, and there seems to be almost no deference with that kind of sqwishy word and the new Court's view that they can sort of overrule the findings of Congress which have always been given big deference. You combine those two concepts and you are really changing things around rather dramatically, in my judgment.

Ms. HAMILTON. I would disagree with that, respectfully. The law of remedies has been employing those phrases for a long time and the courts have been trying to fit remedies to wrongs.

I think one needs to look carefully at the federalism decisions that have come down since 1995, especially since *Boerne*, because the primary finding in these cases is that there are no widespread constitutional violations in the country to justify the exercise of the power in the first place.

The threshold question is how are the States behaving? Are they violating the Constitution? If they are violating the Constitution, then Congress actually has a broad hand, and the Court has said that more than once. The turning point in these cases—the determinative element has not been congruence and proportionality. It has been whether or not there have been widespread and persistent constitutional violations. That is the key.

Senator SCHUMER. Particular for a State, that is a rather narrow group, that is a rather narrow field. I mean, many of the other things we seek to do have other bases of power, not constitutional protection of the citizens against the States. That is not much salve to what I am saying here.

I understand that if it is constitutional, obviously we have the right to step in. But what about in all the instances where there are other bases for our regulation—Commerce Clause or anything else?

Ms. HAMILTON. Congruence and proportionality only apply under section 5, and so we are only talking about the section 5 cases.

Senator SCHUMER. I think we are headed—I don't know if Judge Noonan agrees—we are headed to a situation where the basic view that Congress' findings should not be deferred to are going to be added to many of these other areas.

Ms. HAMILTON. Actually, I think that is a misinterpretation. It is part of the over-reaction to the cases. The fact-finding is only required under section 5. In fact, it is not even required, and the Court said this a number of times, but it is repeatedly misstated everywhere.

The Court said that a record is not necessary to justify congressional legislation explicitly in *Boerne*; we argued this in *Boerne* and I think it is right. If there is general knowledge of violations of the Constitution, that is sufficient.

Racial discrimination with respect to the civil rights acts—one hardly needed a record, although Congress had a record and the Court refers to it.

The problem is where it is not clear that there have been widespread constitutional violations. The Court has refused to presume the States violate the Constitution without some evidence of it, and that is where the records issue comes up. So it is not a constitutional requirement to have a record, but in the absence of a record the Court will not presume constitutional violations.

Senator SCHUMER. Do you want to comment on what Professor Hamilton said, Judge?

Judge NOONAN. I would draw the committee's attention to an article I was not aware of when I wrote my book, but since I have just been teaching it at Emory University Law School, this is by two professors at Emory and it is called "Legislative Record Review" and it is published in the *Stanford Law Review*.

Professor Busby and Professor Shapiro have interpreted the cases differently and see a requirement in them for a legislative record, and they ask what is a legislative record. We know what an administrative record is, but Congress has not been used to making something they call a legislative record. Is it speeches, is it anecdotes? What is it? I find the set of questions posed in this overwhelming, and the authors don't see a very easy way out of it.

I would like to submit this article to the committee afterwards.

Senator SCHUMER. Without objection, it will be put in the record.

I would just note, corroborating what Judge Noonan said, in *Lopez* and in VAWA, the Court rejected an ample record. They then took that record and said, well, that is not good enough, for a bunch of different reasons. I was part of the VAWA record. I was amazed when the Court overruled that record. I mean, they may not like the reasoning, but if there is lots of violence against women, it certainly is interfering with commerce in this country.

Ms. HAMILTON. Well, that is a leap that the Court is not willing to let the Congress take, thankfully.

Senator SCHUMER. Why?

Ms. HAMILTON. The record in VAWA was about violence against women, but the record did not substantiate that these violent actions were commercial in nature. That is what needs to be in the record with respect to the Commerce Clause, and it wasn't there.

Senator SCHUMER. I don't recall, but if we put in that a million person-hours were lost because of violence against women in terms of economic productivity, would that be enough for you?

Ms. HAMILTON. Well, it doesn't matter what I think. Would it be enough for the Court?

Senator SCHUMER. Yes, well, in your view of what the Court ought to do.

Ms. HAMILTON. There are two doctrinal bases we are talking about. One is under section 5 of the 14th Amendment, no matter how much Congress had shown impact on commerce that wasn't going to turn the law into a regulation of the States, as section 5 requires. So I will leave section 5 to the side.

With respect to the Commerce Clause, what had to be shown was that the Congress was regulating an intrastate activity, because the violence against the woman is unquestionably intrastate, and whether or not that intrastate activity would result in substantial effects on commerce.

Senator SCHUMER. Would you recommend the Court overturn the Hobbs Act, which is what Judge Noonan had talked about?

Ms. HAMILTON. No, I wouldn't recommend——

Senator SCHUMER. What is the difference?

Ms. HAMILTON. The difference between the two is that the entity being regulated with respect to violence against women in the way the Act was drafted—and as I said before, I think there are ways to draft that Act to make it work. But in the way that it was drafted, what was being regulated was an intrastate activity for which you could not show substantial effects on commerce.

Senator SCHUMER. Well, isn't that true in what was regulated in the Hobbs Act?

Ms. HAMILTON. In the Hobbs Act, it was the transportation of the women across State lines. That is an interstate activity. That is quite different.

Senator SCHUMER. I see. Why don't we let Judge Noonan respond.

You are saying even if there are indirect effects on interstate, that doesn't apply. It has to be direct crossing of interstate lines, which is a pretty narrow interpretation of the Commerce Clause.

Ms. HAMILTON. It still leaves an enormous amount of power. But the Court is still clarifying precisely the question you are asking about, which is how to deal with intrastate effects on commerce.

Senator SCHUMER. Judge Noonan, do you want to respond?

Judge NOONAN. Well, I thought that was a debate that went on in the 1930's.

Senator SCHUMER. Right.

Judge NOONAN. And I thought we were well past direct and indirect. You can turn almost anything into a direct or indirect——

Senator SCHUMER. That is what I thought, but Professor Hamilton is going back to that standard.

Let me go to a second question. As you observe in your book, Judge Noonan, recent efforts to enforce State sovereign immunity are based neither on the text nor the legislative history of the 11th Amendment. This adventurous—that is your wording, not mine—reading of the 11th Amendment is embraced by the same Justices who, in the area of individual rights, complain that the rights are nowhere to be found in the text of the Constitution and thus are not rights at all. Privacy is the big one.

It seems to me there appears to be some kind of inconsistency here. It strictly adheres to the text when interpreting the Constitution with respect to individual rights, but uses broader, more expansive and more creative approaches in all the ways that Professor Hamilton and I have been debating when it comes to States' rights.

Judge NOONAN. Well, I think it is fair to say that in these decisions the Court has given up its critique that at least individual Justices have made in other contexts. The key words, it struck me, are in *Alden* v. *Maine*, where the Court says we don't believe in "a historical literalism." In other words, taking up the text out of history just won't work.

Once the Court has said that, it seems to me it brings into doubt a number of these pronouncements which said you have just got to look at the text and the text will tell you what it means.

Senator SCHUMER. Only in some types of cases.

One final question for you, because I know Jeff has a few and we have a vote in about 9, 10 minutes. The vote is now, about 10 minutes left.

Do you think there is going to be real danger—let me not characterize it. Do you think there is a likelihood that the constitutionality of the Family Medical Leave Act, which is coming before the Court this term, will be invalidated?

Judge NOONAN. I really don't want to speculate.

Senator SCHUMER. Well, it is past you already; it is up to the Supreme Court, but that is OK.

Judge NOONAN. Everyone can read what is there and what the logical implications are.

Senator SCHUMER. Yes. I am very worried about that.

Judge NOONAN. They are not hard to figure out.

Senator SCHUMER. Thank you, Judge.

Let me let Jeff ask a couple of questions and then I think we will call it a day.

Senator SESSIONS. Well, you know, on the Hobbs Act it is just something I have wrestled with over the years. It was passed in 1945. It requires a commerce nexus. Not only does it require a commerce nexus, but the name of the Act is not the Hobbs Act. The name of it in the rubric is "Interference with Commerce by Threats of Violence." It requires a connection between commerce and——

Senator SCHUMER. If we rename VAWA that, would that be OK?

Senator SESSIONS. It might because it would make it an element of the offense. I don't know about the VAWA Act, frankly.

Senator SCHUMER. A little sophistry there.

Ms. HAMILTON. It is called the jurisdictional element.

Senator SESSIONS. The jurisdictional nexus element. It has always been in that. The next offense, interstate and foreign travel of transportation in aid of racketeering—racketeering by itself is not sufficient.

I had a case involving a small town where the police chief was taking money from people for traffic tickets and we had a serious doubt as to whether or not the case could be prosecuted under the Hobbs Act if it was only local people in the local town having to pay bribes to avoid the ticket. Fortunately for our case, somebody was involved from out of State coming through and we felt that provided the sufficient nexus.

It is not going back to the 1930's to say that the Constitution is being violated here. Section 8 says, "The Congress shall have the power to regulate commerce with foreign nations and among the several states." Now, that has to have some meaning. Otherwise, we are at a point of breathing in and breathing out somehow in air that travels.

Isn't the Supreme Court simply struggling, Professor Hamilton, to put some meaning to a clause that we have always felt had meaning and have some rational standard for its application? And

isn't the Court saying that merely because we find A, B and C as fact does not necessarily decide the question if it takes a finding of D to answer the question?

Ms. HAMILTON. I think that is right. I think that is exactly what the Court is doing.

Senator SESSIONS. I just don't feel like this is anything other than—maybe we can disagree with precisely where you draw the line, but I do not believe it would be sound constitutional law to conclude that this phrase "commerce" has no meaning whatsoever, to define it so weakly that it covers everything that you could imagine. I just can't believe that that would be what we are talking about.

Judge Noonan, on that subject about good people might disagree, do you think if a lawyer defended a hospital, as Elliot Spitzer, the Attorney General of New York has, on the grounds of sovereign immunity, or defended a defendant on the ground that Congress had failed to make the interstate commerce nexus required, that that would disqualify them from serving on the Federal bench?

Judge NOONAN. No. I think it is perfectly appropriate for lawyers to make the arguments that are there in the realm of precedent.

Senator Sessions, your comment, though, makes me recall a case I did write the opinion in when you say we don't want "commerce" to mean anything. We had a case where one animal rights league sued another animal rights league under the antitrust laws and claimed that the defendant was violating the antitrust laws by getting contributions that should have gone to the plaintiff. The way we decided that case—and I wrote the opinion—was non-profits are not engaged in commerce. End of case.

Senator SESSIONS. That is very interesting. I bet Senator Schumer would not agree with that.

Judge NOONAN. Some universities have not picked up on that.

Senator SESSIONS. Well, I know we have a nominee, Jeff Sutton, who has argued for sovereign immunity in the *Garrett* case. I trust our panel here will not browbeat him for asserting what at least is a colorable theory of law. Would you agree with that?

Judge NOONAN. Well, yes.

Senator SESSIONS. Thank you.

Senator SCHUMER. You have 2 minutes left, Jeff.

Senator SESSIONS. Two minutes. Well, I won't continue. It is an interesting, interesting debate. I think the Supreme Court has taken some cases and they have attempted to try to establish a defensible line between what is commerce and what is not commerce. I do not believe it is a retreat to the 1930's, but I believe it is simply an attempt to give meaning to a clear clause in the Constitution and I frankly am not offended by what they have done.

Senator SCHUMER. We will let Jeff have the last word, other than for me to thank both of you. This was really an excellent hearing. It brought the issues to a head and will all make us think a great deal.

So, Judge Noonan, thank you, and your book is something that is just great.

Professor Hamilton, you did a great job and I hope we will be hearing from you in this committee again.

Ms. HAMILTON. Thank you.
Judge NOONAN. Thank you very much.
Senator SCHUMER. Thank you.
We are adjourned.
[Whereupon, at 12:36 p.m., the committee was adjourned.]
[Submissions for the record follow.]
[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

STATEMENT OF RANDY E. BARNETT

SUBMITTED TO THE

COMMITTEE ON THE JUDICIARY

OF THE UNITED STATES SENATE

"CONSTRAINING CONGRESS: THE SUPREME COURT RESPECTS THE TEXT"

October 1, 2002

Mr. Chairman and members of the committee, my name is Randy Barnett and I am the Austin B. Fletcher Professor of Law at Boston University where I teach, among other subjects, Constitutional Law. I am the editor of a two-volume collection of writings on the Ninth Amendment entitled, *The Rights Retained by the People: The History and Meaning of the Ninth Amendment.* I have published widely on various constitutional topics including methods of interpretation and the meaning of the Commerce Clause and the Necessary and Proper Clause. I have been a law professor for 19 years and, before teaching, I was a criminal prosecutor in the States Attorneys Office of Cook County, Illinois. I am a graduate of Northwestern University and Harvard Law School where I will be a Visiting Professor next semester.

In *U.S. v. Lopez,* 514 U.S. 549 (1995), the Supreme Court, for the first time in 60 years declared an act of Congress unconstitutional because Congress had exceeded its powers under the Commerce Clause. In 2000, the Court reaffirmed the stance it took in Lopez in the case of *U.S. v. Morrison,* 120 S.Ct. 1740 (2000), by finding that once again, the Congress had exceeded its powers. Were these examples of something properly called "judicial activism"? This is the question I will address today and, to do so, we must clarify the meaning of the term "judicial activism."

1. THE MEANING OF "JUDICIAL ACTIVISM"

Let me begin by saying that, with one exception,[1] I have never, either in print or conversation, criticized a judge or court for its "activism." I believe this term, while clearly pejorative, is generally empty and this tends to be true whether used by conservatives or more recently by those on the left. An "activist" decision is often simply a decision in which (1) a court strikes down an act of Congress, reverses a criminal conviction or reverses a state supreme court decision and (2) the person using the term disagrees with this outcome. By the same token, the term usually posited as the opposite of "activism"—"judicial restraint"—is similarly without much, if any, content.

Some use this rhetoric to imply that it a court is acting in an "activist" fashion *whenever* it strikes down an act of a legislature, but almost no one really believes this. If pressed, I could think of only one academic who actually contends that courts should never (or almost never) strike down unconstitutional laws. Surely no one on this committee believes this. Though you may often disagree over whether a particular statute is constitutional, you all share with me the conviction that the Supreme Court and lower federal courts should strike down or nullify unconstitutional laws. Therefore, if "judicial activism" is a bad thing, this cannot be what is meant by "judicial activism."

Rather than take the time to survey all the possible meanings of "judicial activism"—and assuming you do not wish to abandon the term entirely as I would favor—let me offer and then defend my own definition: When speaking of constitutional adjudication, it is "judicial activism"

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[1]The exception was Randy E. Barnett, *Left Tells Right: "Heads I Win, Tails You Lose,"* WALL ST. J., Dec. 12, 2000, at A26, *reprinted in* BUSH V. GORE: THE COURT CASES AND THE COMMENTARY 264 (E.J. Dionne Jr. & William Kristol, eds., 2001) (criticizing the Florida Supreme Court for its "activism" in *Bush v. Gore* using the same definition described below).

when courts deviate from the text of the Constitution *either* to uphold a law that violates the text of the Constitution or to strike down a law that is actually consistent with that text. In sum, it is judicial activism when courts substitute for the relevant constitutional provision, another they think, for whatever reason, is preferable. According to this definition, it is not judicial activism to strike down legislation if that legislation violates the Constitution. To the contrary, it would be activism to uphold such legislation.

I believe that most people, including most members of this Committee, would accept this definition of judicial activism upon reflection. All of you think courts should sometimes find a statute to be unconstitutional when it contradicts what the Constitution says. Where disagreements would, should and do arise is over what the Constitution (or statute) actually requires. And part of this disagreement is over how the meaning of the Constitution should be determined.

I am of the view that the courts, and Congress too for that matter, should respect the original meaning of the Constitution where that meaning can be determined—though I also believe that, when the meaning is vague or where the text authorizes supplementation, as it does for example in the Ninth Amendment and the Privileges or Immunities Clause of the Fourteenth Amendment, there is room for discretionary choices and a need for the formulation by judges of constitutional doctrines to put these clauses into effect. This method of interpretation is called "Original Meaning Originalism" and is to be distinguished from "Original Intent Originalism." Whereas Original Meaning Originalism looks to the public meaning that terms and phrases had at the time of their enactment, Original Intent Originalism seeks the intentions of those who wrote or ratified the text to fill any gaps in the original public meaning at the time of enactment.

While Original Intent Originalism is a perfectly respectable position, it is not the theory of interpretation held today by most thoughtful conservatives. And it may come as some surprise for you to know that some version of Original Meaning Originalism—which has also sometimes been called "moderate" originalism, though this is another of those empty terms—is probably the prevailing method of constitutional interpretation these days regardless of political ideology.[2] To take just one example of this method's current popularity, consider the recent controversy over what constitutes an "impeachable offence." Liberals and conservatives, academics and public commentators, alike all began with and placed great stock in the original meaning of the term "high crimes and misdemeanors" and then attempted to apply that meaning to the conduct in question. While its current popularity does not, of course, make it correct, it does make this form of originalism well within the "mainstream" for those who care about such things.

Its popularity flows from the insight that where the Constitution speaks, judges are not empowered to change this meaning, though where the text is either vague or deliberately incomplete, there is room for judicial construction that does not contradict the original meaning. In other words, the whole reason to have a written constitution, like a written contract or written rules governing congressional ethics, is to "lock in" some meaning that can only be changed by proper procedures. Otherwise, why bother? The object is to bind Congress or judges and, were they empowered to change the meaning to something they like better, the whole point of having a written Constitution would be lost.

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[2]I justify this claim in Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOYOLA L. REV. 611, 611-620 (1999).

We should follow the original meaning of the text, then, not because we are bound by the "dead hand" of the past, or by our dead ancestors, or in my case by *other people's* dead ancestors. We should adhere to the original meaning because we—right here, right now—are committed to a written constitution and the whole reason for a writing is to constrain the behavior of political actors. If those actors can change its meaning as they desire and in the absence of an equally written amendment, the written constitution will have failed in its principal purpose and our commitment to it rings hollow.

Also hollow would be the claim that persons should obey Congress or the Courts because their actions were authorized or mandated by the Constitution. Judges claim that their rulings are not just their opinions, but come from an independent source called "the Constitution." If, however, the Constitution means whatever the Congress or the Courts want it to mean, then this is a lie. A more accurate statement would be "obey because WE tell you to" and such a statement is unlikely to be as well-received by the public.

When considering whether you agree or disagree with Original Meaning Originalism, I would ask you to think not of the clause of the Constitution you dislike but of the one you most cherish. Think not of the clause that impedes your ability to accomplish what you think is in the public good, but the clause that stops others from doing bad things that *they* think are in the public interest. In the absence of a constitutional amendment, do you want judges with whom you disagree to be able to change the meaning of your favorite clause to something they like better?

For a moderate or Original Meaning Originalist, then, it is not "activist"—if one insists on using that term—for a court to strike down legislation that violates the original meaning of the text. To the contrary, it would be "activist" to disregard that meaning and uphold the legislation where

it conflicts with the text because a judge, for some reason, disapproves of its original meaning. By the same token, it would not be "activist" for court to adopt doctrines to identify what is or is not "cruel and unusual punishment" or an "excessive fine" since the original meaning of these terms are vague and intentionally so. Nor would it be "activist" for a court to protect from legislative infringement an unenumerated right that, as the Ninth Amendment affirms, was "retained by the people." To the contrary, it would be activist for the Court to ignore the Eighth Amendment's prohibition on cruel and unusual punishment simply because it is vague, or to contradict the original meaning of the Ninth Amendment and "deny or disparage" a right simply because a particular right was not included in the enumeration.

According to this view of "judicial activism," then, whether or not a court is being activist, depends not at all on whether it is upholding or striking down legislation. Instead, it depends entirely on whether the court is enforcing or refusing to enforce the text of the Constitution properly interpreted. We cannot therefore conclude that a court is being activist until we consider and determine the meaning of the text that a particular statute either has or has not violated.

Many who use the term "activist" do so, it seems, in order to criticize a court without having to advance their own view of the correct interpretation of the constitutional text at issue, but this is a cheat. Unless one abandons judicial review entirely, one simply cannot know whether a court is being activist unless one also knows what that text means. The epithet of "activism" provides no escape from the need to take a stance on how the critic thinks the Constitution should be interpreted. By what method should its meaning be found and what meaning does the critic attach to whatever particular passage is at issue?

Upon examination, I conclude that, while the results reached by the Rehnquist court are less activist than those of previous courts in precisely those cases where its activism is now being criticized—most especially in its Commerce Clause decisions. Any such assessment, however, requires an inquiry into the original meaning of the Commerce Clause.

2. ARE THE COMMERCE CLAUSE CASES "ACTIVIST"?

Which brings us back to the *Lopez* and *Morrison* cases. Whether the Court was being activist in striking down the Gun Free School Zone Act or a portion of the Violence Against Woman Act depends entirely on whether those acts did or did not exceed the powers of Congress under the Commerce Clause. Because I think they did, I do not believe the Court was acting in an activist fashion in those two cases. Let me briefly explain why.

As the courts have always recognized, the text of the Constitution does not grant Congress a general "police power" to pass any legislation it may deem to be in the public interest. Instead, the Constitution confines Congress to an enumeration of powers and execution of those powers by means of laws that are necessary and proper. In the landmark case of *Marbury v. Madison,* 5 U.S. (1 Cranch), 137, 176-77 (1803), Chief Justice Marschal stated this proposition as well as it can be stated: "The powers of the legislature are defined, and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed. . . ."

And in the later case of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 405 (1819), Marshall reaffirmed the proposition that: "This government is acknowledged by all to be one of enumerated powers." In that same opinion he also wrote: "We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended." *Id.* at 421. I am reasonably confident that no member of this committee would take issue with Chief Justice Marshall on this proposition. But this means that it is not judicial activism to hold Congress to its enumerated powers and to nullify any law that exceeds those powers.

The next question that must be addressed, therefore, is the meaning of the Commerce Clause which Congress claimed as its source of power in both *Lopez* and *Morrison*. Notice that the Constitution does not grant Congress the power over *all* commerce. Instead it granted Congress the power "to regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes." The only reason to list these three specific powers over commerce was to exclude some commerce from the purview of Congress—and it turns out that the only commerce that is excluded is that commerce that occurs wholly within a particular state. If Article I had included the power to regulate wholly intrastate commerce, it would simply have read "Congress shall have power to regulate commerce." The only reason for the tripartite breakdown specified was to exclude the power to regulate wholly intrastate commerce.

Once again, this position was affirmed by Chief Justice Marshall in *Gibbons v. Ogden*, the most famous of all Commerce Clause cases. There Marshall wrote: "The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. . . . The completely internal commerce of a State, then, may be considered as reserved for the State itself." 22 U.S. (9 Wheat)

1, 195 (1824) In sum, protecting wholly intrastate commerce from the reach of Congress is a constitutional imperative in our federal system. To the extent that the activities sought to be regulated by Congress in these two statutes—possessing guns within a 1000 feet of a school or committing the crime of rape—are wholly intrastate activities, they are outside the reach of Congress whether or not they are commerce. But were these acts "commerce"?

The Commerce Clause empowers Congress given to regulate "commerce," not to regulate other activities, but what does "commerce" mean? The historical evidence is overwhelming that, at the time it was enacted, "commerce" referred to the buying, selling, barter or transportation of goods. I recently surveyed every use of the term "commerce" in the records of the Constitutional Convention, the state ratification conventions, *The Federalist Papers*, and *The Pennsylvania Gazette*.[3] While I found many examples of the term "commerce" being used unambiguously to refer to the exchange or transportation of goods, I found not a single example of it being used in any broader sense. Consistently, commerce was distinguished from other productive economic activities such as agriculture and manufacturing. Moreover, no where was it ever used to refer to a noneconomic activity. Therefore, to the extent that Congress sought in these statutes to reach activities—possessing a gun within 1000 feet of a school or committing the crime of rape—that were not "commerce," it was exceeding its power under the Commerce Clause.

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[3]See Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101 (2001)(surveying the Constitutional Convention, ratification conventions, and THE FEDERALIST PAPERS) ; Randy E. Barnett, *New Evidence of the Original Meaning of the Commerce Clause*, 55 ARK. L. REV. (forthcoming fall 2002)(surveying THE PENNSYLVANIA GAZETTE).

The final question I shall address is whether, though the actions Congress attempted to reach in these statutes were not commerce and took place wholly within a state, these actions could be reached under the Necessary and Proper Clause that gives Congress the power "to make all Laws which shall be necessary and proper for carrying into Execution" its power to regulate commerce between one state and another? Since the founding, it has long been recognized that this provision could not have been intended to render the enumeration of powers redundant or superfluous.

As then-Representative James Madison explained to the first Congress: "Whatever meaning this clause may have, none can be admitted, that would give an unlimited discretion to Congress. Its meaning must, according to the natural and obvious force of the terms and the context, be limited to means necessary to the end, and incident to the nature of the specified powers." 2 Annals of Cong. 1898 (statement of Rep. Madison).[4] Madison then observed: "The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed, if, instead of direct and incidental means, any means could be used . . ."[5]

In *Lopez* and *Morrison,* the Supreme Court adopted two doctrines to avoid construing the Necessary and Proper Clause as a grant of unlimited power to Congress. First, it held that when Congress tries to reach wholly intrastate activities, these activities must be *economic* in nature to be

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[4]Although there came to be disagreement between Madison, Jefferson, and Randolph on the one hand, and Hamilton and Marshall on the other, about the degree of necessity that must be shown, all agreed that, for a measure to be "necessary," there must be a sufficient fit between the means chosen and the enumerated end. See McCulloch v. Maryland, 17 U.S. (4 Wheat.) at 421 (stating that means chosen be "plainly adapted" to an enumerated end); Alexander Hamilton, Opinion on the Constitutionality of an Act to Establish a Bank, 8 PAPERS OF ALEXANDER HAMILTON 97, 104 ("The relation between the *measure* and the *end*, between the *nature of the mean* employed towards the execution of a power and the object of that power, must be the criterion of constitutionality. . . .").

[5]*Id.* at 1898.

incident to its power over commerce. And second, that Congress may reach wholly intrastate economic activity only if that activity was shown to "substantially affect[] interstate commerce." *Lopez,* at 560. Of course the text of the Constitution includes neither doctrine and both can be criticized as much for giving too much power to Congress as for giving too little. But the expressed purpose of adopting these two doctrines was to apply the Necessary and Proper Clause in such a way as to maintain the scheme of limited and enumerated powers that John Marshall correctly attributed to the text while, at the same time, staying within the precedent of *Wickard v. Filburn,* 317 U.S. 111 (1942).

In *Wickard,* the Court said that Congress may regulate wholly intrastate activities that, *taken in the aggregate,* adversely affects interstate commerce. In a world in which virtually any type of action, when aggregated, could be said to "affect" interstate commerce, some limiting doctrine like a "substantial effects test" must be established or the enumerated powers scheme would be completely eliminated and Congress would have unlimited power over all activities whether economic or not. Indeed the Court in *Wickard* itself repeatedly used the term "substantial" to describe the type of effect that an act must have to be reached by Congress: "[T]he reach of that power [granted by the Commerce Clause to Congress] extends to those intrastate activities which *in a substantial way* interfere with or obstruct the exercise of the granted power."[6]

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[6] *Id.* at 124 (quoting United States v. Wrightwood Dairy Co., 315 U.S. 110, 119) (emphasis added). *See also id.* at 125 (Appellee's activity may "be reached by Congress if it exerts a *substantial economic effect* on interstate commerce....") (emphasis added); *Id.* at 128-29 ("Congress may properly have considered that wheat consumed on the farm where grown, if wholly outside the scheme of regulation, would have a *substantial effect* in defeating and obstructing its purpose to stimulate trade therein at increased prices.") (emphasis added).

Nor does this represent some new development created by an interconnected economy that was unforseen by the founders. While President, Madison wrote: "In the great system of political economy, having for its general object the national welfare, everything is related immediately or remotely to every other thing; and consequently, a power over any one thing, if not limited by some obvious and precise affinity, may amount to a power over every other thing."[7]

In sum, adopting any doctrine that gives Congress unlimited power over anything it chooses to regulate under the Commerce Clause coupled with the Necessary and Proper Clause would be the height of judicial activism (if we must use this term). By limiting Congress to regulating only that wholly intrastate activity that was (1) economic and (2) had a substantial effect on interstate commerce, the Court in my view probably ceded too much power to Congress, but it was certainly not activist in attempting to draw a line.

I suggest the following test for any interpretation of the Commerce Clause and the Necessary and Proper Clause: If you cannot think of an example of an activity that Congress may not reach under the proposed interpretation, then that interpretation of the Constitution must be wrong. Any interpretation of the Necessary and Proper Clause and the Commerce Clause that has no discernable limit would violate the very first sentence of Article I which begins, "All legislative Powers *herein granted* shall be vested in a Congress of the United States. . . ." It would also run afoul of the Tenth Amendment that affirms 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." This is not, by the way, to assert states rights, but merely to affirm the limits of federal power. According

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[7]James Madison, *Letter to Judge Roane* (September 2, 1819), *in* 3 LETTERS AND OTHER WRITINGS OF JAMES MADISON 143-44 (Philadelphia, J..B. Lippincott & Co. 1867).

to the Tenth Amendment, powers that are not in the hands of the national government are *either* in the hands of the states *or* in the hands of the People It does not specify which.

I am not here to claim that the present Supreme Court has never acted in an activist fashion as I define the term. In my testimony today, I am only claiming that its Commerce Clause cases are not in any way "activist." Of course you are free to reject the conception of "judicial activism" I am proposing and to advocate the power of Congress and the courts to adjust the meaning of the Constitution to change with the times or to reach better results. But anyone who adopts this position has no basis to criticize the Supreme Court's Commerce Clause cases as "activist," except as an epithet for those decisions with which they happen to disagree.

Is There Conservative Judicial Activism?

by
Richard A. Epstein

On this occasion, I have been asked to state my views on a question that has much agitated members of the United States Senate and the prominent and distinguished academic scholars whom they have rallied to the cause: conservative judicial activism. This issue, we are told, arises because an imperial judiciary chooses to strike down vital laws that Congress has enacted only after long and anxious deliberation. The critics claim that the current court has usurped the prerogatives that the Constitution has placed in the hands of the Congress and, in so doing, has insinuated itself into the role of arbiter of national policy. The payoff of this critique is clear: any nominees to judicial posts who sport the philosophy of the current conservative majority are put on fair notice that theirs is a rocky road to Senate confirmation.

I am proud to be counted in the class of legal academics who by this standard have no chance of confirmation for any public office by the present Senate of the United States. During the past 20 years, I have taken positions on many of the key issues that exercise Senator Biden and Senator Leahy. I have defended the version of the commerce power that was enunciated by Chief Justice Marshall in Gibbons v. Ogden in 1824; I have argued that the takings clause to the Constitution places strong limitations on the power of the federal government to regulate the use and disposition of private property; and I have defended on numerous occasions the soundness of the Supreme Court's 1905 decision in Lochner v. New York. I do not think that these positions are the outgrowth of a predisposition of judicial activism, as has been commonly charged. I do not regard them as outrages perpetrated by conservative (or

libertarian) judges who are bent on an ideological mission. I think that they are strongly grounded in the language and structure of the Constitution and reflect the political judgments that are as sound today as they were at the time of the founding.

In order to make out this case, I shall comment on five issues. The first deals with the basic philosophy behind the Constitution. The next two issues are structural. One deals with the scope of Congress's commerce power, and the other with the question of the immunity of state governments from federal regulation. The last two issues concern individual rights. One deals with the scope of the takings clause and the other with doctrine of substantive due process in relation to Lochner. I shall conclude with some brief observations about the judicial selection process.

Constitutional Preliminaries. The initial inquiry asks why the Constitution contains provisions that limit at every turn the ability of Congress to act. Most evidently, our system is not one that provides that valid statutes can be enacted by the majority vote of a single house. Instead creates two Houses of Congress; it provides that their members shall be chosen by different procedures; it gives each House different powers; it subjects their joint decisions to a veto by the President, which in turn can be overridden by a two-thirds vote of each House. The complexity of the process offers clear testimony to the initial judgment of the Framers that, as Madison said in Federalist Number 10, "[e]nlightened statesmen will not always be at the helm." Human imperfections made sound government was a fragile enterprise run by fallible or venial individuals who could neglect or abuse the public offices they held.

Senators Biden and Leahy write as though all the anxious deliberation of Congress after exhaustive hearings is all that is needed to secure the passage of just laws that redress pressing social issues. They wholly ignore the competing

set of concerns that explain why the Constitution that empowers the Congress on the one hand and tethers it firmly on the other. The Framers were aware of the dangers of faction and of the class legislation that it breeds. The knew that political majorities need not protect the liberties and property of its citizens, but could confiscate them directly or by various subterfuges and schemes. They were willing to slow down the legislative train because of their considered judgment that complex legislative procedures were more likely to knock dangerous legislation off the rails than virtuous legislation. They anticipated the findings of modern public choice theory which holds that self-interested individuals do not invariably assume virtuous poses simply because their are garbed in the raiments of public office.

Commerce Clause The business of curbing legislative abuses was not confined to the processes for passing laws. It also covered the powers that were delegated to the Congress under the original constitutional design. Senators Biden and Leahy write as though the doctrine of enumerated powers has no place in the constitutional framework, even though it functions at the centerpiece of Article I, section 8. The point of this enumeration was both to protect the prerogatives of the states, whose ratification conventions were necessary for the adoption of the Constitution in the first place, and to protect individual citizens from excessive aggrandizement of federal powers. The most extensive of these is the commerce power, and in light of the heated denunciations of the Supreme Court's recent decisions in Lopez v. United States (1995) and United States v. Morrison (2000), it is useful to set out in full the constitutional language that sparked this litigation. "Congress shall have the power to . . . regulate commerce with foreign nations, among the several states and with the Indian tribes."

In dealing with this Construction Senator Biden writes as though Chief Justice Marshall, as architect of our national powers, would endorse a reading of

the commerce clause that is parallel to his own. His proposition is historical make-believe. The question before the Court in Gibbons v. Ogden (1824) was whether the Congress had the power to regulate transportation across state boundary lines. The narrow view of the Commerce clause was that it allowed the federal government to control the crossing of traffic at state boundaries. On Marshall's broader view, the commerce power allowed the Congress to regulate navigation into the interior of each state. In reaching this decision he did use the phrase "commerce which concerns more states than one," but did so in order to explain the domains to which the commerce power was "restricted". He did not believe for example that Congress could pass inspect laws for goods intended for shipment in interstate commerce. Contrary to Senator Biden's suggestion, he explicitly disclaimed any reliance on the "necessary and proper" clause, holding it only expanded the means that Congress could use "for carrying into execution" the class of ends that were elsewhere determined. His decision led to the correct articulation of the general proposition in E.C. Knight v. United States (1895) that manufacture precedes commerce and is not part of it, even if that proposition was in fact misapplied with respect to the issue before it, namely, the application of the Sherman Antitrust Act to a merger between corporations in different states.

The uniform early readings of the commerce clause before 1937 contain not a single decision that applied the commerce clause to any local operations of labor, agriculture, or manufacture prior, or subsequent, to goods entering into the stream of interstate commerce. Rather the battles were fought over whether all transportation and communication should be treated as interstate, or whether local components should be hived off from the larger whole. Thus the Court upheld the 1887 Interstate Commerce Act because it dealt only with rail journeys that began in one state and ended in another. It took a major decision in the

Shreveport Rate Cases (1914) for the Court to hold that the commerce power extended to purely local railroad lines that were in competition with interstate runs. It took yet another decision some eight years later in Wisconsin Railway Commission v. Chicago, B & Q RR (1922) to allow the Congress to impose comprehensive rate of return regulation on the entire railroad grid, for both its instate and interstate components. At no point did Congress attempt to regulate the manufacture or production of goods.

All this is not to say that the pre-1937 Court was unresponsive to changed conditions. It had no difficulty in understanding that the commerce clause applied to railroads, telephones and airplanes even though none of these instrumentalities of commerce were invented at the formation of the Republic. But by the same token it respected the initial distribution of powers that meant that the sphere of local authority was reserved even as the federal power was applied to new objects that fell within its basic language.

All this changed in the New Deal. Senator Biden is simply incorrect when he claims that there was a uniform understanding that the Congress always had had from the outset the last word on the scope of its enumerated powers. All four circuit courts that passed on the constitutionality of the National Labor Relations Act in 1936 struck it down on the grounds that it exceeded (as it indeed did, and does) Congress's power under the commerce clause as a regulation of matters of local manufacture. The Supreme Court decision in NLRB v. Jones & Laughlin Steel (1937) may well have been taken in response to political imperatives, but it represented a repudiation of everything that John Marshall had written over 100 years before in Gibbons. The same must be said of Justice Jackson's 1942 decision in Wickard v. Filburn that upheld Congress's power to regulate the consumption of grains on the farms that produced them because of how they "affected" interstate commerce.

Against this backdrop, it is hard to accuse the current conservative members of the Court of constitutional rebellion against long-established commerce clause jurisprudence because of their recent decision in both Lopez and Morrison. Apart from mountains of staged Congressional findings that address the wrong issues, what is it that explains why the use of firearms within a 1000 feet of a school counts as "commerce among the several states." The issue here is not the question of whether guns are dangerous in this setting, for no one questions that Texas could (as it did) make this form of conduct criminal. Rather, the issue is whether this is a head of Congress's power, which it manifestly is not. Nor has anyone explained why an alleged dormitory rape in Morrison involves commerce among the several states. In both these cases, it will not do to show that extensive violence will deter people from entering into interstate commerce. Any demonstration of the "cumulative effects" of harmful practices could have been used to show why rape or guns were suitable subjects of Congressional regulation in 1787 as well. It cannot suffice to argue the Court should apply a "rational basis" test to review Congressional acts, for that total abdication of judicial responsibility allows Congress to disregard any and all limits on its own power. When Senators Biden and Leahy urge this standard they call in effect for a partial overturning of Marbury v. Madison,(1803) which makes the Court the final arbiter of what the Constitution says.

In making these points, I think it fair to point out that my position on the commerce clause is more restrictive of Congress than is that advanced by the conservative justices on Supreme Court. Chief Justice Rehnquist went out of his way to approve of the holding in Wickard v. Filburn, and noted explicitly that Congress continued to have the power to regulate economic transactions, including the local competition of foodstuffs which, if shipped in interstate commerce, would affect commerce by altering the price of competitive goods. In

so doing, he continued to allow Congress to continue its Byzantine system of agricultural subsidies and restrictions about whose substantive wisdom the less said the better. It is hard to condemn as a form of judicial activism decisions that are more faithful to the original constitutional plan the decisions that they overruled.

Federalism There is an intimate link between the Court's jurisprudence under the commerce clause and that dealing with federalism issues. If the commerce power had been kept to its original boundaries, then Congress would not have, for example, the power to regulate the terms and conditions of local employment in the first place, so that the question of whether state employees were exempt from the Fair Labor Standards Act and the Age Discrimination in Employment Act could never arise. But once the moves were made on the commerce clause front, then the Court has to face the question of whether to craft some exemption of state governments from Congressional behavior.

The impulse to create that exemption is not hard to find. The original Constitution contemplated a system in which the federal government were "delegated" limited powers. Implicit in that scheme has to be the view that the states are therefore exempt from at least some forms of federal regulation. The federal government could not, for example, decide the constitutional structure of state legislatures. This matter is not one addressed by any explicit constitutional provision, so that the question of state immunity from federal regulation has to be inferred from the basic structure of the Constitution. Doing that work is hard, and here the Supreme Court has had mixed success. I believe that it reached the right decision (over strong dissent) when it held in Maine v. Alden that the federal government could not impose the Fair Labor Standards Act on the states. Senator Biden expresses astonishment that any employer should be out from this statute "just because" it is a state. But that is precisely the point. The

Constitution creates an elaborate system of safeguards for and limitations on the states. To treat them as though they were simply private corporations is to show a profound misunderstanding of the origins and structure of American federalism.

With that said, however, I also believe that the Supreme Court erred in Seminole Tribe of Florida v. Florida (1996) when it held that state sovereign immunity made it impossible for states to be sued for violations of federal copyrights and patents. Yet this case differs from Maine v. Alden precisely because Congress is vested under Article I, section 8 with the power to issue copyrights and patents, and I see no reason why the states (who are today covered by the takings clause) cannot be required to respect these property rights once issued. The matter of state sovereign immunity is one which is more finely balanced than the question of the commerce clause power. It therefore behooves us to speak cautiously before denouncing any decisions with which we disagree.

Takings The next set of disputed issues concerns the scope of the takings clause of the Fifth Amendment. Once again, it is instructive to set out the constitutional text: "nor shall private property be taken for public use, without just compensation." No one doubts that this clause limits the power of the federal government, Congress included, to occupy property for public use unless it pays just compensation for it. The key question before the Court has long been the way in which the clause ties into those restrictions on the use or disposition of property that fall short of its occupation by the government.

It should be said that the early history is inconclusive on the question of how the takings clause applies to what has in recent years been called "regulatory takings". But as a matter of structure and logic it is quite indefensible to read the clause as though it applied only to direct government occupations of property. The function of the takings clause is to prevent

Congress from taking the property of one in order to finance and fund activities that benefit the government at large. This abuse does not require the government to occupy land. Today we have extensive concerns with the preservation of endangered species, so why not order a landowner to leave his land in the natural condition, indeed not to enter it at all? If the takings clause does not reach "mere restrictions" on land use, then why must the government even show that its prohibition against entry and development is to protect some species designated as endangered? Why not just allow it to make the designation, without compensation, on the bare assertion that more open spaces are good for the community at large? The same could be said about a federal statute that just prohibited a person from selling, leasing, mortgaging or disposing of property for no particular reason at all. No occupation, therefore no taking. Indeed the idea is so filled with possibilities that we could combine total restrictions on use with total restrictions on alienation and still not have to pay the landowner a dime if this "interpretation" of the takings clause is taken as consistent with its basic structure.

It is examples like this which have persuaded judges of all political persuasions that restrictions on land use cannot receive any categorical exemptions from the takings clause. The hard question therefore is to develop a theory which explains which type of restrictions can be imposed without compensation and which can be imposed only if compensation is supplied. That determination in turn is guided by the concern with the abuses of faction (which could either be loggers or environmentalists, depending on the position of political coalitions). Here if it would be confiscation to take lands from their owner without compensation and give them to the Sierra Club for a nature preserve, then it is confiscation to command that they remain unused and unsold as well to achieve that same objective.

The question then is how far does this critique of regulatory takings extend. As far back as the 1920s Justice Holmes announced in Pennsylvania Coal v. Mahon (1922) a wholly useless test when he decried regulation that went "too far," without indicating why that line was relevant or how it was determined. In my own view is all restrictions on the common law bundle of rights in land count as partial takings for which compensation must be provided unless some justification for the restriction, most notably the prevention of a nuisance) is advanced. This position allows for general regulations that impose a set of reciprocal benefits and burdens on all affected parties, for in those cases the restrictions on the one count as the just compensation needed for the other, such that a strong case can be made that the system will be imposed only if it works for the long-term advantage of the regulated parties.

What is striking about the property decisions of the United States Supreme Court is that they do not go far enough in explicating the takings clause. Rather than dealing in a forthright fashion with partial takings for which the government may offer some justification, the Court in Lucas v. South Carolina Coastal Commission (1992) took the position that only those restrictions that denied the landowner all viable economic use of the property generated an obligation to compensate. The decision was an open invitation for the federal government and the states to contrive systems of regulation that gave the appearance of preserving the rights to use and develop property while strangling them in red tape. Yet to this day the Supreme Court has yet to announce when restrictions go too far and when they do not, in part because it has not supplied an adequate theoretical justificatio for its position. But even its cautious intervention into the takings area to date has curbed to some small extent the kinds of abuses that have been practiced by state and federal

governments. It is an old and honorable maxim of the law that "justice delayed is justice denied".

Thus the past several years have seen a number of cases (Suitum v. Tahoe Regional Planning Agency (1997), City of Monterey v. Del Monte Dunes (1999), Palazzolo v. Rhode Island (2001), and most recently in Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Association now before the court, in which landowners have been subjected to delays ranging up to 20 years before a state agency will determine whether or not to issue the necessary building permits. A comprehensive and coherent approach to the takings clause would reject Justice Scalia's effort to target judicial scrutiny only towards those restrictions that deprive land of all its economic value, and would seek in a forthright fashion to address those all restrictions on development and use of land to see if they run afoul of the takings clause.

The consequence of this inquiry, it must be stressed, is not to prohibit the United States or the states from regulating or taking land for purposes related to the advancement of the public good. The United States could condemn habitat for the protection of endangered species so long as it were prepared to pay the freight. In this sense the purpose of the takings clause is not to short-circuit democratic processes but to strengthen them. Properly applied, it requires government to be transparent in its operation. When it wishes to impose huge private losses for public gains, it can raise the needed appropriation through general taxation and purchase the lands in question. That matter of doing business will prevent government agencies from making extravagant claims for habitat, and will force it to choose more carefully and sensibly the targets for its own activities. The point here was made vivid by the aftermath of Luca. Once the state was required to purchase the land for public use, it did the sensible thing. It sold it off to another private owner, granting him the right to build the

same single-family home that Lucas had sought to build. The ostensible benefits of keeping beachfront land idle disappeared when those costs were placed on the budget of the state. It is hard to see in these tentative judicial moves back to greater enforcement of the takings clause the seeds of an illegitimate conservative judicial activism.

Substantive Due Process The final issue that I wish to address briefly is the question of substantive due process and its ostensible revival by the current conservative majority. To set the stage, the question in Lochner was whether the state could impose criminal sanctions against an employer of certain types of bakers who worked for more than 10 hours per day. The Supreme Court held that this statute infringed on the liberty of contract held by both bakers and their employees and was not justified under the police power as a means to protect the health of the workers or the safety of the public at large. Rather, the Court found, rightly in my view, that this statute was a disguised form of anticompetitive class legislation designed to favor one class of bakers (immigrant bakers who do not use workers on shifts in excess of ten hours) over another (union bakers who did). It regarded the ostensible health and safety justifications of the statute as weak and accordingly struck the statute down.

It is easy today to denounce the statute as an interference with the government power to regulate the economy, but it is important to remember that only Justice Holmes viewed the case in that extreme fashion. Justice Harlan, writing for the other three dissenting justices, found after some inquiry that health and safety justifications were present. When they were not present several years later in Adair v. United States (1908), Justice Harlan struck down a federal statute designed to impose a collective bargaining regime on the railroads.

I believe that these early decisions were correct. I see nothing improper in a Court seeking to preserve competitive institutions against the dangers of legislative protectionism. It seems unavoidable that many cases will present an admixture of health and anticompetitive justifications, and a responsible Court will do its best to sift its way through the relevant evidence, just as it does today when state or federal regulation is attacked as imposing impermissible limitations on the movement of goods in interstate commerce.

Simply to denounce the Lochner decision as the act of a superlegislature, or as efforts of unelected justices to oust the decision of political agents misses the point. Those arguments are so powerful that it becomes impossible to identify any case in which it is proper to exercise the power of judicial review. How ironic it is therefore that Senators Biden and Leahy should push forward this restrictive version of judicial power when they both support the decision in Roe v. Wade (1973) to create a constitutional right to an abortion, where the state interest, the protection of the fetus from involuntary destruction, falls more securely within the traditional police power justifications than any interest asserted by the state in Lochner. It is equally ironic that Senator Biden could don the mantle of judicial restraint when his attack on the Bork nomination some fifteen years ago centered on Bork's unwillingness to find a right to privacy in the federal constitution, a right moreover which is in my view most securely anchored in the logic of substantive due process that animates both Lochner and Roe. But be that as it may, the present Supreme Court has not thrown its lot in with Lochner. It should.

Senatorial Scrutiny of Nominees The speeches of Senators Biden and Leahy in my view raise serious questions about the soundness of their doctrinal position. Under their view the Congress of the United States has acted a stream of wise statutes all of which advance the common good, only to be struck down

by a tone-deaf conservative Supreme Court. I pass by any critique of their legislative positions to make these observations. I have no doubt that each Senator has the right to decide to vote for or against any Presidential nominee for whatever reasons he or she sees fit. It is not possible therefore to craft a legal rule that insulates the ideological views of candidates from their scrutiny. But the entire process is a two way street. The deliberations cannot take place on the assumption that the contestable constitutional views of Senators Biden and Leahy represent some preordained consensus from which all nominees deviate at their peril. Quite the opposite, they have to be prepared to take as well as to give, and to defend their own conclusions against the insist challenges of nominees from the other side. Once that debate takes place in the full public light, I think that the intellectual weaknesses of their position will be fully exposed. Let the debate continue.

A Federal Case

RICHARD A. EPSTEIN

Narrowing the Nation's Power: The Supreme Court Sides with the States, by John T. Noonan Jr. (California, 212 pp., $24.95)

JUDGE NOONAN—a distinguished member of the Federal Court of Appeals for the Ninth Circuit and a professor emeritus of law at Boalt Hall—is on the warpath. His mission is to discredit the Supreme Court's recent decisions in support of federalism and states' rights. Noonan's attack is driven by the deep moral conviction that the Supreme Court has placed technical legal abstractions in the path of the intelligent progressive reforms of the modern welfare state. He thinks that Congress should protect religious freedom against state regulation; that age- and disability-discrimination laws should protect all state and private workers; and that federal power should halt violence against women when state governments fall down on the job.

Noonan does not bother to defend any of his substantive positions; nor shall I critique them here. In all cases, his ulterior motive is to show how novel Supreme Court decisions have frustrated the realization of his self-evident social agenda. As he sees the world, religious liberties are endangered owing to a narrow interpretation of Congress's power to enforce "by appropriate legislation" the religious freedom that the Fourteenth Amendment protects against state governments. The misguided use of sovereign immunity prevents Congress from allowing state workers to sue states under antidiscrimination laws; and artificial limitations on Congress's power to regulate interstate commerce frustrate the effective enforcement of the criminal law.

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In dealing with these constitutional issues, Noonan wisely refuses to rely on the now-standard—indeed stale—charges of judicial activism. But his analysis of the authorities is wholly one-sided and historically flawed. Let's review them from the top.

On religious freedom, Noonan's Exhibit A is *City of Boerne v. Flores*, which in 1997 struck down the Religious Freedom Restoration Act of 1993. RFRA was passed by a strong Left-Right coalition justly incensed by the 1990 Supreme Court decision in *Employment Division v. Smith*, which had held that the state needed no special justification to enforce neutral criminal laws against religious believers (the *Smith* case involved a prohibition against the religious use of peyote). *Boerne* raised the question of whether a religious organization that wanted to build onto its church could escape the strictures of the state landmark-preservation statute. RFRA stipulated that the states had to show a compelling state interest to override the church's choice. Clearly, Noonan cannot sound the clarion call for legislative supremacy, for then he would have to acquiesce in *Smith*; but he objects to *Boerne* nonetheless, on the grounds that the Court arbitrarily displaced Congress's power to "enforce, by appropriate legislation," the commands of the Fourteenth Amendment.

On the narrow question in *Boerne*, however, the Supreme Court had the better of the argument. Congress may choose new remedies to enforce the law against admitted violations of the Fourteenth Amendment, but so long as judicial review remains proper under *Marbury v. Madison*, Congress cannot expand the reach of that amendment by conjuring up new kinds of violations. Unlike the southern resistance in the 1960s that prompted civil rights legislation, RFRA did not respond to any pervasive state violation of the constitutional protections recognized under *Smith*. The 1993 legislation did not remedy any constitutional wrongs; it only expanded the scope of the free exercise of religion. Noonan would have been on strong ground if he had openly urged the Supreme Court to overrule *Smith*. But if *Smith* is right on the free-exercise issue, then *Boerne* is right on federalism.

Noonan does no better on the question of the vexed doctrine of sovereign immunity, which provides that no ordinary person can sue a state for damages without that state's consent. I share Noonan's distaste for the doctrine. Noonan correctly points out that the principle of sovereign immunity is nowhere articulated in the original Constitution, whose explicit language grants the federal courts jurisdiction over disputes between individuals and states. In the 1793 decision of *Chisholm v. Georgia*, the Supreme Court read this jurisdictional provision to allow a South Carolina citizen to sue Georgia in federal court for debts owed on a contract of sale. The resulting furor sparked in 1798 the passage of the Eleventh Amendment, which provides that "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." Self-evidently, these words do not block a federal suit by a citizen against *his own* state.

Noonan condemns a number of recent Supreme Court decisions.

In Noonan's view, this brief analysis richly condemns such recent Supreme Court decisions as *Maine v. Alden*, which barred citizens from suing their state employers under the Fair Labor Standards Act, and *Kimel v. Florida Board of Regents*, which reached the same conclusion on age discrimination. But here, too, Noonan comes out second-best. First, as he acknowledges, *Alden* and *Kimel* are not recent innovations. Their comprehensive view of sovereign immunity had been explicitly articulated in 1890 when the Supreme Court, in *Hans v.*

Louisiana, protected Louisiana from a suit in federal court when it reneged on its bond payments. Nor was *Hans* weakly argued: Every state in the Union accepted sovereign immunity in 1789, so that no citizen could sue his own state in its courts without its consent. The Eleventh Amendment did not invent sovereign immunity; it just corrected the Supreme Court for ignoring it in *Chisholm*, as the word "construed" suggests. As *Hans* argued, the amendment is only intelligible against the background presumption of state sovereign immunity against private damage suits.

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The erroneous interpretation of the Commerce Clause paved the way for federal overreaching.

■

This position is buttressed by powerful historical support, from such luminaries as John Marshall and Alexander Hamilton. The latter concluded in *Federalist* Number 81 that "to ascribe to the federal courts, by mere implication, and in destruction of a preexisting right of the State governments, a power which would involve such a consequence [the rejection of sovereign immunity] would be altogether forced and unwarrantable." Hamilton recognized that sovereign immunity within a national union made no sense for suits between states, or suits between the United States and an individual state. He could not have imagined how the passage of the Bill of Rights—in particular the takings clause—or the Fourteenth Amendment might alter this balance. The issue here is extremely complicated, and Noonan is perhaps right that sovereign immunity does not insulate the states from damage actions in federal court under, say, the federal copyright law; but he does not come anywhere near proving that the Court's invocation of sovereign immunity usurped Congress's legislative power.

Finally, we have Noonan's insistence that Congress's power "to regulate Commerce . . . among the several States" allowed it to enact the Violence Against Women Act, which imposed criminal sanctions and created private rights of action for ordinary state offenses of rape and murder. John Marshall's great 1824 decision in *Gibbons v. Ogden* held that "commerce" covered both navigation and trade among the several states, but it explicitly denied that Congress had, for example, the power to enact quarantine laws before or after the journey. His distinction between manufacture and trade was respected by the Supreme Court until 1937 when the Court, bowing to New Deal pressures, ran roughshod over the doctrine of enumerated powers by allowing the federal government to regulate all local activities because of their indirect nationwide economic effects. The new (and erroneous) interpretation of the Commerce Clause paved the way for the federal regulation of manufacturing unions and agriculture. Yet when—in the 2000 *United States v. Morrison* decision—the Supreme Court struck down portions of the Violence Against Women Act, it refused to cut back on these other, dubious extensions of the commerce power; it confined its ruling to isolated criminal actions.

Noonan offers no explanation of why this slight retrenchment of the Commerce Clause is inconsistent with the federal design, or how it frustrates law enforcement. He never explains why it is that if Congress can regulate rape, it cannot displace the states in the regulation of marriage and divorce, or indeed anything else. His only lament is that *if* the *Morrison* plaintiff's hotly contested allegations of gang rape were true, *then* Congress should not have been rendered helpless to fill a gap in the state law. But he never pauses to ask why Virginia refused to prosecute criminally, nor why the plaintiff refused to bring an ordinary tort action in state court.

Noonan is, of course, entitled to side with the four liberal dissenters in *Morrison*, just as the *New York Times* is free to celebrate this slim and unpersuasive volume as the decisive exposé of a hypocritical conservative majority on the Supreme Court. But the truth is otherwise. The Supreme Court's federalism rulings give much to argue about, but little to denounce. Noonan simply lacks the historical or intellectual ammunition to wage his three-front war to a successful conclusion. **NR**

TESTIMONY BEFORE THE UNITED STATES SENATE JUDICIARY COMMITTEE

HEARING ON "NARROWING THE NATION'S POWER:
THE SUPREME COURT SIDES WITH THE STATES"
BY JOHN T. NOONAN, JR.

October 1, 2002

Testimony of
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Testimony of Prof. Marci A. Hamilton
Before U.S. Senate Judiciary Committee
October 1, 2002

Thank you, Mr. Chairman and members of the Committee, for inviting me to testify today on the important issue of the Supreme Court's federalism jurisprudence. I hold the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University, where I specialize in constitutional law, particularly federalism and church state issues. I write, lecture, and testify frequently on these issues. I clerked for Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit and for Justice Sandra Day O'Connor of the Supreme Court. Perhaps most important for these hearings, I was lead counsel for the successful City of Boerne, Texas in *Boerne v. Flores*, 521 U.S. 507 (1997), a seminal federalism case.

Judge John Noonan has written a book—"Narrowing the Nation's Power: The Supreme Court Sides with the States"--in which he has expressed in strong terms his disagreement with the Supreme Court's federalism jurisprudence. I am grateful to be here today to explain why I believe Judge Noonan's thesis is misguided. The Supreme Court has not sided with the states, though this is a popular misconception, but rather with the Constitution.

Let me begin by pointing to one line in Judge Noonan's book with which I strongly agree: the Court's federalism cases "have been [decided] with great deliberateness, great sincerity, great conviction that they are essential to the preservation of our federal form of government." (p.9) The good faith of the Justices implementing

the Constitution's explicit and inherent federalism limits cannot and should not be questioned.

There are some relevant principles on which there is no disagreement.

(1) It is the province of the Supreme Court to say what the law—including the Constitution—is. Marbury v. Madison, 5 U.S. (1 Cranch), 137 (1803).

(2) The Supreme Court is charged with drawing the lines of power set out by the Constitution.

(3) The federal courts routinely determine the constitutional boundaries between the federal branches (through separation of powers doctrine) and between church and state.

(4) One of the Constitution's fundamentals is that governing power is divided between the federal government and the states.

(5) From 1936 to 1995, the Supreme Court did not police the boundary between the federal and state governments, but rather gave the federal government carte blanche to enact any law at will.

(6) Since 1995, the Supreme Court has clarified the boundaries of power between the federal government and the states.

(7) The Tenth Amendment is a limit on congressional power: "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."

(8) The Congress is properly limited by the Constitution.

(9) The states are properly limited by the Constitution.

Taken together, these principles fully support the Supreme Court's federalism jurisprudence.

Judge Noonan apparently believes the Constitution places no meaningful limits on Congress's capacity to regulate the states. Judge Noonan begins his book with reference to Alexander Hamilton, writing to George Washington that "[t]here are

some things the General Government has clearly a right to do—there are others which it has clearly no right to meddle with, and there is a good deal of middle ground." This is a very odd quote for his purpose, which is to prove that Congress should have plenary power over all subject areas, as it shows that there was clear intent at the time of the framing, even among the most ardent Federalist, that the states would retain certain core areas of power.

Until 1995, there was virtually no middle ground left and there was precious little ground reserved exclusively to the states; rather, Congress (and the policy elites) assumed it had unlimited power. The Supreme Court's refusal to take up federalism principles for most of the twentieth century and Congress's willingness to move in where no limits existed almost eliminated those arenas where Congress "clearly [has] no right to meddle with." Rather, we reached a moment in history where Congress had persuaded itself it had plenary power over *any* policy item a lobbyist could conjure. It is that sense of entitlement to plenary power that appears to motivate Judge Noonan's book and leads him to erroneous conclusions about the proper role of federalism.

Judge Noonan does not quote another passage by Alexander Hamilton, though it is relevant to his task. Hamilton mistakenly believed that Congress would not have the desire to encroach on the arenas controlled by the states, but rather would only be attracted to the new powers given to the federal legislature:

> It may be said that [the constitutional design] would tend to render the government of the Union too powerful, and to enable it to absorb those residuary authorities, which it might be judged proper to leave with the States for local purposes. Allowing the utmost latitude to the love of power which any reasonable man can require, I confess I am at a loss to discover what temptation the persons intrusted with the administration of the general government could ever feel to divest the States of the authorities of that description. The regulation of the mere domestic police

> of a State appears to me to hold out slender allurements to ambition. Commerce, finance, negotiation, and war seem to comprehend all the objects which have charms for minds governed by that passion; and all the powers necessary to those objects ought in the first instance to be lodged in the national depository. *The administration of private justice between the citizens of the same State, the supervision of agriculture and of other concerns of a similar nature, all those things, in short, which are proper to be provided for by local legislation, can never be desirable cares of a general jurisdiction.* It is therefore improbable that there should exist a disposition in the federal councils to usurp the powers with which they are connected; because the attempt to exercise those powers would be as troublesome as it would be nugatory; and that possession of them, for that reason, would contribute nothing to the dignity, to the importance, or to the splendor of the national government.[1]

How wrong he was. The innate pride in national issues in which Hamilton placed his faith has not been a check on the "love of power." To the contrary, there is no local arena into which Congress has been unwilling to venture. Indeed, the situation is so bad that the debate has become whether there is *any* identifiable arena of local control left. Land use? Education? Crime?

The federalism cases unfortunately show Congress at its worst—grabbing for power as it imposed fewer and fewer restraints on itself, vis-à-vis the states. For example, when Congress enacted the Gun-free School Zones Act, it did not even consider the constitutional basis of its action. U.S. v. Lopez, 514 U.S. 549, 551, 559, 561(1995). When Congress enacted the Religious Freedom Restoration Act, it did not consult with the state and local governments on the likely impact of a law that would apply strict scrutiny to *every* general law that affected religious claimants.

The Court is not imposing its policies on the nation. Despite Judge Noonan's charges, the Court has not usurped policymaking power and has not aggrandized its own power, but rather has embraced its responsibility to draw the constitutionally mandated

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[1] The Federalist No. 17 (Alexander Hamilton) (emphasis added).

lines of power. It is doing nothing different in the federalism cases than the courts do routinely in separation of powers and church-state cases. The burden of proof lies with those who would disable the courts vis-à-vis federalism to explain why the federal state divide is off-limits, but the courts properly demarcate the boundaries between federal branches and between church and state. There is nothing in Judge Noonan's work or in the work of others criticizing the Court that satisfactorily explains why the Court should stand down when it comes to federalism but continue to arbitrate the separation of powers and church-state separation.

The federalism cases do not leave civil rights out in the cold. Although this would be hard to decipher if one were to read "Narrowing the Nation's Power" and not the cases, the pragmatic result of the federalism decisions is not to shut down any particular policy, but rather to send the lobbyists to the states on particular issues. There is no constitutional guarantee that lobbyists need have offices in Washington only.

In fact, in two civil rights arenas--prohibiting age and disability discrimination--the Court made a point of noting that the states had already enacted laws prohibiting such discrimination. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 91 n.1, 92 (2000); Bd. of Trustees v. Garrett, 531 U.S. 356, 368 n.5, 374 n.9 (2001). Thus, the heat and light Judge Noonan trains on these decisions is odd, to say the least.

"Narrowing the Nation's Power" underexplains the Supreme Court's Eleventh Amendment cases. One of the means the Court has used to bring Congress back within reasonable constitutional boundaries and to give the states some room within which to act as sovereigns, is to strengthen the Eleventh Amendment doctrine. The Eleventh Amendment is one of the constitutional features that reinforces the Framers'

clear intent to set up a federal republic, one wherein the states retained significant power to serve the public good alongside the federal government.

Under the doctrine, the states are protected from suits for damages, unless they abrogate their immunity. Yet, there are still ample means of forcing the states to obey the federal law (assuming the law was enacted within Congress's enumerated powers). As the Court explained in *Garrett*, a holding that the Eleventh Amendment prohibits a suit against a state for monetary damages still leaves open suits brought by the United States for monetary damages, private actions for injunctive relief, and state laws providing "independent avenues of redress." 531 U.S. 356, 374 n.9 (2001).

It is my view that the recent federalism cases do not invalidate the vast majority of congressional lawmaking and certainly do not impede any civil rights agenda. Rather, the Court's decisions have called on the Congress to ask whether the states might already have acted on a particular issue, to engage in a dialogue with the states, and to respect the states. That seems hardly worthy of the disapprobation heaped upon it by Judge Noonan, but rather worthy of the high praise earned when a court pursues fundamental constitutional principles.

In sum, it is my view that Judge Noonan has misjudged the Supreme Court's federalism decisions, and the strong constitutional bases for them. The Court should be praised for its wisdom and perseverance in the federalism cases, not castigated.

Thank you again for the honor of appearing before this Committee on these important national issues.

Marci A. Hamilton
Paul R. Verkuil Chair in Public Law

Statement of
The Honorable Orrin Hatch
United States Senator
Utah

October 1, 2002

PRINTABLE VERSION

First, I would like to applaud my friend from New York for holding this hearing, which I hope will be a high-minded discussion of the constitutional structure and theories that underlie the Supreme Court's recent jurisprudence in the area known as federalism, which includes cases interpreting the commerce clause and the doctrine of sovereign immunity.

Views of those cases defy partisan or political pigeonholing. There are people on both sides of the political aisle who agree, and disagree, with the Supreme Court from time to time. There are subtleties that are not explained simply by whether a person generally favors state power over federal power. For instance, I have been critical of the Court's City of Boerne decision, not because I disagree with the notion of state or local control - I don't - but rather because I believe the First Amendment protects religious freedom against ANY government that seeks to interfere. A majority of the Supreme Court happened to disagree with me, and I respect that. That is our system of justice under the Constitution. For different reasons, I was troubled by the College State Bank case, which caused a great deal of uncertainty among the owners of intellectual property. So these issues are not a simple matter of politics.

A second point that must be made is that the Supreme Court's federalism decisions are often wildly exaggerated in the media. Most of the decisions have been pretty narrow, affecting only one part of a larger Act of Congress, and they have certainly not left people without legal remedies. In the Morrison case, for example, the Court's decision left intact many important programs, which I happened to co-sponsor with Senator Biden, aimed at reducing violence against women and had no adverse affect on the existing state laws designed to prevent and punish acts of violence. And the sovereign immunity cases, while blocking private suits for money damages, leave open a number of possible remedies - including injunctions - that protect people in important ways. I hope our witnesses will illuminate these issues further.

Page 1 of 3

It is a great pleasure to welcome our distinguished witnesses here today, and I'll start with Professor Marci Hamilton. She holds the Paul R. Verkuil Chair in Public Law at the Benjamin N. Cardozo School of Law, Yeshiva University,

where she specializes in constitutional law, particularly federalism and church/state issues. She served as a law clerk to Chief Judge Edward R. Becker of the United States Court of Appeals for the Third Circuit and for Justice Sandra Day O'Connor of the Supreme Court. Perhaps most important for today's hearing, she was lead counsel for the successful City of Boerne, Texas in Boerne v. Flores, a seminal federalism case.

It is also a great pleasure to welcome Circuit Judge John Noonan, an outstanding federal judge who was a renown scholar and teacher before he took the bench. Judge Noonan's most recent book, Narrowing the Nation's Power: The Supreme Court Sides with the States, shows that he continues his great scholarship. The book of his with which I am most familiar is A Private Choice, published in 1979, which is a scholarly condemnation of the Supreme Court's decision in Roe v. Wade. He demolishes every conceivable argument on behalf of the liberty of abortion, concluding with a twelve-point indictment of legalized abortion which begins as follows:

The liberty established by The Abortion Cases has no foundation in the Constitution of the United States. It was established by an act of raw judicial power. Its establishment was illegitimate and unprincipled, the imposition of the personal beliefs of seven justices on the women and men of fifty states. The continuation of the liberty is a continuing affront to constitutional government in this country. [(Page 189) (emphasis added)].

Professor Noonan drafted and lobbied for a constitutional amendment to overturn Roe and to return the power to outlaw abortions to the states. His federalism approach influenced me when I co-sponsored the Human Life Amendment in 1981. So I have great respect for Judge Noonan's scholarly opinions on both Roe v. Wade and federalism, regardless of where one might be on the policy of any issue implicated.

Fortunately for the Country, Judge Noonan was confirmed back in 1985, when the single-issue extremist interest groups did not hold such sway over this Committee. I recall that his nomination was attacked by a group called the Federation of Women Lawyer's Judicial Screening Panel, not for his views, the group said, but for the "intemperate zeal with which he holds and expresses them." The group decried his "tone", saying that "[t]here is a certain passion, an emotional pitch, if you will, which pervades Professor Noonan's work on the subject [of abortion]" which, the group said, should force one to "pause and consider whether such fervor could magically disappear with the incantation of the oath of office."

Well, the Judiciary Committee and the Senate looked beyond such unwarranted attacks, and chose instead to take this fine scholar at his word that he would enforce Roe v. Wade and all other controlling Supreme Court precedents. I would like today's record to reflect that Judge Noonan has not, from his perch on the Ninth Circuit, overturned the Supreme Court's abortion decisions - despite the fears of his critics. He has done as he said, as any fine judge should.

The fact that Judge Noonan is here today at the invitation of this Committee

should be a profound warning of the price this Committee pays - and forces the American people to pay - when it deprives the judiciary of the service of high-caliber legal thinkers on the basis of unfounded criticism made by the usual Washington single-issue interest groups. You have to admit, Mr. Chairman, that the Ninth Circuit and the country are better off today for Judge Noonan's service, right? And we would be even better if we confirmed the highly qualified nominees currently pending for that court, Carolyn Kuhl and Jay Bybee.

Judge Noonan is an example of what I have been saying about well-qualified judges: they take seriously their responsibilities of adhering to the Constitution and following precedent. Judge Noonan clearly disagrees with the Supreme Court both on Roe and on the issue of state sovereign immunity. In fact, he has written powerful books challenging the basis for those decisions. Nevertheless, as a lower court judge, he has no qualms whatever about being bound by those very precedents.

Again, I thank the Chairman for holding, and the witnesses for participating in, this forum for discussing the role of the Supreme Court, federalism, and state sovereign immunity.

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UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

HEARING ON

"Narrowing the Nations's Power: The Supreme Court Sides with the States"

October 1, 2002

STATEMENT

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1. Introduction

Mr. Chairman, distinguished members, thank you for the opportunity to submit my remarks on the Rehnquist Court's federalism for your consideration.

My name is Michael Greve. For the past two years, I have directed the American Enterprise Institute's Federalism Project, where I conduct and supervise research and writing on American federalism. Prior to joining the American Enterprise Institute, I directed the Center for Individual Rights, a non-profit constitutional litigation firm. During my tenure, the Center served as defense counsel in *United States v. Morrison*,[1] one of the modern U.S. Supreme Court's landmark federalism decisions.

I received my Ph.D. in Government from Cornell University in 1987. I have written widely on federalism issues for both scholarly and journalistic publications. A list of my writings on the subject is attached, along with my Curriculum Vitae. Several of the listed articles expand upon topics covered only briefly in my testimony. The views expressed in those writings and today's testimony are my own; the American Enterprise Institute as an institution holds no views on the subject.

As a political scientist (rather than an attorney), my interest lies not only in the Supreme Court's doctrines but also in its role as a co-equal branch of government, and my testimony reflects that perspective. To state my conclusion up front: I believe that a sustained public debate about judicial activism serves a compelling public need and purpose. As my occupational pursuits suggest, I am still more firmly persuaded that a public debate about federalism would be a highly instructive and productive exercise. Conjoining those two debates, however, is bound to confuse rather than illuminate both of these important issues and the political decisions that are at stake.

2. *Conservative* Activism?

At the outset, an inquiry into the Rehnquist Court's federalism as a form of "conservative judicial activism" raises the question of whether the Court's federalism—assuming that it constitutes activism—is distinctly conservative. That is not a meaningless question. The conjunction of the ideological attribute ("conservative") with "activism" reflects a historical pattern: Periods that are commonly identified as activist— the Marshall Court, the *Lochner* Court, and the Warren-Brennan Court—owe their reputation to the fact that the Court's decisions during those periods coincided with the political agenda of identifiable political constituencies and, usually, of a political party. The politics have varied: the *Lochner* Court curtailed and impeded the Democratic Party's program, whereas the Brennan Court enacted the agenda of the Democratic Party's liberal constituencies. But the identification was close in both these (and all other) cases, which gave the "activism" charges of those eras their plausibility and political force.

The Rehnquist Court's federalism, in sharp contrast, is "conservative" only in the trivial sense of being the work of Justices who are generally viewed as conservative. Unlike activisms past, it does not enact, or thwart, a particular political program or agenda.[2] Its principal beneficiaries have been state and local governments, which are bipartisan; and criminal defendants, who are a constituency (of sorts) but not one on

which the Supreme Court would stake its reputation. With those exceptions, federalism has no consistent champion, conservative or otherwise (certainly not big business, which detests federalism). Conversely, federalism has no predictable political target or victim.[3] One can think of numerous contexts where judicially enforced federalism guarantees are useful for liberal constituencies and causes and/or are harmful to conservatives. The Court's decisions may have made it easier for state institutions to invade privately held patents: in what sense were those "conservative" decisions? The Court's Commerce Clause decisions have arguably (to my mind, conclusively) established that the national government may not criminalize the mere possession of marijuana: in what sense would *that* be a conservative decision?[4]

The Rehnquist Court's federalism, then, must be activist in some other sense. "Activism" may denote (1) the overruling of the Supreme Court's own precedents, and perhaps sharp departures from precedents; (2) an eagerness to enforce constitutional norms against the Congress, rather than state and local governments; or (3) departures from the constitutional text and structure.[5]

The Rehnquist Court has been so resolutely anti-activist in the first dimension (precedents) that little comment is required. While the Court has over the past decade shown a renewed judicial respect for enforceable federalism principles, that shift has occurred well within the confines of extant case law. The Justices have overruled only two past decisions in this area.[6] They have otherwise gone out of their way to reaffirm the Court's precedents, including questionable decisions that are in my mind best viewed as period pieces.[7] Accordingly, I will limit the remainder of my testimony to activism's second and third dimensions—the Court's role vis-à-vis the Congress, and its departures from the Constitution.

3. The Court and the Congress: The Record

Critics of an "activist" Rehnquist Court have often observed that the Court has, over the past decade, found unconstitutional (or "struck down," as the popular though inaccurate phrase has it) an unusually large number of congressional enactments—as distinct from invalidating state laws (typically, under the Bill of Rights). Many such decisions have implicated structural federalism issues.

The good sense behind this criticism lies in what the late Alexander M. Bickel, perhaps the greatest defender of the judiciary's "passive virtues," called the "antimajoritarian difficulty."[8] Congress is, under the Constitution, a co-equal branch of government, with an independent right and a responsibility to interpret and enforce the Constitution. Unlike the Supreme Court, Congress possesses an unquestionable democratic pedigree and legitimacy. So the Court ought to be circumspect in second-guessing Congress's judgments. For several reasons, however, the claim that the Rehnquist Court's federalism betrays an unusual lack of respect for the Congress seems quite unpersuasive.

First, and respectfully, charges of judicial aggression vis-à-vis the Congress would gain credibility if Congress itself were to guard its constitutional duties and prerogatives with greater care. The proliferation of expedited review provisions over the past years—most recently, in the just-enacted campaign finance reform

legislation—suggests that Congress does not in fact view itself as co-equal but rather as subordinate to a constitutionally supreme Supreme Court. The dearth of constitutional deliberation and argument in congressional debates points in the same direction. The political incentives that induce such conduct are perfectly understandable. Still, against a backdrop of congressional abdication, selective complaints about judicial overreach invariably look opportunistic rather than principled.[9]

Second, *federalism* decisions are inherently less anti-democratic than individual rights decisions. Federalism decisions merely hold that one level of government—the national government—may not pursue a particular objective. *States* are still free and indeed invited to do so. To the extent that limitations on national power invite public debate and politicking in the states, and to the further extent that state-level decisions often reflect varying popular sentiments and preferences more accurately than a uniform national rule, federalism decisions in fact promote democracy. Judicial decisions that affirm, protect or expand individual constitutional rights, in contrast, terminate democratic debate and decisionmaking at all levels of government, including the national level. As briefly discussed below, the Rehnquist Court has continued to issue such decisions with great regularity, and some those cases richly merit the "activism" appellation. But they are precisely *not* federalism decisions.

Third, and most important, the record simply does not support the contention that the Rehnquist Court's federalism represents a unique and distinct form of judicial aggression against the Congress. As a first approximation, we can count judicial declarations of unconstitutionality. While admittedly incomplete, rough, and in some ways misleading, that examination supplies a patch of firm ground in a sea of abstractions.

During Chief Justice Rehnquist's tenure (excluding only the current Term), the Supreme Court has issued 35 decisions holding portions of federal statutes unconstitutional. These decisions—listed in Appendix A to this testimony—were rendered under the following constitutional provisions and doctrines (in order of frequency):

Constitutional Issue	Number of Decisions
First Amendment	14
Federalism	11
Separation of Powers	3
Fifth Amendment (Takings)	3
Export Clause	2
Seventh Amendment	1
We-Said-So Clause[10]	1

Federalism decisions amount to less than one-third of all Rehnquist Court decisions declaring federal legislative provisions unconstitutional, and they are fewer in number than First Amendment rulings (which, with the recent ruling in Ashcroft v. ACLU, have increased to 15). If that "nose count" supports an activism debate about the

Court's federalism, it just as easily supports an activism debate about a judicial "First Amendment rampage."[11]

A somewhat closer—though still impressionistic—look confirms this picture. The federalism count lumps together decisions issued under several different constitutional provisions (the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and the Fourteenth Amendment), whereas the First Amendment damage—if that is the word—was done under a single provision. Moreover, as observers across the political spectrum have noted, the Rehnquist Court has tended to aim its federalism fire at symbolic federal enactments that resemble congressional press releases more than serious operational statutes.[12] Its First Amendment decisions, in contrast, have tended to affect statutes of intense interest to regulated industries, the general public, and members of this body. On the eve—or at least the afternoon—of a judicial invalidation of sizeable chunks of the just-enacted campaign finance legislation, the Rehnquist Court's First Amendment jurisprudence might make a fine subject for an activism debate.

4.The Court and the Congress: Doctrine

In important respects, the preceding assessment still exaggerates the anti-democratic implications of the Rehnquist Court's federalism. Overwhelmingly, the Court's decisions do not forbid Congress to pursue a given objective (while leaving states free to do so). More modestly still, they hold that Congress may not pursue a particular objective *in a certain fashion* (*e.g.*, by "commandeering" state governments or by abrogating their sovereign immunity). Congress has legislated around *United States v. Lopez* and around *City of Boerne v. Flores*;[13] it could easily legislate its way around *United States v. Morrison* and any other federalism decision of the past decade.[14] Most obviously, Congress can always *spend* its way around judicially enforced federalism limitations. Barring a drastic and highly unlikely judicial curtailment of congressional authority under the Spending Clause, that will continue to be the case.

That said, I disagree with interpretations (from left, right, and center) of the Rehnquist Court's federalist "means restrictions" as merely procedural, inconsequential, or neutral "good government" doctrines. Congress generally chooses particular means to facilitate interest group bargains (*i.e.*, legislation). The means chosen are usually the most efficacious to that end (though not necessarily to the statutory objectives). If the means are ruled out of constitutional bounds, then the ends themselves may move beyond reach or at least, become extravagantly more expensive. Accordingly, judicial means restrictions systematically disadvantage political constituencies that favor federal intervention, while favoring constituencies that oppose intervention.

By way of a generic but pertinent example: if the Court "strikes down" a statute that imposes the costs of some federal program on state and local governments, Congress can always re-enact the program by providing full federal funding. That program, though, may never be enacted; it passed in its original form precisely because its beneficiaries and their congressional patrons managed to hide the costs. Thus, the Supreme Court's federalism has the predictable effect of inhibiting Congress's ability to accede to interest group demands. It is in that sense vulnerable to the charge of infringing, in an activist fashion, on congressional prerogatives. That criticism is most plausibly leveled (1) at the

Court's determined resistance to private lawsuits as an instrument of federal policy implementation, and (2) its increased stringency in reviewing congressional fact-finding and means-ends relationships under federal statutes, especially those enacted under Section 5 of the Fourteenth Amendment.

Entitlements And Mandates. For the most part, Rehnquist Court decisions restricting the means of federal legislation enjoin a specific legislative strategy—to wit, *the enlistment of federal courts* in the pursuit of congressional and interest-group objectives. At the constitutional level, Eleventh Amendment sovereign immunity cases provide the clearest example. The tendency is even more pronounced in infra-constitutional, statutory interpretation cases. It is evident, for example, in the Court's great reluctance to detect "implied" private rights of action in federal statutes; in its increasingly restrictive view of Section 1983 actions; in numerous cases that apply a "clear statement" canon of statutory construction; and in other, still more esoteric contexts, such as the scope of the *Ex Parte Young* doctrine.[15]

The Rehnquist Court's campaign against the private enforcement of federal mandates is an open secret—open, because the Chief Justice himself has officially complained, in this body, about the continued proliferation of federal causes of action;[16] secret, because the case law in this area—with the possible exception of the sovereign immunity cases—has attracted far less comment than, for example, *Lopez* and *Morrison*, the highly visible but much less consequential Commerce Clause cases. The Court's entitlement jurisprudence warrants attention, though, for two reasons.[17]

First, the Court's entitlement decisions have a predictable, determinate political effect. They have tended to transform the operation of "cooperative" (federally funded and state-administered) programs from litigation-driven entitlement politics to intergovernmental bargaining. They have strengthened the hand of state governments and, correspondingly, weakened the hand of the intended beneficiaries of federal legislation, of their congressional patrons, and of (some of) the advocacy groups that litigate on behalf of those constituencies.[18] The Rehnquist Court's jurisprudence in this area has already had a substantial impact on intergovernmental relations and constituency politics, and it has yet to run its full course.

Second, the Rehnquist Court's entitlement decisions have already worked a substantial legal regime change. The Court has not touched and will not seriously touch the judicial legacy of the New Deal or the civil rights era. What it will do, however, is to unmake the Brennan Court's welfare state agenda. After the flood of statutory federalism decisions, the Rehnquist Court is only two or three decisions from accomplishing that intended result.

The Brennan Court's agenda rested on the premise that the federal judiciary should facilitate, and expand upon, the congressional imposition of entitlement mandates on state and local governments. The Rehnquist Court, in contrast, views federal Spending Clause statutes as being "in the nature of a contract,"[19] which it will in doubtful cases construe, like all other contracts, against the party that wrote them (the Congress.) The courts will cooperate in the imposition of federal mandates only when Congress has expressed an unmistakable intent to recruit the judiciary for that purpose and when the states have been put on notice that their acceptance of federal funds will entail exposure to private enforcement actions.

The systemic effects of the Rehnquist Court's private-enforcement decisions, coupled with the unmaking of the Brennan legacy, lend initial plausibility to a charge of judicial activism. For three reasons, however, that charge is ultimately unpersuasive.

First, the most immediate and transparent implication of the Rehnquist Court's anti-entitlement federalism decisions is a sharp curtailment of the federal judiciary's role in the design and implementation of federal entitlement programs. It seems odd to describe that sort of jurisprudence as "activist."

Second, the "activism" charge here at issue must presume that federalism (or, more likely, some other constitutional principle) demands unquestioning judicial collusion in the interest-group driven imposition of federal mandates on state and local governments. That presumption, however, runs up both against the Constitution—which enshrines the separation of powers, rather than congressional government—and against a broad, bipartisan consensus. State and local government officials of both parties have aggressively and consistently supported—and, in litigation, advanced—the Rehnquist Court's statutory federalism.[20] Congress itself has over the past decade recognized that federal mandates often harm not only federalism but also the intended beneficiaries of those mandates.[21]

Third, a judicial change of direction may signal, not activism but rather a departure from activist precedents.[22] So here: It was the Brennan Court, in its eagerness to serve as the handmaiden of an omnipotent Congress, that discovered rights and entitlements in statutes that had for decades (in the case of Section 1983, nearly a full century) been understood to imply nothing of the sort. It was the Brennan Court that transformed AFDC from an entitlement program *for the states* into an entitlement program *for individuals*—until Congress, in the 1996 Personal Responsibility and Work Opportunity Act, undid the Court's policy choice and restored welfare policy as a cooperative program between the states and the national government.[23] The Rehnquist Court may in individual cases misconstrue, in an unduly restrictive fashion, a federal contract with the states. For *bona fide* activism, however, one must look to the Brennan Court.

Standard of Review. In a series of federalism decisions, the Rehnquist Court has applied an increasingly stringent standard of judicial review both with respect to congressional fact-finding and the requisite means-ends relationship for federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment.[24] These decisions have attracted much forceful criticism,[25] and the Court's tests and their application in individual cases demand a thoughtful defense. But if the defense of those decisions is more complicated than partisans may wish to acknowledge, the same is true of the attack.

Criticism of the Court's tests cannot start from a baseline of a "rational basis" test and proceed to denounce any more stringent test as "activism." Rational basis review effectively means no judicial review at all (regardless of whether the subject is free speech or federalism). No judicial review means that the structural federalism protections of the Constitution are dead and gone, and federalism will be no more. States will continue to exist—but only as recipients of federal largesse, not as rival centers of power. Therefore, if we are to have federalism at all, the judicial tests must be something more than rational basis review. The Rehnquist Court's tests may not be precisely the right

ones, in design or application, and individual decisions may merit the "activism" moniker. But (to repeat) that conclusion cannot rest on the bare fact that the tests exceed mere rationality.

Moreover, one cannot readily explain why a lessened standard of review is appropriate in federalism cases *but not* in individual-rights or equal-protection cases, where we presumably wish to retain a probing standard. Until the U.S. Supreme Court conceived this double standard in the wake of the New Deal, nothing in our constitutional history (let alone the Constitution itself) remotely suggested such a double standard. Viewed in its most charitable light, the double standard rests on a particular political theory (about, respectively, the "underrepresentation" of minority interests and the "adequate representation" of the states in the political process) that many scholars find highly implausible.[26] It may be possible to think of a more plausible political theory to support a dual standard of review and to link that theory, in a reasonably direct fashion, to the structure of the Constitution. In the absence of such a theory, it is the double standard for individual-rights and federalism cases, rather than the recent, modest convergence of those standards in the Rehnquist Court's decisions, that warrants a suspicion of judicial activism.

One might contest the step from "no judicial review" to "no federalism." In other words, and as just suggested, one might contend that the political process itself provides protection for federalism. That, of course, was the premise of the Supreme Court's wholesale abdication at the federalism front prior to the Rehnquist Court's rediscovery of judicially enforceable federalism norms. Only a handful of scholars, however, continue to defend that premise,[27] which makes it difficult to characterize its judicial demise as activist *per se*.

One might also contend that federalism, in the sense of protecting states as partially autonomous power centers, is not worth having.[28] That is a respectable argument and, in my estimation, one that merits a far more serious and thoughtful response than federalism's defenders have so far seen fit to provide. It marks, however, the contours of a substantive debate about federalism, rather than judicial style. If critics of the Rehnquist Court's federalism wish to rest their case on this substantive ground, they should say so.

5. Constitutional Federalism

The most meaningful definition of judicial activism centers on the spread between the constitutional structure and judicial decisions. The larger the spread, the more activist the decision. It is in the end impossible to conduct a meaningful debate about judicial activism in isolation from a substantive debate about the Constitution.

That observation is not an endorsement of "strict constructionism." Even assuming—to my mind, implausibly—that such an approach makes sense in some contexts, it makes no sense at all with respect to federalism. As a matter of constitutional text, structure, and history, the Constitution establishes a "compound republic," containing both national and federal elements.[29] It is subject to highly nationalist interpretations and to competing, states-oriented interpretations. The plethora of qualifying nouns and adjectives—"dual federalism," "cooperative federalism," "states'

rights federalism," "administrative federalism," "fiscal federalism," "competitive federalism," and so on—suggests the range. Not all those variants are equally plausible or attractive, and the Constitution plainly establishes outer limits. But federalism's constitutional architecture is much more open than either judicial decisions or the partisans of this or that brand of federalism would lead one to suspect. The Constitution defines a range of possibilities over which we are supposed to argue, rather than a rigid rule of decision.

Judges do not enjoy the luxury of this common-sensical perspective. They must render up-or-down decisions in individual cases, and so they tend to view a structural constitutional principle—federalism—as rather more determinate than in fact it is. Nothing, however, compels us to adopt the judiciary's artificial perspective for all purposes of constitutional discussion. In fact, doing so is quite probably unhealthy. For judges, the view of federalism as a fixed "thing" is a professional hazard; in a broader debate, that view typically signals partisan myopia or demagogy.

Federalism's partial constitutional indeterminacy entails that judicial federalism decisions can easily be wrong (or wrongly reasoned, or on balance less sensible than a different decision) without being necessarily or even probably "activist" in the sense of straying from the Constitution. By way of example, a decision to the effect that the Commerce Clause has no judicially recognizable limits is obviously outside the bounds of the Constitution. (For that reason, no Supreme Court decision has ever so held.) There must be a line that identifies the limits of "interstate commerce." One can debate whether *Lopez* or *Morrison* drew the line in the right place, for the right reasons. But that is a question of better or worse arguments and more or less plausible federalism conceptions. Charges of activism merely confound the debate.

That observation may hold true even when federalism cases involve a binary choice, rather than line-drawing. Consider the highly controversial question of whether Congress may abrogate the states' sovereign immunity pursuant to its Article I powers: *Union Gas* said "yes," while *Seminole Tribe* and its progeny say "no."[30] That is not a line-drawing exercise; one of the answers must be wrong, in a rather fundamental way. I profess agnosticism as to the correct answer. (Even without my comparatively uninformed voice, there are notoriously more opinions than scholars on the true meaning of the Eleventh Amendment.) I am quite confident, however, that *Union Gas* and *Seminole Tribe* are both consistent with constitutionally plausible, albeit very different, conceptions of federalism. I am likewise confident that neither shouts of "activism" nor a posture of "strict constructionism" will assist an informed debate about the scope of sovereign immunity and its constitutional grounding.[31]

I can think of one pro-federalism, pro-states-rights decision in reasonably recent memory—although it pre-dates the Rehnquist Court—that is unquestionably outside the constitutional boundaries.[32] A few other decisions may push those boundaries,[33] and I apprehend that the Court might mistakenly affirm those decisions. Only in that event, however, would I be inclined to revisit my judgment that the Rehnquist Court's federalism has remained, and will remain, well within federalism's constitutional bounds.

6. Activism *or* Federalism

Some Supreme Court decisions strain the constitutional text, structure, and logic so far as to invite a debate about judicial activism. A few decisions are so far beyond any plausible constitutional argument—and so disrespectful of precedent and so contemptuous of democratic decision-making—as to compel that debate.

Some Rehnquist Court decisions comfortably fit that description. As already suggested, though, those decisions are precisely *not* federalism decisions. For what it's worth, they are also not conservative decisions. They are ruthlessly nationalist precedents that, by force of expansive judicial interpretations of individual rights, drastically curtail state and local autonomy. The Rehnquist Court has either issued itself or else, pointedly refused to discard earlier precedents. The clearest example is *Roe v. Wade*: Bereft of any conceivable constitutional rationale, and all by itself more profoundly anti-democratic than the Rehnquist Court's entire federalism corpus, *Roe* has since been confirmed on the grounds that the Supreme Court said so (and the rest of us must follow).[34]

Between 1986 and 2000, the Rehnquist Court has issued over 70 such decisions. (*See* Appendix B.) Needless to say, not all those decisions are controversial, let alone indefensible, and as it happens, I agree with the reasoning and results in most instances. Still, the Rehnquist Court's lapses into extra-constitutional, nationalist judicial imperialism are sufficiently frequent and disconcerting to make a serious debate about judicial activism very much worthwhile. That debate would have to start with *Roe v. Wade*. It might move on to *Planned Parenthood v. Casey*, and *Romer v. Evans*, and *United States v. Virginia*, and *Stenberg v. Carhart*, and *Dickerson v. United States*, and the Equal Protection analysis of seven Justices in *Bush v. Gore*.[35] One could spend weeks in this pantheon of judicial activism without coming anywhere near a federalism decision that is comparably untethered from the constitutional text and structure.

Perhaps, the Rehnquist Court's federalist enthusiasm partakes of, or provides an additional outlet for, a dismayingly activist disposition that is evidenced more clearly by other types of decisions. On that theory, what distinguishes the Rehnquist Court's activism is (a) its randomness (in that it is no longer practiced, in a predictable fashion, on behalf of a particular cause and clientele or, for that matter, any substantive concern other than the Court's own self-importance) and (b) the fact that the Court now feels sufficiently confident to confront Congress as well as state and local governments.[36] Distressing proclamations of judicial supremacy have in fact tagged along with paeans to federalism, and individual federalism opinions raise troubling questions concerning the Court's priorities.[37] But an attempt to *limit* the activism debate to federalism—to the exclusion of nationalist judicial impositions on government at all levels, and in isolation of the larger jurisprudential edifice—would be a transparent charade and, constitutionally speaking, an absurd joke.

The Rehnquist Court's federalism may, however, with a bit of good will on all sides, prompt a debate about federalism. The fact that the Court's federalism cases cannot hold an activist candle to *Roe* does not mean that those decisions are in all instances and respects wise, or well-reasoned, or consistent with the kind of federalism we should aspire to. We can have a judicially enforced federalism that restrains the power of distributional coalitions in American politics—or a federalism that tends to the opposite result. We can have a judicially enforced federalism that empowers states—or a federalism that disciplines the states (along with the federal government), by exposing

them to competitive pressures. An increasingly global, interdependent world may render federalism more plausible and salient—or it may render federalism a "national neurosis."

These and other federalism questions matter greatly. The Constitution forecloses none of the options; it rather challenges us to confront and debate them. In that sense, the Supreme Court's federalism is profoundly faithful to the Constitution: if federalism questions have after a long slumber re-appeared on the political agenda, that is largely because the Supreme Court has put them there. We should gratefully accept that invitation.

Respectfully submitted,

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Appendix (A, B)
Exhibits (Curriculum Vitae, Federalism Publications)

Notes

1 529 U.S. 598 (2000).

2 Experts who view the Supreme Court's federalism jurisprudence with a very jaundiced eye share that sentiment. *See, e.g.*, Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L. J. 477, 514 (2001) ("In the present circumstances, the relationship between interpretations of the Constitution's structural features and any particular political agenda is highly contingent and uncertain.")

3 As noted *infra* Sec. 4, *some* constituencies stand to lose from federalism. But the political branches can easily compensate for those losses.

4 *See, respectively, College Savings Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 627, 527 U.S. 666 (1999) (certain patent and trademark infringement actions against state governments are barred by Eleventh Amendment); and *United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause authority does not extend to regulation of non-economic conduct).

5 Another possible meaning of "activism," the judicial intrusion into political disputes, tends to collapse into a departure-from-the-Constitution analysis. Many First Amendment cases (for example, about campaign finance legislation) have momentous political implications, but no one doubts that the Court should nonetheless decide them. Judicial interference with political results or processes become troublesome when, and because, its political effects are more than merely incidental to the exercise of genuine judicial power—that is, the authority to decide cases and controversies in accordance with law.

6 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *College Savings Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.*, 527 U.S. 666, 680 (1999) (overruling the constructive waiver doctrine of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

7 *See, e.g., United States v. Lopez*, 514 U.S. 549, 560 (1995) (explicitly reaffirming the holding of, *inter alia*, *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)); *United States v. Morrison*, 529 U.S. 598, 620 (2000) (explicitly reaffirming *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

8 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed. 1986).

9 *See* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L. J. 435 (2001).

10 The decision at issue, *Dickerson v. United States*, 530 U.S. 428 (2000) , held that the federal provision (of the Omnibus Crime Control Act) violated no constitutional provision at all but rather a "constitutional" protection created by the Court.

11 In truth, a mere count tells us little about judicial activism. The frequency of judicial invalidations *may* signal activism vis-à-vis the Congress; it may signal something else, such as a greater proclivity on the part of the Congress to test the constitutional boundaries. A responsible assessment requires a more nuanced examination, including an examination of the merits of individual cases. *See infra* Sec. 5.

12 *See, e.g., Printz v. United States*, 521 U.S. 898 (1997) (invalidating certain interim gun registration requirements); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal Gun Free School Zones Act where vast majority of states had equivalent criminal laws in place); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating rarely used civil remedies provision). *See also* Jeffrey Rosen, "Dual Sovereigns," THE NEW REPUBLIC, July 28, 1997, pp. 16-19. The evidence of the Court's tactical decisionmaking at the federalism front is overwhelming; the only question is whether one wants to

celebrate it as statesmanlike and pragmatic or rather criticize it as calculating. The latter charge, however, does not translate into a plausible case for "activism." It rests on the contention that the Court has failed to apply its federalism principles consistently and in all cases (specifically, the cases where such applications might trigger unforeseen or undesirable consequences, including a congressional backlash). Quite so. (*See, e.g.*, GREVE, REAL FEDERALISM 79-82 (1999).) But "activism"? If the Court were to bend First Amendment principles in accordance with perceived political realities, we would call its conduct lots of names, but "activist" is not among them. Much more likely, we would argue that the Court is insufficiently activist in enforcing constitutional norms.

[13] In 1995, both the Senate and House proposed legislation to enact "gun free school zones" (see The Gun-Free School Zones Act of 1995, S. 890, 104th Cong. and H.R. 1608, 104th Cong.). The former, sponsored by Sen. Herb Kohl (D-Wis.), passed, in modified form, as part of the Omnibus Appropriations Bill for fiscal year 1997. Also see Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §§ 2000cc (2000).

[14] *See United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., diss.) (suggesting ways to legislate around the majority decision and opinion).

[15] While the origins of these lines of decisions pre-date the Rehnquist Court, the pace of change has accelerated since the Chief Justice's appointment. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action for disparate impact violation under Title VI); *Blessing v. Freestone*, 520 U.S. 329 (1997) (narrow scope for implied private rights of action); *Suter v. Artist M.*, 503 U.S. 347 (1992) (restrictive view of Sec. 1983 actions); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (clear statement on congressional intent required for imposition of federal mandates that invade core state functions); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (detailed statutory remedial scheme precludes *Ex Parte Young* relief).

[16] *See, e.g.*, WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6.

[17] For a fuller development of the following paragraphs see Michael S. Greve, *Federalism, Yes. Activism, No*. FEDERALISM OUTLOOK No. 7 (July 2001) (available at http://www.federalismproject.org).

[18] "Some of," because certain entitlement constituencies have remained, and will continue to remain, largely immune from the sweep of the Rehnquist Court's statutory federalism. Racial minorities enjoy a *de facto* exemption: it is not easy to explain why the application of the disparate impact provisions of Title VII of the Civil Rights Act (42 U.S.C.A. § 2000e-17) is constitutional under the test of *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* Jesse Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2297 (1998). Still, those protections will remain constitutional in fact. Feminist constituencies, too, are "safe," *see Davis v. Monroe County School Board*, 526 U.S. 629 (1999) and *id.* at 654-5 (Kennedy, J. diss., arguing that majority decision is utterly inconsistent with federalism precedents). Environmental advocacy groups likewise appear to enjoy special judicial favor and consideration, *see Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). All three constituencies may well suffer occasional federalism-induced setbacks in the courts. For already extant examples *see Alexander v. Sandoval*, 532 U.S. 275 (2001); *United States v. Morrison*, 529 U.S. 598 (2000); *Solid Waste Assn. of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Such losses, however, have been marginal; they do not affect the scope and operation of the major federal programs. The reasons why that will remain so are political, not legal. The affected constituencies enjoy too much congressional and media support to become targets of the Supreme Court's federalism. Both the pro-federalism Justices and state litigants know better than to push their federalism luck at these fronts.

[19] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[20] *See*, for one among countless other examples, the *amicus* brief submitted by fifteen states (spanning the ideological spectrum) in *Gonzaga Univ. v. Doe*, 143 Wash 2d 687, 24 P.3d 390 (2001), *cert. granted*, 122 S.Ct. 865 (Jan. 11. 2002). The brief argues (at the outer limits of extant precedent, though to

my mind very plausibly) that *no* Spending Clause statute is enforceable under Section 1983.

[21] That is the premise of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. 104-193, 110 Stat. 2105 (1996), 42 U.S.C, § 1305, at seq., which abolished private entitlements to welfare. (*See infra* n. 23). The substantial drop in welfare enrollments since the enactment of the statute lends support to the contention that discretionary programs may be more effective than entitlement- and litigation-driven ones.

[22] While considerations of stability, reliance interests, etc. counsel a general rule of *stare decisis* especially in a statutory context (*see Patterson v. McLean*, 491 U.S. 164, 172-3 and authorities cited *id.* (1989)) the Supreme Court should, on suitable occasions, reverse its own precedents. A complete failure to do so would signal that the Supreme Court, rather than the Constitution itself, is the supreme law of the land. A stubborn adherence to questionable precedents, on the grounds that "the Court said so," is often an alarming sign of judicial imperialism—activism, if you will. For cases on point *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and *Dickerson v. United States*, 530 U.S. 428 (2000).

[23] R. SHEP MELNICK, BETWEEN THE LINES 65-111 (1994) (chronicling Brennan Court's transformation of AFDC); and Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. 325, 332-37 (1996) (arguing that repeal of individual entitlements constituted the central element of PRWOA).

[24] *See*, respectively, *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 statutes must be congruent and proportionate to the Fourteenth Amendment violations Congress intends to remedy).

[25] *See, e.g.*, Michael W. McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (criticizing the decision as slighting Congress's interpretive functions and prerogatives under the Constitution); and Even H. Caminker, *Appropriate Means-Ends Constraints on Section 5 Powers*, 53 STAN L. REV. 1127 (2001).

[26] *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (criticizing "underrepresentation" theory as implausible in most contexts); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 325 and id. n. 22 (1997) (describing Supreme Court's heavy reliance on process federalist theorists as "somewhat stunning given the many persuasive critiques of their position"; citing several of those critiques); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n. 64 (1985) (process federalism is difficult to understand "as other than a good-hearted joke").

[27] *See, e.g., United States v. Morrison* , 529 U.S. 598 (2000) (determination of what constitutes interstate commerce for constitutional purposes is a judicial rather than congressional task); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (probing inquiry into legislative record and means-ends congruence and proportionality of Section 5 statute); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (same).

[28] For a powerful argument along these lines see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

[29] FEDERALIST PAPERS No. 39 (Madison) (Clinton Rossiter ed. 1961).

[30] *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[31] Here is why: *Seminole Tribe* rests squarely on a line of precedents dating back to *Hans v. Louisiana*, 134 U.S. 1 (1890), unbroken except for *Union Gas*. In that sense, *Union Gas* was the activist departure. On the other hand, the text of the Eleventh Amendment says nothing about governmental immunity from suit by a state's own citizens, and in fact cuts against such immunity. In that sense, *Seminole Tribe* is "activist." We can trade shouts of activism, or we can discuss whether *Hans v. Louisiana*

was correctly decided. I do not profess to know the answer to that question, but it strikes me as the right question.

[32] *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

[33] I would put *Barclay's Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), in that category.

[34] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[35] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans,* 517 U.S. 620 (1996); *United States v. Virginia*, 518 U.S. 515 (1996); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Bush v. Gore,* 531 U.S. 98 (2001).

[36] Jeremy A. Rabkin, *A Supreme Mess at the Supreme Court*, WEEKLY STANDARD, July 17, 2000, at 24.

[37] A prime example is *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* GREVE, REAL FEDERALISM 37-39 and sources cited *id.*

Appendix A

Rehnquist Court Decisions Rendering Federal Statutes Unconstitutional (Organized by Constitutional Provision or Subject Matter) 1986-2001[1]

First Amendment (14)

United States v. United Foods, 533 U.S. 405 (2001).
7 U.S.C. § 6101.

The assessment provision of the Mushroom Promotion, Research, and Consumer Information Act of 1990, mandating that fresh mushroom handlers fund advertisements promoting mushroom sales, violates the First Amendment. Since the assessments were not ancillary to a more comprehensive program restricting market autonomy, the advertising itself was the principal object of the regulatory scheme.

Legal Services Corporation v. Velazquez, 531 U.S. 533 (2001).
42 U.S.C. § 2996 (as conditioned by the Omnibus Consolidated Rescissions and Appropriations Act, § 504).

The Omnibus Consolidated Rescissions and Appropriations Act of 1996, enacting a funding restriction on the Legal Services Corporation, violates the First Amendment. The restriction prohibits LSC funded-attorneys from engaging in representation involving efforts to amend or otherwise challenge the validity of existing welfare laws. LSC attorneys' advice to clients and advocacy to the courts cannot be classified as governmental speech, thus the restriction is impermissible viewpoint-based discrimination.

Bartnicki v. Vopper, 532 U.S. 514 (2001).
18 U.S.C.A. §2511(1)(c).

The Omnibus Crime Control and Safe Streets Act of 1968, prohibiting the disclosure of illegally intercepted wire, electronic, and oral communications by a person that has reason to know that the communication was obtained through an illegal means, violates the First Amendment. The interests served by §2511(1)(c) do not justify its restrictions on speech; privacy concerns give way when balanced against the interest in publishing matters of public importance.

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[1] Citations and summaries for the 2000/1 Term by the AEI Federalism Project (Kim Kosman). All other summaries and citations from THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES (Congressional Research Service, Library of Congress, 1992 edition and 2000 supplement.).

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000).
47 U.S.C. § 561.

Section 505 of the Telecommunications Act of 1996, which required cable TV operators that offer channels primarily devoted to sexually oriented programming to prevent signal bleed either by fully scrambling those channels or by limiting their transmission to designated hours when children are less likely to be watching, violates the First Amendment. The provision is content-based, and therefore can only be upheld if narrowly tailored to promote a compelling governmental interest. The measure is not narrowly tailored, since the Government did not establish that the less restrictive alternative found in section 504 of the Act—that of scrambling a channel at a subscriber's request—would be ineffective.

Greater New Orleans Broadcasting Ass'n v. United States, 527 U.S. 173 (1999).
18 U.S.C. § 1304.

Section 316 of the Communications Act of 1934, which prohibits radio and television broadcasters from carrying advertisements for privately operated casino gambling regardless of the station's or casino's location, violates the First Amendment's protections for commercial speech as applied to prohibit advertising of private casino gambling broadcast by stations located within a state where such gambling is illegal.

Reno v. ACLU, 521 U.S. 844 (1997).
47 U.S.C. §§ 223(a), 223(d).

Two provisions of the Communications Decency Act of 1996—one that prohibits knowing transmission on the Internet of obscene or indecent messages to any recipient under 18 years of age, and the other that prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to anyone under 18 years of age—violate the First Amendment.

Denver Area Educ. Tel. Consortium v. FCC, 518 U.S. 727 (1996).
47 U.S.C § 532(j) and § 531 note.

Section 10(b) of the Cable Television Consumer Protection and Competition Act of 1992, which requires cable operators to segregate and block indecent programming on leased access channels if they do not prohibit it, violates the First Amendment. Section 10(c) of the Act, which permits a cable operator to prevent transmission of ''sexually explicit'' programming on public access channels, also violates the First Amendment.

Colorado Republican Campaign Comm. v. FEC, 518 U.S. 604 (1996).
2 U.S.C. § 441a(d)(3).

The Party Expenditure Provision of the Federal Election Campaign Act, which limits expenditures by a political party ''in connection with the general election campaign of a [congressional] candidate,'' violates the First Amendment when applied to expenditures

that a political party makes independently, without coordination with the candidate.

United States v. National Treasury Employees Union, 513 U.S. 454 (1995).
5 U.S.C. app. § 501.

Section 501(b) of the Ethics in Government Act, as amended in 1989 to prohibit members of Congress and federal employees from accepting honoraria, violates the First Amendment as applied to Executive Branch employees below grade GS–16. The ban is limited to expressive activity and does not include other outside income, and the ''speculative benefits'' of the ban do not justify its ''crudely crafted burden'' on expression.

Rubin v. Coors Brewing Co., 514 U.S. 476 (1995).
27 U.S.C. § 205(e).

The prohibition in section 5(e)(2) of the Federal Alcohol Administration Act of 1935 on the display of alcohol content on beer labels is inconsistent with the protections afforded to commercial speech by the First Amendment. The government's interest in curbing strength wars among brewers is substantial, but, given the ''overall irrationality'' of the regulatory scheme, the labeling prohibition does not directly and materially advance that interest.

United States v. Eichman, 496 U.S. 310 (1990).
18 U.S.C. § 700.

The Flag Protection Act of 1989, criminalizing burning and certain other forms of destruction of the United States flag, violates the First Amendment. Most of the prohibited acts involve disrespectful treatment of the flag, and evidence a purpose to suppress expression out of concern for its likely communicative impact.

Sable Communications of California v. FCC, 492 U.S. 115 (1989).
47 U.S.C. § 223(b)(1).

Amendment to Communications Act of 1934 imposing an outright ban on ''indecent'' but not obscene messages violates the First Amendment, since it has not been shown to be narrowly tailored to further the governmental interest in protecting minors from hearing such messages.

Boos v. Barry, 485 U.S. 312 (1988).
U.S.C.A. Const.Amends. 1, 14; D.C.Code 1981, §§ 22- 1115.

District of Columbia Code § 22–1115, prohibiting the display of any sign within 500 feet of a foreign embassy if the sign tends to bring the foreign government into ''public odium'' or ''public disrepute,'' violates the First Amendment.

FEC v. Massachusetts Citizens for Life, Inc., 479 U.S. 238 (1986).
2 U.S.C. § 441b.

Provision of Federal Election Campaign Act requiring that independent corporate campaign expenditures be financed by voluntary contributions to a separate segregated fund violates the First Amendment as applied to a corporation organized to promote political ideas, having no stockholders, and not serving as a front for a business corporation or union.

Federalism (11)

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).
42 U.S.C. § 12202.

Title I of the Americans With Disabilities Act of 1990 invalidly abrogates states' Eleventh Amendment immunity from suits for money damages. Congress impermissibly abrogated the states' immunity because (1) states are not required by the Fourteenth Amendment to make special accommodations for the disabled, so long as their actions towards such individuals are rational; (2) the legislative record of the ADA fails to show that Congress identified a pattern of irrational state discrimination in employment against the disabled; (3) Congress' § 5 enforcement authority under the Fourteenth Amendment is appropriately exercised only in response to state transgressions, and not constitutional violations by units of local governments; and (4) the rights and remedies created by the ADA against the states raise concerns as to congruence and proportionality.

United States v. Morrison, 529 U.S. 598 (2000).
42 U.S.C. § 13981.

A provision of the Violence Against Women Act that creates a federal civil remedy for victims of gender-motivated violence exceeds congressional power under the Commerce Clause and under section 5 of the Fourteenth Amendment. The commerce power does not authorize Congress to regulate ''noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce. '' The Fourteenth Amendment prohibits only state action, and affords no protection against purely private conduct. Section 13981, however, is not aimed at the conduct of state officials, but is aimed at private conduct.

Kimel v. Florida Bd. Of Regents, 528 U.S. 62 (2000).
29 U.S.C. §§ 216(b), 630(b).

The Fair Labor Standards Act Amendments of 1974, amending the Age Discrimination in Employment Act to subject states to damages actions in federal courts, exceeds congressional power under section 5 of the Fourteenth Amendment. Age is not a suspect classification under the Equal Protection Clause, and the ADEA is ''so out of proportion

to a remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior."

Alden v. Maine, 527 U.S. 706 (1999).
29 U.S.C. §§ 203 (x), 216(b).

Fair Labor Standards Amendments of 1974 subjecting non-consenting states to suits for damages brought by employees in state courts violates the principle of sovereign immunity implicit in the constitutional scheme. Congress lacks power under Article I to subject non-consenting states to suits for damages in state courts.

College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999).
15 U.S.C. § 1122.

The Trademark Remedy Clarification Act, which provided that states shall not be immune from suit under the Trademark Act of 1946 (Lanham Act) "under the eleventh amendment . . . or under any other doctrine of sovereign immunity," did not validly abrogate state sovereign immunity. Congress lacks power to do so in exercise of Arti-cle I powers, and the TRCA cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. The right to be free from a business competitor's false advertising is not a "property right" protected by the Due Process Clause.

Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank, 527 U.S. 627 (1999).
29 U.S.C. § 296.

The Patent and Plant Variety Remedy Clarification Act, which amended the patent laws to expressly abrogate states' sovereign immunity from patent infringement suits is invalid. Congress lacks power to abrogate state immunity in exercise of Article I powers, and the Patent Remedy Clarification Act cannot be justified as an exercise of power under section 5 of the Fourteenth Amendment. Section 5 power is remedial, yet the legislative record reveals no identified pattern of patent infringement by states and the Act's provisions are "out of proportion to a supposed remedial or preventive object."

Printz v. United States, 521 U.S. 898 (1997).
Pub. L. No.103-159.

Interim provisions of the Brady Handgun Violence Prevention Act that require state and local law enforcement officers to conduct background checks on prospective handgun purchasers are inconsistent with the Constitution's allocation of power between Federal and State governments. In *New York v. United States*, 505 U.S. 144 (1992), the Court held that Congress may not compel states to enact or enforce a federal regulatory program, and "Congress cannot circumvent that prohibition by conscripting the State's officers directly."

City of Boerne v. Flores, 521 U.S. 507 (1997).
42 U.S.C. §§2000bb to 2000bb-4.

The Religious Freedom Restoration Act, which directed use of the compelling interest test to determine the validity of laws of general applicability that substantially burden the free exercise of religion, exceeds congressional power under section 5 of the Fourteenth Amendment. Congress' power under section 5 to ''enforce'' the Fourteenth Amendment by ''appropriate legislation'' does not extend to defining the substance of the Amendment's restrictions. This RFRA appears to do. RFRA ''is so far out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.''

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).
25 U.S.C. § 2710(d)(7).

A provision of the Indian Gaming Regulatory Act authorizing an Indian tribe to sue a State in federal court to compel performance of a duty to negotiate in good faith toward the formation of a compact violates the Eleventh Amendment. In exercise of its powers under Article I, Congress may not abrogate States' Eleventh Amendment immunity from suit in federal court. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), is overruled.

United States v. Lopez, 514 U.S. 549 (1995).
18 U.S.C. § 922q.

The Gun Free School Zones Act of 1990, which makes it a criminal offense to knowingly possess a firearm within a school zone, exceeds congressional power under the Commerce Clause. It is ''a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise.'' Possession of a gun at or near a school ''is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce.''

New York v. United States, 505 U.S. 144 (1992).
42 U.S.C. § 2021e(d)(2)(C).

''Take-title'' incentives contained in the Low-Level Radioactive Waste Policy Amendments Act of 1985, designed to encourage states to cooperate in the federal regulatory scheme, offend principles of federalism embodied in the Tenth Amendment. These incentives, which require that non-participating states take title to waste or become liable for generators' damages, cross the line distinguishing encouragement from coercion. Congress may not simply commandeer the legislative and regulatory processes of the states, nor may it force a transfer from generators to state governments. A required choice between two unconstitutionally coercive regulatory techniques is also impermissible.

Separation of Powers (3)

Clinton v. City of New York, 524 U.S. 417 (1998).
2 U.S.C. §§ 691 et seq.

The Line Item Veto Act, which gives the President the authority to ''cancel in whole'' three types of provisions that have been signed into law, violates the Presentment Clause of Article I, section 7. In effect, the law grants to the President ''the unilateral power to change the text of duly enacted statutes.'' This Line Item Veto Act authority differs in important respects from the President's constitutional authority to ''return'' (veto) legislation: the statutory cancellation occurs after rather than before a bill becomes law, and can apply to a part of a bill as well as the entire bill.

Plaut v. Spendthrift Farm, Inc., 514 U.S. 211 (1995).
15 U.S.C. § 78aa-1.

Section 27A(b) of the Securities Exchange Act of 1934, as added in 1991, requiring reinstatement of any section 10(b) actions that were dismissed as time barred subsequent to a 1991 Supreme Court decision, violates the Constitution's separation of powers to the extent that it requires federal courts to reopen final judgments in private civil actions. The provision violates a fundamental principle of Article III that the federal judicial power comprehends the power to render dispositive judgments.

Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, 501 U.S. 252 (1991).
49 U.S.C. App. § 2456(f).

The Metropolitan Washington Airports Act of 1986, which transferred operating control of two Washington, D.C., area airports from the Federal Government to a regional airports authority, violates separation of powers principles by conditioning that transfer on the establishment of a Board of Review, composed of Members of Congress and having veto authority over actions of the airports authority's board of directors.

Fifth Amendment (Takings) (3)

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998).
26 U.S.C. §§ 9701-9722.

The Coal Industry Retiree Health Benefit Act of 1992 is unconstitutional as applied to the petitioner Eastern Enterprises. Pursuant to the Act, the Social Security Commissioner imposed liability on Eastern for funding health care benefits of retirees from the coal industry who had worked for Eastern prior to 1966. Eastern had transferred its coal-related business to a subsidiary in 1965. Four Justices viewed the imposition of liability

on Eastern as a violation of the Takings Clause, and one Justice viewed it as a violation of substantive due process.

Babbitt v. Youpee, 519 U.S. 234 (1997).
25 U.S.C. § 2206.

Section 207 of the Indian Land Consolidation Act, as amended in 1984, effects an unconstitutional taking of property without compensation by restricting a property owner's right to pass on property to his heirs. The amended section, like an earlier version held unconstitutional in *Hodel v. Irving* (1987), provides that certain small interests in Indian land will escheat to the tribe upon death of the owner. None of the changes made in 1984 cures the constitutional defect.

Hodel v. Irving, 481 U.S. 704 (1987).
25 U.S.C. § 2206.

Section of Indian Land Consolidation Act providing for escheat to tribe of fractionated interests in land representing less than 2% of a tract's total acreage violates the Fifth Amendment's takings clause by completely abrogating rights of intestacy and devise.

Export Clause (2)

United States v. United States Shoe Corp., 523 U.S. 360 (1998).
26 U.S.C. §§ 4461, 4462.

The Harbor Maintenance Tax (HMT) violates the Export Clause of the Constitution, Art. I, § 9, cl. 5 to the extent that the tax applies to goods loaded for export at United States ports. The HMT, which requires shippers to pay a uniform charge of 0.125 percent of cargo value on commercial cargo shipped through the Nation's ports, is an impermissible tax rather than a permissible user fee. The value of export cargo does not correspond reliably with federal harbor services used by exporters, and the tax does not, therefore, represent compensation for services rendered.

United States v. IBM Corp., 517 U.S. 843 (1996).
26 U.S.C. § 4371(1).

A federal tax on insurance premiums paid to foreign insurers not subject to the federal income tax violates the Export Clause, Art. I, § 9, cl. 5, as applied to casualty insurance for losses incurred during the shipment of goods from locations within the United States to purchasers abroad.

Seventh Amendment (1)

Feltner v. Columbia Pictures Television, 523 U.S. 340 (1998)
17 U.S.C. § 504 (c).

Section 504(c) of the Copyright Act, which authorizes a copyright owner to recover statutory damages, in lieu of actual damages, ''in a sum of not less than $500 or more than $20,000 as the court considers just,'' does not grant the right to a jury trial on the amount of statutory damages. The Seventh Amendment, however, requires a jury determination of the amount of statutory damages.

We-Said-So Clause (1)

Dickerson v. United States, 530 U.S. 428 (2000).
18 U.S.C. § 3501

A section of the Omnibus Crime Control and Safe Streets Act of 1968 purporting to reinstate the voluntariness principle that had governed the constitutionality of custodial interrogations prior to the Court's decision in *Miranda v. Arizon*a, 384 U.S. 486 (1966), is an invalid attempt by Congress to redefine a constitutional protection defined by the Court. The warnings to suspects required by *Miranda* are constitution-based rules. While the *Miranda* Court invited a legislative rule that would be ''at least as effective'' in protecting a suspect's right to remain silent, section 3501 is not an adequate substitute.

Appendix B

Rehnquist Court Decisions Rendering State Acts and Local Ordinances Unconstitutional, 1986-2000[1]

	State	Local	Total
Structural			
Preemption (statutory)	22	2	23
Dormant Commerce Clause	18	1	19
Other	3	-	3
Total	43	3	46
Individual Rights			
First Amendment	24	11	35
Equal Protection; Fifteenth Amendment	12	2	14
Eighth Amendment; Other Criminal	9	-	9
Due Process; Privacy	8	-	8
Article I Rights, Privileges and Immunities	6	-	6
Total	**59**	**13**	**72**
TOTAL	**102**	**16**	**118**

[1] Data from THE CONSTITUTION OF THE UNITED STATES OF AMERICA, ANALYSIS AND INTERPRETATION, ANNOTATIONS OF CASES DECIDED BY THE SUPREME COURT OF THE UNITED STATES (Congressional Research Service, Library of Congress, 1992 edition and 2000 supplement.) Tabulations by the Federalism Project.

BOOK REVIEW OF

JUDGE JOHN T. NOONAN'S "NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES"

By Michael Greve*

A narrow majority of the U.S. Supreme Court has over the past decade expanded states' rights and immunities against federal authority. These decisions are the target of John T. Noonan's plea against *Narrowing the Nation's Power*. Noonan detests the Court's new doctrines: they are "overextended, unjustified by history, and unworkable in any consistent way." They are "unjust," invite comparison with *Dred Scott* and *Lochner*, and threaten to "return the country to a pre-Civil War understanding of the nation." Noonan's passion, alas, gets the better of him. It is matched, moreover, by his maddening coyness about the scope of his argument and its point of departure.

Noonan's chief merit is to call attention to the fact that the Rehnquist Court's "federalism" has indeed assumed a disconcerting air of judicial imperialism and neo-Confederalism. For example, the Court has repeatedly invoked the "dignity" of the states—an extra-constitutional and, although Noonan does not say so, a distinctly Antifederalist notion—to grant states immunities that have no basis in the constitutional text. The supposed source of state dignity and immunity from private suits is the eleventh amendment, which provides that "the Judicial power of the United States shall not be construed to extend to any suits … against one of the United States by Citizens of another State." The Court has extended that protection to suits by a state's own citizens and,

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moreover, to proceedings in state courts and federal administrative agencies. Noonan is obviously right that the eleventh amendment will not bear that extension.

In the form of a dialogue between a fictitious judge and his law clerks and friends, Noonan characterizes sovereign immunity as not only extra-textual but also self-contradictory. It "works" only because exceptions to the principle (prominently the so-called *Ex parte Young* doctrine, which permits private suits against state officers even when the state itself is immune) prevent the absurd result of placing state conduct entirely beyond the reach of federal law.

While Congress may still abrogate states' immunity when it legislates under the fourteenth amendment (rather than its Article I powers), the Court has subjected such statutes to increasingly stringent review. *City of Boerne v. Flores*, the 1997 decision striking down the federal Religious Freedom Restoration Act, demanded that laws must be "congruent and proportionate" to the ills at which they are directed. In subsequent decisions, the Court has insisted on an adequate congressional record to determine whether challenged statutes meet the *Boerne* standard. Noonan argues that congruence and proportionality translate into "just a hunch as to what seems reasonable." The Justices, he says, have no warrant for substituting their own hunch for that of the Congress. Nor should Congress be compelled to assemble a "record" in the fashion of an administrative agency.

Noonan's arguments and denunciations have been rehearsed in a torrent of law review articles and in the liberal Justices' dissents in leading cases which Noonan summarizes approvingly. The liberal advocacy mob and its patrons in the U.S. Senate have mobilized the same charges against supposedly "activist" judicial nominees. (To his

credit, Noonan views the label as worse than useless.) A respected, Reagan-appointed appellate judge, with an ability to translate arcane legal doctrines into English, could spark a broader, more informed public debate and, perhaps, induce the Justices to re-think their premises. Noonan writes explicitly in pursuit of those objectives—and fails.

Noonan's most obvious problem is his failure to content himself with one argument where three of four will do. For instance, Noonan criticizes the extension of sovereign immunity to situations where states do not act in a governmental capacity but as market participants, as when a state college infringes a patent or trademark. That criticism is persuasive. But what is its point—if sovereign immunity is wholly implausible to begin with? The exercise smacks of an attempt to prop up an argument that will not stand on its own.

More exasperating is Noonan's failure to place his arguments against states' rights into an appropriate constitutional context. The lack of context gives the indictment an underserved aura of plausibility and its author, an equally undeserved aura of moderation.

Noonan is alone in identifying *City of Boerne* in 1997 as "the big break." Scholars usually date the beginning of the Rehnquist Court's federalism earlier—with *New York v. United States* (1992), which bars the federal government from "commandeering" the states; and with *Gregory v. Ashcroft* (1991), the origin of a long line of cases holding than Congress may regulate states only if it makes its intention absolutely clear. If those cases—which Noonan never mentions—were correctly reasoned and decided, the states' rights decisions Noonan denounces may simply be an ill-advised detour on an otherwise rewarding federalism journey.

Is that it? Or is *any* judicial effort to re-establish a state-federal balance hopelessly misguided? Noonan does not say.

By a similar token: are the Court's states' rights decisions more "audacious" than its individual rights rulings? Never mind *Roe v. Wade*: everything Noonan says about states' rights is also true of First Amendment law. It, too features a congruence and proportionality test (called "overbreadth" analysis.) Strikingly, the Rehnquist Court has invalidated more congressional enactments under the First Amendment (fifteen) than under all of its federalism doctrines combined (where the count stands at eleven). Unlike states' rights decisions, First Amendment ruling vitiate entire statutes (regulating, for example, internet decency and the telecommunications industry), not simply their enforcement by private litigants. Unlike states' rights decisions, moreover, First Amendment rulings preclude action by *any* level of government. (Despite the plain text of the amendment, states are considered bound by its strictures.) If we are worried about "narrowing the nation's power," individual rights decisions would be a terrific place to start.

What, in short, *is* the "present danger to the exercise of democratic government"—judicial imperialism, or states' right enthusiasm? Does the latter partake of the former, or is it unique and uniquely destructive? Noonan does not say.

Noonan's overkill and evasion converge on his own vantage point. He draws the important and under-appreciated distinction between states' rights and a constitutional federalism that comprises national and federal elements, suggesting that he defends federalism. He prefaces his book with a quote from Alexander Hamilton's defense of the First Bank of the United States, describing that controversial institution as a

congressional occupation of a "middle ground" between clearly constitutional exercises of federal authority and matters which the national government "has clearly no right to meddle with." Noonan writes, ostensibly, to defend that middle ground against judicial usurpation. But that is not actually his perspective.

"There's nothing," Noonan claims, "to support the view that [state] immunity was part of the constitutional design or inherent in its plan." *Nothing*? Noonan himself is forced to concede that Hamilton, Madison, and Marshall—the leading nationalists of the founding era—recognized some realm of state immunity. Federalism cannot function without it. As John Marshall explained, states may not tax an instrument (the Bank) of the United States, even though that disability appears nowhere in the Constitution. Intergovernmental immunity must run both ways; otherwise, the national government could turn the states into mere dispensers of federal largess.

The fourteenth amendment authorizes Congress to *enforce* the rights recognized therein; it provides no authority to create new rights. The *Boerne* test may or may not be the right way to police that boundary. Noonan, however, dismisses the test *in toto*. He would hand Congress a carte blanche.

The last case-related chapter in Noonan's book is a vituperative critique of *United States v. Morrison* (2000). Properly speaking, the case has no place in the book, for it has nothing to do with state immunities: it held that Congress lacks the power to create a private tort remedy—against other private parties, not states—for acts of "gender-based" violence. If gender-based violence constitutes "interstate commerce," the Court majority reasoned, then nothing is beyond the power of Congress. The dissenters in *Morrison*

never answered that argument. (It is unanswerable.) Noonan provides no answer, either. He simply sides with the dissenters.

Judge Noonan opposes state immunities only incidentally—because he opposes any limit to congressional authority. The middle ground on which he claims to stand has only one extreme. He is no federalist; he is an adherent of the dogmatic nationalism that Robert Nagel, in his splendid and unjustly ignored book on *The Implosion of American Federalism*, has identified as the source of the hysterical opposition to the Rehnquist Court's federalism decisions.

The Court's extra-constitutional states' rights decisions remain troublesome, insofar as fidelity to the constitutional text is a vital means of constraining willful judges. The root of that problem, though, is not states' rights ideology but rather a judicial failure to identify and protect the areas that Congress "has clearly no right to meddle with." If the textual constraints on Congress were enforced, we would need no extra-textual immunities to protect states as rival centers of power.

The Court has not narrowed "the nation's" powers. At most, it has narrowed congressional powers. The true federalism problem is that the Court has not done nearly enough of that.

Statement of
The Honorable Patrick Leahy
United States Senator
Vermont

October 1, 2002

PRINTABLE VERSION

Today's hearing is long overdue. Over the past few years, we have seen an unrelenting assault by the U.S. Supreme Court on the legislative powers of Congress. In a series of five-to-four decisions, the Court's so-called "conservative" wing has radically altered the balance of power between the Congress and the states, greatly restricting our ability to protect the individual rights and liberties of ordinary Americans. These decisions have not been based on the text of the Constitution or on precedent. Instead, the Court appears to have made a policy decision that broad abstract notions of "state sovereignty" are more important than the accountability of state governments to the American people. The Court's imposition of that policy decision over the will of Congress smacks of judicial activism of the most dangerous, anti-democratic kind.

As a member of the bar of the Court, as a U.S. Senator, and as an American, I have the utmost respect for the Court's role in our constitutional system. In matters of constitutional interpretation, the Court's rulings are the supreme law of the land, whether they are decided unanimously or by a single vote. I have defended the Court even when I strongly disagreed with a decision, such as the five-to-four decision in Bush v. Gore. While I felt the Court was wrong, I said that its decision was final and that we all must abide by it.

But as Justice Jackson once said, the Supreme Court is not final because it is infallible. It does make mistakes, as we all do. And we in Congress, who have also taken an oath to uphold the Constitution, should let the Court know when we think it is headed down a dangerous course for our democracy. Our system is one of checks and balances, and just as the Court serves as an important check on the power of the executive and legislative branches, we have a role to play in checking the Court, whether through legislation or, from time to time, when we are called upon to give our advice and consent to high court nominees.

I began expressing my concerns about the Court's new direction in July 1999, shortly after it issued its end-of-term decisions in the Florida Prepaid, College Savings Bank, and Alden cases. In Florida Prepaid and College Savings Bank, the Court ruled that states could no longer be held liable for violating the federal intellectual property laws, even though they can and do enjoy the full protection of those laws for themselves. In Alden, the Court held that states could no longer be held liable for violating the federally-protected right of their employees to get paid for overtime work. In short, the Court held that state institutions were above the law.

The Court's decisions in the Florida Prepaid trilogy have been the subject of bipartisan criticism. Charles Fried, a former Solicitor General during the Reagan Administration, has called these decisions "truly bizarre." Senator Specter has remarked that they "leave us with an absurd and untenable state of affairs," where "States will enjoy an enormous advantage over their private sector competitors." I could not agree more. I also agree with the four dissenting justices that these decisions constitute an egregious example of judicial activism and a misapplication of the Constitution. In their rush to impose their natural law notions of sovereignty as a barrier to democratic regulation, the activist majority cast aside the text of the Constitution, ripped up precedent, and treated Congress with less respect than that due to an administrative agency.

Senator Brownback and I have introduced a bill, S. 2031, that would repair some of the damage caused by the Florida Prepaid decisions by restoring federal remedies for violations of intellectual property rights by states. The Committee held a hearing on the bill in February, and I had hoped that we could have made more progress before the end of the session.

When I discussed the Florida Prepaid decisions in July 1999, I warned that they could endanger a wide range of other federally-protected rights. That prediction unfortunately came to pass. Since then, the Court's abstract notion of state sovereignty has been accumulating concrete victims at ever-increasing speed.

In July 2000, I went to the floor of the Senate to discuss another crop of five-to-four decisions that further chipped away at congressional authority. In Kimel v. Florida Board of Regents, the Court held that state employees are not protected by the Federal law banning age discrimination, notwithstanding Congress's clearly expressed intent. In United States v. Morrison, the Court invalidated a portion of the Violence Against Women's Act that provided a federal remedy for victims of sexual assault and violence. In both cases, the five-justice majority was unimpressed with the evidence that Congress had amassed demonstrating the need for remedial legislation.

As I noted two years ago, these decisions are troubling, both for what they do to the rights of ordinary Americans, and for what they say about the relationship between Congress and the present majority of the Supreme Court. The legislative judgments we make that are reflected in the laws we pass deserve more respect than the Rehnquist Court has shown. It is troubling when five unelected Justices repeatedly second-guess our collective judgments as to whether discrimination and violence against women and other major social problems are serious enough, or affect commerce in the right sort of way, to merit a legislative response.

The Court continued its state sovereignty crusade the following year in the Garrett case. I spoke about this case on the floor the week after it was issued. The Court held that state employees can no longer enforce their right under the Americans with Disabilities Act not to be discriminated against because of a disability. The plaintiff in Garrett was a nurse at the University of Alabama, who was diagnosed with breast cancer, and was demoted after taking sick leave to undergo surgery and chemotherapy.

I was proud to be part of the overwhelming bipartisan consensus that passed the ADA in 1990. I remember the day that the first President Bush signed the ADA into law. He later took the unusual step of writing an eloquent brief to the Supreme Court in support of the ADA and in support of Patricia Garrett's right to her day in court. Sadly, the Court paid little heed to the view of either democratic branch of our government – the Congress that enacted the ADA or the President who signed it into law.

Now it is up to another Congress, and another President Bush, to seek new ways to protect the rights of disabled Americans and other groups who have been sacrificed on the alter of state sovereignty. I believe that Congress needs to remind the Supreme Court that we are a coequal branch of government whose policy determinations deserve respect just as the Court demands respect for its legal determinations.

We should always cherish judicial independence, even when we dislike the results, but we also must defend our democratic role as the peoples' elected representatives. When we see bipartisan policies, supported by the vast majority of the American people, being overturned time and again by the unelected members of an increasingly activist Supreme Court majority, it is our right and duty to voice our concerns.

The Rehnquist Court has embarked on a path of sacrificing the legal rights of individuals in favor of what it calls the "dignity" of the states. Yet there is nothing dignified in claims of immunity that seek to avoid accountability for unlawful discrimination and violations of intellectual property and labor rights. As the peoples' representatives, we have a responsibility to protect their rights and keep their government accountable. There is ample dignity in adherence to the rule of law.

I look forward to today's hearing and thank our witnesses for coming.

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NARROWING THE NATION'S POWER

STATEMENT OF

JOHN T. NOONAN, JR.

BEFORE
THE SENATE JUDICIARY COMMITTEE

OCTOBER 1, 2002

My name is John T. Noonan, Jr. I am a judge of the United States Court of Appeals for the Ninth Circuit, in senior status. I am also currently the holder of the Kluge Chair in American Law and Government at the Center for Scholars at the Library of Congress. In both capacities I believe I have an obligation to cooperate with Congress to enhance the understanding of constitutional law and, if possible, to contribute to its improvement.

I, therefore, have responded to the invitation issued on behalf of this committee by Senator Schumer and Senator Hatch to testify before it on the subject of federalism as shaped by the recent decisions of the Supreme Court. I note from the invitation that this hearing will be a fully bipartisan affair. I further note that the federal legislation held unconstitutional by recent decisions of the Supreme Court was enacted by large bipartisan majorities. I am confident that every senator and every member voting for this legislation believed that Congress was acting constitutionally in enacting it. The issues raised by these decisions are not partisan political issues but cut more deeply into the structure of our American government.

I propose to set out the holding of three interlocking sets of recent decisions which, as a federal judge, I am bound to follow, but which significantly affect the structure of government and the nation's power.

First. All the states have entered the Union "with their sovereignty intact." This proposition was put forward by the Supreme Court in *Blatchford v. Noatak Village*, 501 U.S. 775, 779 (1991). The proposition has been repeated in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54 (1996), *Alden v. Maine*, 517 U.S. 706, 713 (1999), and *Federal Maritime Commission v. South Carolina State Ports Authority*, 122 S. Ct. 1864, 1877 (2002). The sovereignty of the states carries with it immunity from individuals suing them for damages.

Second. The immunity of the states from suits by individuals from damages is not a judge-made rule of common law, but is a constitutional principle embodied in the Eleventh Amendment. *Blatchford v. Noatak Village*, 501 U.S. 775, 779 (1991). As a constitutional principle, the immunity of the states controls and limits the enforcement of federal legislation seeking to bind the states. *Alden v. Maine*, 527 U.S.706, 732 (1999). Enforcement is barred in the courts of a state as much as in the courts of the United States. *Id.*

Third. Under its power to regulate commerce among the states Congress does not have power to pierce the states' immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 47 (1996).

Fourth. Under its power to enforce the Fourteenth Amendment "by appropriate legislation," Congress must conform to criteria now set by the Court in *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) and its sequelae. What is required is:

1. A record of evidence taken by Congress. *Boerne* at 531.

2. The evidence be more than allegations and more than anecdotes. *Bd. of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356, 368 (2001).

3. The evidence must establish the existence of an evil. The evil must affect one of the rights secured by the Fourteenth Amendment. The evil must be current. The evil must be more than local. It must be widespread and national. It must

form a pattern. *Id.* at 374.

4. The response of Congress to the evil must be proportionate to the evil. *Boerne* at 531.

5. The response of Congress must be congruent. *Boerne* at 530.

Corollaries of these criteria are the following:

1. Under the Fourteenth Amendment, Congress cannot enact preventative legislation. Congress is confined to remedying the pattern of an evil already in existence.

2. Under the Fourteenth Amendment, Congress cannot prohibit states from discrimination that is actually irrational but might be supposed to reflect a rational stereotype. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2002).

3. Congress can cut "a somewhat broader swatch" of protection for civil rights than does the Constitution; but the Supreme Court will determine what "somewhat broader" means and how far Congress can go. *Id.* at 81.

4. Only legislation enacted under the Fourteenth Amendment can penetrate a state's immunity to a suit for damages. For that reason, the holders of patents, copyrights or trademarks cannot seek damages from a state institution infringing on their rights as Congress in its patent, copyright and trademark legislation has flunked the *Boerne* criteria. *See Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627, 635-36 (1999).

5. The "preeminent purpose" of immunity is to accord dignity to the states. *Federal Maritime Commission v. South Carolina Ports Authority*, 122 S. Ct. 1864, 1874 (2002). It is "an impermissible affront" to this dignity for an independent federal agency to entertain a suit by an individual against an agency of the state. *Id.*

Commentary On These Cases

The Intact Sovereignty of the Fifty States. The Constitution "is crowded

with provisions which restrain or annul the sovereignty of states in some of the highest branches of their prerogatives." *Martin v. Hunter's Lessee*, 14 U.S. 304, 343 (1816). For example, Article I, section 10 of the Constitution forbids any state to "pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts." The Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." The Fourteenth Amendment provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . ." It is difficult, to say the least, to reconcile the teaching of the Marshall Court in 1816 and the actual provisions of the Constitution with the statement that the states entered the Union with their sovereignty intact.

The Basis for State Immunity. At common law, the king was immune from suit, because it was important to convey to his people that he was a superior being. The elevation of this common law principle to a constitution principle insulating the states from individuals suing for damages has little historical support. The text of the Eleventh Amendment does not mention either sovereignty or immunity.

Hunter v. Martin's Lessee, 14 U.S. 804 (1816); *Cohens v. Virginia*, 19 U.S. 264 (1821); *McCulloch v. Maryland*, 17 U.S. 316 (1819); *Osborn v. Bank of the United States*, 22 U.S. 738 (1824) and *Worcester v. Georgia*, 31 U.S. 6 (1832) are decisions of the Marshall Court that are foundational of our federalism. In each of them the Supreme Court upheld federal jurisdiction over a state at the behest of an individual. In none of these cases was the sovereign immunity of the state or the Eleventh Amendment treated as a barrier to the exercise of federal judicial power.

2. No convincing reason has been put forward as a rationale for state immunity today. A state could not invoke it to avoid payment on its bonds and notes without endangering its credit. A state should not invoke it to escape liability for its torts. A state is not a human being, who has human dignity. A state is not a

king who has to be considered a superior being.

3. The immunity of states survives only because it is not logically and consistently applied. Logically and consistently applied, state immunity would bar actions of habeas corpus by state prisoners and all suits alleging unconstitutional acts by officers of the states. Logically and consistently applied, state immunity will transform the ability of the federal government to protect the rights secured by the Fourteenth Amendment.

The Breadth of the States' Immunity. Today, immunity has two kinds of breadth it did not have as a principle of common law:

First, immunity has been extended to all enterprises that act on behalf of a state. State universities, for example, and state university presses and state university laboratories enjoy the immunity of the state itself. So do a large variety of other boards, commissions, and agencies, as the *Ports Authority*, *supra*, made evident. In 1789, the states did not have these multiple arms.

Second, immunity has been extended to all suits started by individuals against states before federal administrative agencies. In 1789, these independent agencies, set up by Congress to carry out the laws, did not exist. Now they do a substantial part of the work of the federal government. Administrative agencies enforce the Clean Air Act, the Clean Water Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act. As *Ports Authority* makes clear, these federal agencies are now barred from holding administrative hearings on the complaints of a citizen against an agency or activity of a state.

The Commerce Power. The power to regulate commerce implies the power to regulate activity that has a substantial impact on commerce. Robbery and extortion are not commercial activities, but no one has doubted that the Hobbs Act, which prohibits them, is constitutional. See, for example, *United States v. Culbert*, 435 U.S. 371, 373 (1978) ("These words [of the statute] do not lend themselves to

restrictive interpretation; as we have recognized, they "manifest . . . a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery or physical violence") (quoting *Stirone v. United States*, 361 U.S. 212, 215 (1960). The traditional understanding of the power of Congress to regulate commerce in our federal system was expressed by Chief Justice Marshall in these terms: "The power, like all others vested in Congress is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons v. Ogdes*, 22 U.S. 1, 196 (1824). Where in the constitution is immunity of the states "prescribed"?

All Article I Powers. The power of Congress to regulate commerce, the power of Congress to create enforceable labor standards, the power of Congress to provide damage suits for violations of patents and copyrights are Article I powers that the Court in the cases cited has found insufficient to penetrate state immunity. It has not been explicitly decided by the Court whether the bankruptcy law of the United States, created under Article I, can trump state immunity. Nor has the Court decided whether the exercise of the War Powers under Article I can trump state immunity. Logically, immunity, as now conceived by the Court, blunts all powers exercised under Article I.

Judges as Supervisors of Federal Legislation. The criteria of *Boerne* and its sequelae are binding on every federal court. The federal district court in Guam, as much as the Supreme Court itself, must now measure federal law in terms of these criteria As a consequence, every federal judge is made a monitor of Congress. The federal judge will scrutinize a law enacted under the Fourteenth Amendment for the evidence establishing a pattern of the existing evil the law is supposed to cure. The federal judge will determine if the law is a proportionate and congruent response. Before a case reaches the Supreme Court, a variety of federal judges

will exercise this function of monitoring. Congress is subjected to review as a federal administrative agency is subjected to review for the reasonableness of the agency's response to the evidence before it. The burden is on the government to show that evidentiary record was made and that the response of Congress was proportionate and congruent.

The standard set by *City of Boerne* and its sequelae is new, and it is high. It represents a substantial increase in judicial supervision of Congress. It effects a shift in power from the Congress to the judges. Its invention could be understood as an invasion by the judiciary of the sphere created by the Constitution for the Congress.

Under section 5 of the Fourteenth Amendment, Congress has the power to enforce "the provisions" of the amendment by "appropriate legislation." The adjective "appropriate" echoes Chief Justice John Marshall expounding the power of Congress to create a national bank: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adopted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819). By Marshall's test, there is no place for the criteria for federal legislation set by *City of Boerne*.

"Narrowing the Nation's Power, The Supreme Court
Sides with the States" by John T. Noonan, Jr.
Book Review by Bruce Fein*

It is uncommon for an active federal judge to pluck a quill to assail cascades of constitutional decisions by superior deities known collectively as the United States Supreme Court. The intellectual onslaught creates an appearance of bias against faithful implementation in future cases, plus the temerity of an enfant terrible.

It is even more arresting when the judge displays literary dazzle in critiquing areas of law notorious for tedium and unapproachability: namely, the powers of Congress under the Commerce Clause and section 5 of the Fourteenth Amendment; and, the immunity of States from private damage suits.

And the oddities mount when the judge is summoned by the Chairman of the Senate Judiciary Committee on Administrative Oversight and the Courts, Charles Schumer (D. N.Y.) to testify about the Supreme Court's asserted wrong turns. Chairman Schumer gleefully embraced the testimony to fortify his contrived excuses for opposing the nominations of the likes of superstars Mike McConnell, Miguel Estrada, and John Roberts.

This judge of uncommon learning and owlishness is none other than John T. Noonan, Jr. of the United States Court of Appeals for the Ninth Circuit, an appointee of President Ronald Reagan and generally admired by political conservatives. His snappy book, Narrowing the Nation's Power, The Supreme Court Sides with the States, has been keenly relished by the ususal liberal suspects as proof that the Rehnquist Court is saluting the ancien regime in lieu of the enlightened utopianism of Robespierre and Danton.

But Judge Noonan's case against the Court is at best anemic and at worst a troublesome attack on *Marbury v. Madison*, which has crowned the judiciary for two centuries with the final say on what the Constitution means. Even the title wars with the basic understanding that Congress, unlike the States, was entrusted with limited powers. It would not grow from a modest acorn into a mighty oak. As James Madison elaborated in Federalist No. 45: "The power 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 infinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part, be

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* A forthcoming book review to appear in the *Legal Times* on October 28, 2002.

connected. 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."

The prevailing assumption today, however, outside a razor-thin Supreme Court majority, is that Congress can do anything not expressly prohibited. It turns on its head the Madisonian understanding that Congress could do nothing unless authorized by the Constitution, including its generous "necessary and proper" clause.

But the title is a quibble compared with Judge Noonan's misconceived attacks on the Supreme Court's demarcation line between congressional and state powers. His flagship aspersion is cast upon *City of Boerne v. Flores*, 521 U.S. 507 (1997), a case implicating the First Amendment's protection of religious freedom and congressional power to enforce, but not enlarge, the Fourteenth Amendment.

"The Battle of Boerne," to borrow from Judge Noonan's drama-filled prose, featured little drama, not the stuff of wrenching religious persecutions that had stained the nation's past. A Catholic parish sought a permit to expand an historic church structure to accommodate its burgeoning flock at Sunday masses. The Boerne City Council balked because the structure fell within an historic district. The Archbishop of San Antonio countered with a lawsuit under the Religious Freedom Restoration Act (RFRA), bathos compared with the titanic struggle between Henry II and Beckett.

RFRA's origins speak volumes about its constitutional fragility. In *Employment Division, Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), the Supreme Court addressed application of a state law categorically forbidding ingesting peyote to members of the Native American Church who claimed a constitutional exemption for sacramental use. In denying that Free Exercise Clause argument, Justice Antonin Scalia explained that neutral, generally applicable, and evenhandedly applied secular laws may constrain religious practices without proving a compelling government interest. The previous Free Exercise Clause standard announced in *Sherbert v. Verner*, 374 U.S. 398 (1963), required that the latter be demonstrated if the law "substantially burdened" religion. (Justice Scalia added that laws infected with a religiously discriminatory purpose would violate the Clause, a protection with teeth as exemplified in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). The Fourteenth Amendment's ban on racial discrimination likewise requires proof of an invidious intent, as held in *Washington v. Davis*, 426 U.S. 229 (1976)).

Justice Scalia fretted that under the Sherbert standard judges were at sea in deciding how pivotal a practice was to a creed in determining the substantial burden issue, for example, blocking abortion clinic entrances to forestall abortions or refusing to pay taxes to support war. Equally beyond the judicial ken was dividing government objectives between the compelling and non-compelling. Indeed, in the Smith case itself, Justice Sandra Day O'Connor decreed that Oregon's anti-drug law was compelling, while Justices Harry Blackmun, William Brennan, and Thurgood Marshall insisted otherwise. In sum, the Smith standard of neutrality, general applicability, and evenhandedness avoids a Jackson Pollock, Abstract Expressionist interpretation of the Free Exercise Clause.

Members of Congress chorused outrage at the Smith ruling. Whether any had perused and digested the opinion might reasonably be questioned. But it cannot be doubted that constituents across the political and religious spectrum clamored for legislation. And when it comes to a Member's choosing between constituent demands and the Constitution, the choice is never suspenseful.

The House passed RFRA unanimously, the Senate approved 97-3, and the saintly but sin-riddled President William Jefferson Clinton signed the congressional commandment on November 16, 1993. It fastened on the States the non-constitutional standard of Sherbert in lieu of Smith's less adventuresome constitutional construction of the Free Exercise Clause. Thus, RFRA prohibited government from "substantially burdening" religion unless the prohibition was the "least restrictive means" of promoting a "compelling interest."

Congress clutched at section 5 of the Fourteenth Amendment to justify its outrance demand that States jump higher than the Constitution requires. The section states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article [including the Free Exercise Clause]." (emphasis supplied). Enforce is no synonym of enlarge. On the other hand, the term is routinely understood to include remedial measures to overcome past violations which would not be justified without previous illegalities. Congress, for example, was empowered to ban literacy tests as a voting qualification under the Fifteenth Amendment because of past and rampant racially discriminatory abuses. But as regards RFRA, Congress assembled no evidence that States were violating the Free Exercise standard of Smith, and thus there was no constitutional misbehavior to justify hurling Congress into the breach under section 5. Indeed, Congress failed to identify a single instance of religious persecution in the last 40

years. Moreover, in the aftermath of Smith, Oregon exempted the religious use of peyote from its anti-drug laws. Congress similarly authorized the wearing of religious garb by members of the military in the wake of the Supreme Court's upholding a regulation banning the same in *Goldman v. Weinberger*, 475 U.S. 503 (1986). Congress also exempted the Old Order Amish from social security taxes and stopped a logging road through Indian burial grounds after adverse Free Exercise rulings in *United States v. Lee*, 455 U.S. 71 (1982) and *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). And to further demonstrate that fevered imaginations occupied the commanding heights in the RFRA debate, the customarily measured president of the American Civil Liberties Union daftly maligned the Smith decision as "the Dred Scott of first amendment law," as though religious adherents had been declared non-citizens stripped of any rights the majority was bound to respect.

In sum, Congress was insisting in RFRA that it was crowned under section 5 to substitute its interpretation of the Constitution for that of the Supreme Court, and to bind the States accordingly. But that would stiletto *Marbury v. Madison*, and make Congress the ultimate arbiter of its own power. Thus, Congress might ban capital punishment in States by declaring it offensive to the Eighth Amendment. It might prohibit States from punishing religiously inspired, non-violent obstructions of abortion clinics on the theory that the Free Exercise Clause demands that broad accommodation for religious conscience. All State laws with disproportionate impacts on minorities might be prohibited by a congressional declaration that adverse effects is the touchstone of an equal protection violation. Congress might further ban State durational residency rules for obtaining divorces as an unconstitutional burden on the right of interstate travel, although the Supreme Court held to the contrary in *Sosna v. Iowa*, 419 U.S. 393 (1975).

The powers of Congress would be whatever it wanted them to be. The idea of a limited federal government would be expelled from the Constitution. And it speaks volumes on that score that Judge Noonan offers no standard for arresting the congressional colossus he champions under section 5.

The Judge acerbically scolds the *Boerne* decision for its general pronouncement that to pass muster, section 5 legislation must be both "proportional" and "congruent" in relation to the constitutional injury to be prevented or remedied. He hotly protests: "This formula was unprecedented. Proportionality in legislation! Who would measure the proportion? Implicitly, the answer was 'the court.' What measure would the

court use? Implicitly, the answer was 'whatever we find handy.'"

It is difficult to take Noonan's jeering seriously. The staple of the Supreme Court's jurisprudence is the interpretation of open-ended language no more precise than proportional or congruent. For instance, the Fourth Amendment prohibits "unreasonable" searches and seizures. That standard is more elusive than handcuffing an eel, and has begotten a staggering five volume Search and Seizure treatise by Wayne R. LaFave. The Supreme Court's prevailing definition of obscenity is but a modest improvement on Justice Potter Stewart's, "I know it when I see it." Further, the proportionality and congruence loadstars of *Boerne* are no more susceptible to judicial whimsy than the RFRA and *Sherbert* phrases "substantial burden," "compelling government interest," and "least restrictive alternative," all of which Judge Noonan finds untroublesome!

If Boerne is the catastrophe that Noonan imagines, then why did liberal Justices John Paul Stevens and Ruth Bader Ginsburg, the sole full dissenters in *Bush v. Gore* (2000), join the majority opinion of Justice Antony Kennedy? If covert religious persecution was afoot, then why did the city after its Supreme Court victory approve a remodeling plan keeping 80 percent of the 1923 church and adding seven hundred seats?

It is shocking that so little provoked Judge Noonan to cannonade at *Marbury v. Madison,* and rashly denounce the Court for insisting that its interpretation of the Constitution trumped that of Congress or the President in justiciable cases and controversies. He chastised the High Court for telling Congress: "Six or even five of us count for more than five hundred of you because the constitution has provided us with a province and a function in regard to legislation, a duty to give definitive meaning to the foundational document. We are not to be governed by the judgments made by the branches of government that are our co-equals but that are not equal to us in the discharge of this duty. Performing it, we are not only the highest court in the land but the highest authority. Our words constitute the constitution that is now in force."

But that is exactly what Chief Justice John Marshall told Congress in *Marbury v. Madison* to justify his invalidation of a provision of the Judiciary Act of 1789. It is unnerving that a respected federal judge has called that sacred precedent into question, and even more unnerving that a Senate Judiciary Subcommittee Chairman has enthusiastically joined the ranks.

What next? A sequel to President Franklin D. Roosevelt's court-packing machinations?

STATEMENT OF STEPHEN B. PRESSER

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SUBMITTED TO

THE COMMITTEE ON THE JUDICIARY

OF THE UNITED STATES SENATE

"NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES"

October 1, 2002

My name is Stephen B. Presser, I am the Raoul Berger Professor of Legal history at Northwestern University School of Law, in Chicago Illinois. I have previously testified before this subcommittee on June 26, 2001, at the hearing on Judicial Ideology, I have appeared many times before House and Senate Committees to testify about the Constitution and proposed federal laws, and I ask that this written statement be inserted in the record for these hearings. As I have previously indicated, I am in my third decade of teaching and writing about the federal courts and the constitution, and it is that perspective that informs my comments.

The topic of today's hearings deals with the Rehnquist Court's Federalism Jurisprudence and its so-called conservative judicial activism. I should begin by saying that, in my opinion the activism label is something of a misnomer. As you know, Professor Laurence H. Tribe, in his GOD SAVE THIS HONORABLE COURT 103-04 (1985), criticized the Burger Court for being more

"activist" than the Warren Court because it struck down more federal statutes. The striking down of a federal statute, if that statute violates the Constitution, however, should not be regarded as judicial "activism," unless by "activism" one simply means the doing of one's job. I have never cared for the term "activism," which seems ambiguous at best, and misleading, if not pernicious at the worst. I am aware that some conservatives have regarded judge's activities when they throw out state and federal statutes based on the judges' personal views of appropriate policy, and not on the plain meaning of a text or the expressed understanding of the framers', as "judicial activism" but I don't think that is particularly helpful either.

The simple truth is that if the Constitution is to be enforced by a vigilant federal judiciary, as the framers intended, as our scheme of separation of powers and federalism requires, and as Federalist 78 makes plain, then judicial acts to strike down unconstitutional state and federal legislation are sometimes required. This is what federal judges undertake to do when they take their oaths to be faithful to the Constitution. In my opinion this appropriate judicial activity is what the Rehnquist Court has been engaged in its recent "Federalism" jurisprudence. This series of decisions, involving the allocation of powers between the state and federal governments, is required by the structure of the Constitution, implicit in the body of the document, and explicit in the Tenth Amendment.

The Constitution itself spells out the powers of the federal government, and puts some restrictions on the states. According to the ancient legal maxim *expressio unius est exclusio alterius* ("to express one is to exclude the others") the facts that some powers are expressly granted to the federal government while others are not, and some restrictions are placed on the state governments while others are not means that the powers not granted do not belong to the

federal government, nor are the states to be restricted in a manner that the Constitution does not specify. This is made explicit by the 10th Amendment to the Constitution, which states 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."

Again, to stay at the simplest level, the constitutional scheme, made explicit by the Tenth Amendment, was for the federal government to be one of limited and enumerated powers, and to reserve the rest of government to the state and local governments and to the American people themselves.[1] Thus, for example, while the federal government was expressly given the power to coin money, to issue currency, and to regulate interstate commerce, most domestic regulation, including education, criminal law, family law, contract law, tort law, and all of the other common law subjects studied by generations of American law students, were to be matters for the state, rather than the federal governments. This is our scheme of "federalism" or "dual sovereignty." Sometimes, by those who should know better, this has been denigrated as a theory of "states rights," and linked with the rebellion of the Southern states that led to the civil war, or the resistance to the assertion of civil rights by minorities in the second half of the twentieth century, but "states rights" obscures rather than clarifies the constitutional scheme. It is the text of the constitution and its amendments that limns the appropriate sphere of state government, and not any abstract theory of "states rights."

Much of the controversy over the Rehnquist court's federalism jurisprudence has centered

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[1]As Madison makes clear in Federalist 51, one of the principal means by which the Constitution seeks to preserve liberty is by ensuring that state and federal governments will check each other, and zealously seek to keep each other's governments within bounds. The same "checking and balancing" notion is embodied, as Madison also explores in Federalist 51, in separating the powers of government among the three branches, but giving them the means of checking and balancing each other. Federalism and Separation of Powers, then, are the twin devices for checking the exercise of arbitrary power in government, and preserving our rights and privileges. To quote Madison, by these two means the Constitution ensures that "a double security arises to the rights of the people."

around the meaning of the Constitution's "commerce clause," Article I, Section 8, clause 3, which gives to Congress the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It is important to understand, from the outset, that this is not the language of a plenary power to regulate every facet of national life, or even to regulate every aspect of commercial life. Precisely defining the power has not been easy, but there are some attempts to exercise the power by Congress that clearly go too far, and it is only these that the Rehnquist Court has struck down. The two cases that have most prominently been cited in this regard as "judicial activism," *Lopez* and *Morrison*, are really just sensible line-drawing exercises preserving the powers guaranteed to the states by the Tenth Amendment.

United States v. Lopez, 514 U.S. 549 (1995), declared that the "Gun Free School Zones Act of 1990," a federal statute that sought to prohibit the carrying of firearms in or within 1000 feet of a school anywhere in the country, exceeded Congress's powers under the commerce clause. There had been no explicit Congressional findings that such carrying of guns had any effects on interstate commerce, and the arguments to justify the statute - that guns interrupted education, that interrupted education led to a diminishment of commerce, and that this was an effect on commerce substantial enough to justify Congress's power to act – was the kind of argument that could have been used to justify regulation of anything and everything, thus leaving the states with no exclusive Tenth Amendment reserved powers at all. Education has traditionally been one of the clearest areas reserved to the states,[2] providing security at the schools would also have been traditionally regarded as a task of the state and local governments, and to allow the "Gun Free School Zones Act" to be permitted under the commerce clause would

[2]See, e.g., 514 U.S., at 580-83 (Kennedy, J., concurring) ("It is well established that education is a traditional concern of the States.").

simply have been going too far.[3]

Much has also been made of the decision of the Supreme Court in United States v. Morrison, 120 S. Ct. 1720 (2000), which declared that a portion of the federal Violence Against Women Act which allowed a victim of a sexual assault to sue the assailant in federal court was constitutionally invalid. This should have been no surprise, since enforcement of the general criminal law is, again, a traditional prerogative of state and local governments, and not one generally for the federal government.[4] The particular provision of the Violence Against Women

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[3]It should be noted, in passing, that the continuing impact of *Lopez* in the area of the prevention of carrying of guns in or around school is uncertain because Congress has recently passed, as part of an omnibus appropriations bill, an amended "Gun Free School Zones Act,"18 USC 922(q)(2)(A) (Supp. IV 1998), which may have a better chance of passing Constitutional muster. As it has been recently observed, "Per General Reno's suggestion, Congress changed the gravamen of the offense from possessing a firearm in a school zone to possessing a firearm "that has moved in or that otherwise affects interstate or foreign commerce" in a school zone." See generally, Seth J. Safra, Note: The Amended Gun-Free School Zones Act: Doubt as to Its Constitutionality Remains, 50 Duke L.J. 637 (2000)(giving the arguments for and against the constitutionality of the Act as amended).

[4]As my colleague Steven Calabresi observed, in the context of a discussion of *Lopez,* but equally relevant to the issue in *Morrison:*

> Federalizing ordinary state law crimes transfers power and work from state prosecutors to federal prosecutors, from state police forces to the Federal Bureau of Investigation, and from state courts to federal courts. This process raises valid concerns about the sweeping power of the federal government and implicates genuine issues of that civil liberty which is protected by federalism. It is not too difficult in light of this to see why the Court thought the *Lopez* case was an appropriate one in which to draw a line. Had the Court upheld Congress's statute in *Lopez*, it would have been difficult to imagine any federalization of the criminal law that would not be deemed to pass constitutional muster.

Steven G. Calabresi, Federalism and the Rehnquist Court, A Normative Defense, 574 Annals 24, 28 (2001)(Annals of the American Academy of Political and Social Science). Indeed, concerns about the federal government improperly intruding into the realm of the enforcement of the criminal law are as old as the republic itself. See generally, for a discussion of the problem of the federal common law of crimes (it was eventually rejected, as opening too many possibilities for abuse), Stephen B. Presser & Jamil S. Zainaldin, Law and Jurisprudence in American History

Act struck down in *Morrison* was but a small part of the law, however, and the many federal grant programs and other provisions of the Act remain intact

All *Lopez* and *Morrison* do then, is to preserve the traditional ambit of state power, and keep the federal government within its traditionally-bounded powers.[5] There has been some expressed concern that the Rehnquist Court's federalism jurisprudence might place in jeopardy the enforcement of the federal civil rights statutes, which are in part grounded in the Commerce Clause, but there has been no indication at all that the Court has sought or will seek to overturn the decisions upholding these statutes.[6] There will be no return to the days of segregated lunch

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178-200 (4th ed., 2000), and sources there cited.

[5]See, to similar effect, Jones v. United States, 120 S. Ct. 1904 (2000), in which the court unanimously held that federal arson law did not cover the destruction of a personal residence. Such destruction, of course, was a matter for state law, as the protection of property, a matter generally grounded in the common law, and state constitutions and legislation, is one of the paradigm areas for domestic regulation by the states. For the suggestion that *Lopez* swung the pendulum back in a proper direction after the Post-1937 Supreme Court had gone too far in permitting virtually anything to be regulated as "interstate commerce," see, e.g. Ronald D. Rotunda, Symposium: Federalism and the Supreme Court: The 1999 Term: The New States' Rights, The New Federalism, The New Commerce Clause, and the Proposed New Abdication, 25 Okla. City L.Rev. 869, 872 (2000):

> [T]he post-1937 Court [before *Lopez*] appeared to eschew any serious effort to limit the reach of the Commerce Clause to "commerce among the states."[footnote omitted] The Court kept the language of enumerated powers but in practice found that all regulated activity either was in "interstate commerce" or "affected" interstate commerce. [footnote omitted] Many commentators concluded that the Court would allow Congress to regulate whatever it wanted. [footnote omitted] In their view, the only limit on federal power would be the self-restraint of those who exercised it.

For a discussion of *Jones*, see Id., at 922-924.

[6]See, e.g. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung 379 U.S. 294 (Upholding the provisions of the 1964 Civil Rights Act which forbid discrimination in public accommodation as a permissible exercise of Congress's powers under

counters, segregated hotels, or segregated motels, because whatever the limits of the Commerce Clause as understood by the Rehnquist court, these limits are broad enough to include within them the commerce associated with the interstate transportation of food to restaurants, and the commerce involved in interstate travel by patrons of hotels and motels[7].

Another line of cases in the Rehnquist Court that has attracted the attention of critics who worry that the Court is too concerned with the traditional prerogatives of states are those that have invoked the concept of "sovereign immunity" to prevent lawsuits from being brought against states by private citizens.[8] But the concept of protecting states from lawsuits antedates the Constitution, was probably a part of the original understanding of the Constitution, and is certainly made clear by the Eleventh Amendment.[9] It it reflects a sentiment that state treasuries

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the Commerce clause). For a similar reading of the Rehnquist's Court attitude toward the civil rights cases, see Rotunda, supra not 5.

[7]See note 6, supra.

[8]See especially in this regard the 1999 trilogy of cases Alden v. Maine, 119 S.Ct. 2240 (1999)(Chisholm v. Georgia, 2 Dall. 419 (1793), which permitted a law suit in federal court by private citizens against the state of Georgia was inconsistent with the original understanding of the Constitution. This original understanding was clarified in the Eleventh Amendment, which confirmed the immunity of states against lawsuits filed without their consent. Accordingly, while the Constitution could expressly abrogate sovereign immunity, as has been done for example in Section 5 of the Fourteenth Amendment, legislation passed by Congress under Article I of the Constitution may not abrogate state sovereign immunity. Thus Maine was immune from a lawsuit brought by a private party under the federal Fair Labor Standards Act of 1938), Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199 (1999)(a lawsuit brought under a federal patent act provision could not be characterized as one brought pursuant to Congress's authority under the Fourteenth Amendment, but rather was an Article I matter), and College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, 119 S.Ct.119 S.Ct. 2219 (1999)(Sovereign immunity is abrogated also by a waiver of that immunity by the state, but there was no such waiver in the case at hand) . These general principles of state sovereign immunity were also expounded by the Rehnquist Court in Seminole Tribe of Florida v. Florida, 517 US 44 (1996).

[9]See Alden v. Maine, supra note 8.

should not be subject to bankruptcy as a result of actions brought by private citizens.

Especially in our era, when litigation can be crippling and when the availability of large damage judgements or expensive settlements in class actions is an almost irresistible lure for some lawyers on contingency fees (fees that were not even generally available when sovereign immunity was first protected in the nation),[10] it makes good sense to discourage such lawsuits. State budgets ought primarily to be available for traditional state spending needs, such as education, medicaid and other payments to those in need of welfare assistance, aid to families with dependent children, or salaries for state law enforcement officials.[11] This is not to say that individuals should not be entitled to relief against the states when it is actually warranted, and the Rehnquist Court has recognized this in cases such as Board of Trustees of the Univ. of Alabama v. Garrett, 121 S. Ct. 955 (2001), which has preserved remedies against state officials under the Americans with Disabilities Act, and Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000), which has preserved such remedies under the federal Age Discrimination in Employment Act.

The idea that states should be permitted to preserve their traditional ability to set their own budgets and plan for their own law enforcement activities is the notion that also lies behind the third important area of the Rehnquist Court's federalism jurisprudence, those cases involving the federal government's commandeering state officials for the enforcement of federal statutes or

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[10]On the recent litigation "explosion" in America, and the role of contingency fees in that development, see, e.g. Walter K. Olson, The Litigation Explosion: What Happened When America Unleashed the Lawsuit (1991).

[11]For a cogent defense of the Rehnquist Court's sovereign immunity jurisprudence emphasizing the needs of state governments, see Roderick M. Hills, Jr., Symposium: Shifting the Balance of Power? The Supreme Court, Federalism, and State Sovereign Immunity: The Eleventh Amendment as a Curb on Bureaucratic Power, 53 Stan.L.Rev.1225 (2001).

commandeering state legislatures to implement federal regulatory programs. Thus, in New York v. United States, 505 U.S. 144 (1992), the Rehnquist Court declared that Congress could not force the state of New York to take title to certain radioactive wastes nor could it force the New York legislature to enact provisions for the regulation of such waste pursuant to a federal legislative scheme. To permit such coercion, the Court made clear, would violate the Tenth Amendment. In Printz v. United States, 521 U.S. 898 (1997), the Court held that it was impermissible for Congress to order that state law enforcement officials implement provisions of the federal Brady Handgun Violence Prevention Act. To allow Congress to compel local law enforcement officials to perform, even on an interim basis, the background checks mandated by the Brady law, said the Court, would be counter to the "historical understanding and practice" under the Constitution, to the "Constitution's structure" of "dual sovereignty"and to the prior "jurisprudence" of the Court itself (expressed in New York v. United States). The problem in this area, as is made clear in the syllabus to *Printz* is that "The Federal Government's power would be augmented immeasurably and impermissibly if it were able to impress into its service--and at no cost to itself--the police officers of the 50 States."

In conclusion, then, there is nothing extraordinary in the Rehnquist Court's federalism jurisprudence. It may be true that for a long time the Supreme Court seemed to be willing to allow the federal government to expand its regulatory reach in a manner unprecedented in our history. That *was* extraordinary.[12] What the Rehnquist Court has been about, though, is simply reasserting the basic principles of dual sovereignty that are one of the two foundations of our

[12]On how far the federal courts of the twentieth century strayed from the original understanding of the Constitution see, e.g. Stephen B. Presser, Recapturing the Constitution: Race, Religion and Abortion Reconsidered (1994), and Rotunda, supra note 5.

Constitution's protections of liberty.[13] That the Rehnquist Court has been involved in the reassertion of these principles is not cause for alarm, and it is certainly not cause for radically reconceptualizing the process of confirmation of judicial nominees.

The Rehnquist Court's federalism jurisprudence has reminded us of the dangers of extending the commerce power justification for Congressional action to reach non-economic activity or to extend the commerce power to reach the sale or production of anything that might have an indirect impact on interstate commerce. Such extensions, which seem to be demanded by the critics of the Rehnquist Court's federalism jurisprudence, would have the effect of setting no bounds on Congress's power – Congress could regulate the most intimate domestic relations and every conceivable economic or non-economic transaction between private persons and Congress could, in effect, implement national police forces in a way that would obliterate not only our system of dual sovereignty, but American liberty itself. This was not the scheme the framers envisioned. In contrast, all the Rehnquist Court has done, in its Federalism jurisprudence, is to be faithful to our tradition. This is not an effort that should be endangered, frustrated, or cast into odium by this Subcommittee.

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[13]The argument that the Rehnquist Court's "new federalism" is a simple defense of liberty is also made in Rotunda, supra note 5.

STATEMENT OF SENATOR JEFF SESSIONS
Before the
Committee on the Judiciary
"Narrowing the Nation's Power:
The Supreme Court Sides with the States"
October 1, 2002

Mr. Chairman, thank you for holding this hearing to discuss a recent book that describes three specific features of the Supreme Court's federalism jurisprudence: sovereign immunity, Section 5 of the 14th Amendment, and the Commerce Clause. Judge Noonan's book, which has been endorsed by a former president of the ACLU, severely criticizes the Supreme Court's recent federalism jurisprudence. JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002) [hereinafter NOONAN]. While I respect Judge Noonan and his long service to the federal judiciary and to academia, I must say that I categorically reject the opinions contained in the book.

In my view, the Supreme Court's federalism jurisprudence is consistent with the text, intent, and history of the Constitution. So viewed, federalism is not a theory of states rights that trumps the Constitution, but a division of power between the federal government and the States that is mandated by the Constitution itself. The Court's recent federalism jurisprudence reflects an escalating scale of protections for the States in the form of limitations on congressional

power over state functions and state funds. Ultimately, the Court's modest decisions affecting sovereign immunity, Section 5 of the 14th Amendment, and the Commerce Clause simply reflect the Framers' intent to divide the authority to make substantive policy decisions thus protecting the rights of the people from the dangers of concentrated governmental power.

Federalism v. States Rights

As an initial matter, it is important to note what federalism is not. Federalism clearly is not, as some would argue, see, e.g., NOONAN, at 3, a revamped version of states rights. States rights is a theory under which, the States, rather than the federal government, should be invested with governmental powers every time there is a choice between the national and the state governments and it is at all possible to empower the States. In contrast, federalism is a constitutional allocation of power between the federal government and the state governments that recognizes certain powers in each. Thus, constitutional federalism differs from states rights theory in several respects.

For example, Article I, Section 10 of the Constitution contains a key component of federalism that actually deprives States of various rights or powers. States cannot impair the obligation of contracts, coin money, lay general tariffs, or enter treaties. And the 14th

Amendment to the Constitution, which changed constitutional federalism in many ways, provides that a State cannot deprive a person of due process of law or deny equal protection of the laws to him. See **Appendix A**. Thus, far from adhering to an abstract, agenda-laden states rights theory, constitutional federalism, whether in 1789, 1868, or 2002, is the allocation of power expressed in the Constitution itself.

Constitutional Federalism

Constitutional federalism's allocation of governmental power between the federal government and the state governments begins with the express grant of powers to the three branches of the federal government. See, e.g., U.S. Const. art. I, § 1 (vesting the legislative powers "herein granted" in Congress); id. at art. II, § 1 (vesting the executive power in the President); id. at art. III, § 1 (vesting the judicial power in the Supreme Court and inferior courts). Similarly, each state government derives the lion's share of its powers from that State's constitution. See, e.g., Ala. Const.1901, § 44 (vesting the legislative power in the Legislature); id. at § 113 (vesting the executive power in the Governor); id. at amend. 328, § 6.01(a) (vesting the judicial power in the Unified Judicial System). While the federal Constitution both supplements and limits state governmental powers, see, e.g., U.S. Const. art. V (granting state legislatures the power to ratify constitutional amendments); id. at art. I, § 10 (providing

that a State cannot impair the obligation of contracts, make treaties, coin money, etc.), id. at art. VI, cl. 3 (requiring members of state legislatures, state executive offices, and state judges to be bound by oath or affirmation to support the federal Constitution), the Constitution's main federalism provisions dealing with state power simply reserve to the States what their own constitutions grant them and what they retained after their entry into the Union, see, e.g., id. at art. I, § 9 (limiting Congress' legislative power to only certain subject matters, including interstate commerce, bankruptcy, and immigration); id. at amend. X ("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.").

Escalating Limitations on Congressional Power

In the last two decades, the Supreme Court's federalism jurisprudence has addressed the Constitution's recognition of the authority of state governments to control state functions and state funds and the concomitant limits on congressional authority over state functions and funds. This recognition takes the form of an escalating scale that requires Congress to plainly state its intent, requires Congress to establish a legislative record supporting its action, or bars congressional action altogether.

Plain Statement Rule – First, the Supreme Court has ruled that before Congress can regulate an area clearly within the traditional functions of state governments or expose state funds to law suits brought by private parties, it must plainly express its intention to do so. For example, the Court has interpreted a general federal employment statute as not regulating the tenure of state judges because Congress failed to include a plain statement in the act providing that it intended to regulate that state function. Gregory v. Ashcroft, 501 U.S. 452 (1991). In addition, the Court held that Congress must plainly state its intention to expose state funds to law suits before it can abrogate a State's sovereign immunity. See Green v. Mansour, 474 U.S. 64, 68 (1985) (stating that for Congress to abrogate a State's sovereign immunity from law suits, it must "unequivocally express[ ] its intent to abrogate the immunity"). Thus, at a minimum, Congress must plainly state its intention to regulate state functions or funds.

Legislative Record Requirement – Further, to affect state functions or funds, Congress must act pursuant to one of its enumerated powers, often requiring it to establish a legislative record supporting the proposed federal remedy. When acting under Section 5 of the 14th Amendment to address state actions other than the historical race discrimination, which gave rise to that Amendment, Congress must establish a legislative record that demonstrates

widespread and persistent state discrimination.[1] See City of Boerne v. Flores, 521 U.S. 507, 508-09 (1997). For example, when Congress tried to use its Section 5 enforcement power to promote religious rights by overriding state and local laws, the Court held that Congress failed to establish a legislative record demonstrating widespread religious discrimination by the States. See id. at 530 ("[The Religious Freedom Restoration Act]'s legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry. The history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years.").

In addition, the statutory response that Congress proposes must be proportional and congruent to the state wrong to be remedied. See id. at 530. For example, when Congress attempted to use its Section 5 power to subject state funds to patent infringement suits by private parties, the Court held that the legislative record failed to establish a widespread and persistent record of state violations of the patent laws and that Congress' response was not proportional to the asserted injury caused by the States. Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999). Similarly, when Congress attempted to subject state funds to

[1] Section 5 of the 14th Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

law suits by private parties for money damages due to age discrimination and disability discrimination, the Court held that Congress had failed to establish a sufficient legislative record showing such discrimination by the States. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 90-91 (2000); Board of Trustees of the University of Alabama v. Garrett, 531 U.S. 356, 368 (2001).

When Congress attempted to use its commerce power to criminalize possession of an object, which was traditionally a subject for state police powers, the Court held, in part, that the legislative record failed to establish that the possession of a firearm in a school zone substantially affected interstate commerce. United States v. Lopez, 514 U.S. 549, 563 (1995) (noting the lack of congressional findings in the Gun Free School Zones Act). Thus, when acting under Section 5 of the 14th Amendment to regulate non-racial matters, or under Commerce Clause to regulate state functions or state funds, the Court may require Congress to establish a legislative record justifying the regulation.

Bar on Congressional Action – Moreover, in certain instances the Court has recognized a bar to congressional regulation of state functions or state funds. For example, the Court has held that Congress cannot commandeer the state legislative and executive branch functions to carry out federal policies. See New York v.

United States, 505 U.S. 144, 161 (1992) (holding that Congress could not "commandeer [ ] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"); Printz v. United States, 521 U.S. 898 (1997) (holding that Congress could not commandeer state law enforcement officials to carry out federal firearms law enforcement responsibilities). Further, the Court has recognized that Congress cannot use its commerce power to regulate non-economic activities, such as assault, which are plainly within the police powers of the States. See United States v. Morrison, 529 U.S. 528 (2000). And the Court has held that Congress cannot use its commerce power, or other Article I power, to expose state funds to suits brought by private parties because to do so would violate the sovereign immunity from such suits that the States retained when they originally entered the Union. See Seminole Tribe v. Florida, 517 U.S. 44, 60-67 (1996); Alden v. Maine, 527 U.S. 706, 712 (1999).

Thus, the recent federalism jurisprudence of the Supreme Court recognizes several limitations on the powers of Congress to regulate state functions and state funds. Nonetheless, unlike opinions that mandated substantive policy results that no county commission, state legislature, or Congress could change, see, e.g., Engel v. Vitale, 370 U.S. 421 (1962) (banning state-authored prayer in public schools), the

Court's federalism jurisprudence simply recognizes that Congress cannot make all policy decisions on all subjects. See **Appendix B**. In short, constitutional federalism allows state governments to make decisions for state matters.[2] See **Appendix C**.

Federalism's Protection of Individual Rights

This division of policy making authority does not undermine individual rights, but preserves them from the historical danger of a concentration of governmental power. As James Madison, the primary author of the Constitution, explained in Federalist No. 51:

> In the compound republic of America, the 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. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter, ed., 1961). Thus, through a graduated set of protections, the Court

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[2] See generally New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J. dissenting) ("There must be power in the states and the nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs.").

has effected our constitutional federalism that protects individual rights from usurpation by an all-powerful government.

Sovereign Immunity

Judge Noonan's book vigorously criticizes the Supreme Court's recent decisions dealing with three areas of federalism: (1) sovereign immunity; (2) Section 5 of the 14th Amendment; and (3) the Commerce Clause. NOONAN at 2 & 41 - 101; id. at 4 - 6, 15 - 40; id. at 13, 120 - 37. First, Judge Noonan criticizes the Court's recent sovereign immunity jurisprudence as without a grounding in our constitutional history and as expanded beyond the original purpose of immunity from suit. Id. at 2 & 41- 101. These criticisms do not survive an assessment of the Framers' own statements regarding sovereign immunity or the functional necessity of having the immunity protection of state funds follow the funds it was intended to protect.

The doctrine of sovereign immunity provides that a private party cannot sue a State for money damages without the State's consent unless the allowance of such a suit derives from the text and intent of the Constitution. See Alden v. Maine, 527 U.S. 706 (1999). In numerous places, including the 10th Amendment, the Constitution refers to "States" – state governments. The model of government from which the Framers of the Constitution were working was the English government. Blackstone, the leading English authority upon

which the lawyers of the Revolution relied, stated that a basic attribute of government was immunity from law suits – sovereign immunity. See I WILLIAM BLACKSTONE, COMMENTARIES *242 ("[T]he law ascribes to the king the attribute of *sovereignty*, or pre-eminence. ... Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him.") (Emphasis in original). It is this immunity from law suits that protects the tax dollars paid into the treasury so they can be used to pay for government programs, such as the armed services, education, hospitals, and relief of the poor.[3]

That Blackstone's view of the immunity of a government from private law suits applied to the American States is clear from the contemporaneous writings of the Framers of our Constitution. In the Federalist No. 81, Alexander Hamilton stated: "It is inherent in the nature of sovereignty not to be amenable to the suit of an individual *without its consent*. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union." THE FEDERALIST NO. 81, at 487-88 (Hamilton) (Clinton Rossiter ed. 1961) (emphasis in the original).

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[3] The Supreme Court has long recognized that this immunity applies to the federal government. See, e.g., Federal Housing Auth. v. Burr, 309 U.S. 242 (1940) (noting the federal government's immunity from law suits) (citing Buchanan v. Alexander, 45 U.S. (4 How.) 20 (1846)).

At the Virginia ratifying convention, James Madison and John Marshall agreed. In discussing Article III's grant of jurisdiction to the federal courts, Madison stated: "Its jurisdiction in controversies between a state and citizens of another state is much objected to, and perhaps without reason. It is not in the power of individuals to call any state into court. The only operation it can have, is that, if a state should wish to bring a suit against a citizen, it must be brought before the federal court." See III JONATHAN ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 533. And John Marshall stated: "With respect to disputes between *a state and the citizens of another state*, its jurisdiction has been decried with unusual vehemence. I hope that no gentleman will think that a state will be called to the bar of the federal court. ... It is not rational to suppose that the sovereign power should be dragged before a court. The intent is, to enable states to recover claims of individuals residing in other states." Id. at 555 (emphasis in the original). Thus, a government's sovereign immunity from private law suits has a deep and abiding history that was expressly part of the framing of our Constitution.

Indeed, the Supreme Court's deviation from this principle in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793), a case allowing out-of-state debtors to sue a State, was immediately repudiated by the adoption of the 11th Amendment that addressed that specific

departure from the broader immunity enjoyed by the States. Since the adoption of the 11th Amendment, the Supreme Court has recognized that sovereign immunity protects state funds from suits in federal court by citizens of the same State, Hans v. Louisiana, 134 U.S. 1 (1890), suits in federal court by foreign governments, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), and federally mandated suits in state courts, Alden, 527 U.S. 706. Of course, when they believe it an injustice to deny private suits for money damages, the federal and state governments may waive their respective immunities. See, e.g., Department of the Army v. Blue Fox, Inc., 525 U.S. 255 (1999) (citing 28 U.S.C. § 2671 et seq. (Federal Tort Claims Act)).

And more recently, the Court has explained that Congress cannot abrogate the States' immunity from suits by private parties under the Article I legislative powers that existed at the time the original Constitution was ratified. See, e.g., Garrett, 531 U.S. at 364 (holding Congress may not abrogate a State's sovereign immunity under the Article I, section 8, clause 3 Interstate Commerce Clause); Florida Prepaid, 527 U.S. at 635-36 (holding that Congress may not abrogate a State's sovereign immunity under the Article I, section 8, clause 8 Patent Clause); Seminole Tribe, 517 U.S. at 65 - 67 (holding that Congress may not abrogate a State's sovereign immunity under the Article I, section 8, clause 3 Indian Commerce Clause). This

results because the States did not yield their sovereign immunity from private suits when they joined the Union under the Constitution that include the Article I powers of Congress. Seminole Tribe, 517 U.S. at 54 & 64.

This bar to federal exposure of state finds to law suits by private parties, as explained in Garrett, Florida Prepaid, and Seminole Tribe, protects the state treasuries from large damage awards that could easily result in cutting teachers salaries, cutting the pay of state troopers, reducing payments to hospitals, etc. See, generally, e.g., Shell Reaches Settlement in Lawsuit by Alabama, HOUSTON CHRONICLE, March 21, 2002, at B2 (noting that an Alabama jury awarded $3.5 billion in a recent civil fraud case against Exxon); Bob Johnson, Education Budget Approved, OPELIKA-AUBURN NEWS, Apr. 12, 2002, at 1 (noting Alabama's entire education budget was $4.2 billion). To say that sovereign immunity has no place in protecting the funds of state universities, NOONAN, at 3, ignores the fact the largest expenditures of many state governments is for education, including colleges and universities. Indeed, the Supreme Court has long recognized that:

> [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both

> demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship.

Brown v. Board of Educ. of Topeka, 347 U.S. 483, 493 (1954). Thus, sovereign immunity's bar of private suits for money damages is a fundamental constitutional protection of state funds that is deeply rooted in our constitutional history and, to have any real effect, must extend to protect state funds as they are expended for state functions, like education.

Section 5 of the 14th Amendment

Second, Judge Noonan argues that the Supreme Court's recent cases under Section 5 of the 14th Amendment inappropriately require Congress to establish a record of widespread and persisting violations and make its remedy proportional to the injury before it can abrogate a State's sovereign immunity. NOONAN, at 5 & 15 - 40. These arguments fail to take into account the historical background against which the 14th Amendment was ratified and the well-settled precedents for remedies being proportional to wrongs.

The 14th and 15th Amendments were ratified after the Civil War to ensure that States would not deny due process, equal protection of

the law, or voting rights to the newly freed slaves and their descendants. Congress' civil rights and voting rights laws enacted under these Amendments dealt with widespread refusal by the States to provide due process and equal protection to African American citizens on the basis of their race. Congress' enforcement power was not intended to extend due process, equal protection, and voting rights protections to groups of people who had not suffered similar widespread discrimination, such as persons claiming religious discrimination by the States. See, e.g., City of Boerne, 521 U.S. at 532-33 (distinguishing between widespread voting rights discrimination by certain States and lack of similar religious discrimination by States).

However, when Congress properly exercises its enforcement power under the 14th Amendment to address a widespread pattern of state violations, it can abrogate a State's sovereign immunity from private law suits. As the Court explained in Alden, 527 U.S. at 756, when the States ratified the 14th Amendment, they altered the original plan of federalism and with it the scope of sovereign immunity. ("We have held also that in adopting the Fourteenth Amendment, the people required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution, so that Congress may authorize private suits against nonconsenting States pursuant to its § 5 enforcement power.") (Citing Fitzpatrick v. Bitzer,

427 U.S. 445 (1976)). This alteration, however, allows Congress to abrogate a State's sovereign immunity from private law suits only when it demonstrates in the legislative record that there is a widespread and consistent problem affecting due process or equal protection. When there is not such a problem, the States retain their immunity from private suits.

For example, in Garrett, 531 U.S. at 368, the Court stated: "The legislative record of the [Americans with Disabilities Act], however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled." Also, in Kimel, 528 U.S. at 90 - 91, the Court stated: "Congress failed to identify a widespread pattern of age discrimination by the States." Further, in Florida Prepaid, 527 U.S. at 627, the Court stated: "The legislative record thus suggests that the Act does not respond to a history of widespread and persisting deprivation of constitutional rights of the sort Congress has faced in enacting proper prophylactic § 5 legislation." Thus, where there is not a broad problem, the broad remedy of Section 5 is inappropriate.

Indeed, with respect to the application of Congress' employment discrimination laws, it is important to note that the Court's Section 5 and sovereign immunity jurisprudence only applies to State

employees – 3.7% of the total workforce.[4] For the remaining 96.3% of employees, Congress can provide a private suit for money damages against a non-state entity in federal court. See **Appendix D**. And the 3.7% of the workforce still has several alternative remedies available to them: (1) the federal government, e.g., the E.E.O.C., can sue a State for money damages; (2) private persons can sue a State officer for injunctive relief under Ex parte Young, 209 U.S. 123 (1908); (3) private persons can sue under a State's own laws in state court for money damages and other relief; and (4) Congress can use its Spending Power to influence state actions. See Garrett, 531 U.S. at 374 n.9; South Dakota v. Dole, 483 U.S. 203 (1987). See **Appendix E**. Given these alternative remedies, sovereign immunity's denial of a private suit for money damages to state employees results in a denial of only one of five available remedies to only 3.7% of the workforce.

Moreover, despite the expression of surprise in Judge Noonan's book at the Court's requirement that a remedy under Section 5 be proportional to the injury, NOONAN at 35 ("This formula was unprecedented. Proportionality in legislation!"), requiring a legislative remedy to be proportional to the harm to be prevented was not objected to by any Justice in Boerne, 521 U.S. 507, and has

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[4] See U.S. Census Bureau, State Government Employment Data (last modified July 8, 2002) <http://www.census.gov/govs/apes/01stus.txt>; Bureau of Labor Statistics (visited Sept. 26, 2002) <ftp://ftp.bls.gov/pub/news.release/history/empsit.04062001.news>.

numerous precedents in the law. For example, the Eighth Amendment requires that legislative punishment for a crime not be grossly disproportionate with the offense. See, e.g., Coker v.Georgia, 433 U.S. 15 (1971). Similarly, due process requires some degree of proportionality between compensatory damages and punitive damages. See, e.g., BMW of North America, Inc. v. Gore, 517 U.S. 559, 580 (1996).[5] Thus, the Court's Section 5 jurisprudence reflects that the 14th Amendment was designed to stop widespread failures by state governments to ensure due process and equal protection of the law and reflects the well-settled principle that enforcement mechanisms should be proportional to the wrongs that they are intended to remedy.

Commerce Clause

Third, Judge Noonan asserts that the current Supreme Court's Commerce Clause opinions return the Court to the conservative activist days of the 1930s when it struck down New Deal economic legislation. NOONAN, at 13 & 135. This assessment simply misreads

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[5] See also Eu v. San Francisco Democratic Central Committee, 489 U.S. 214 (1989) (requiring content-based restrictions on speech to be narrowly tailored to meet a compelling governmental interest); I M.J. TILBURY, CIVIL REMEDIES: PRINCIPLES OF CIVIL REMEDIES 3139 (1990) ("the principle of compensation [in the law of damages] is qualified by the principle that responsibility for the consequences of a wrong should be in proportion to the degree of fault"); ARISTOTLE, NICOMACHEAN ETHICS V, iii ("What is just ... then, is what is proportional, and what is unjust is what violates the proportion.").

the fundamental difference between New Deal decisions that deemed economic activities to be beyond the reach of the Commerce Clause and the Rehnquist Court's decisions that do not.

The Supreme Court's interpretation of the phrase "commerce among the several States" has evolved from narrow to broad over the last 200 years as interstate commerce has grown. Prior to 1937, the Court adopted a restrictive view of commerce that excluded various economic activities from congressional regulation using a variety of tests, including in-state versus out-of-state business in Gibbons v. Ogden,[6] indirect versus direct impact of in-state economic activities on interstate commerce in Carter v. Carter Coal Co.,[7] manufacturing

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[6] Compare Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824) (stating that the Commerce Clause did not encompass commerce which is completely within a State and does not extend to or affect other States) with Shreveport Rate Cases, 234 U.S. 342 (1914) (upholding ICC's power to regulate rates of intra-state railroad where intra-state activity was closely related to interstate operations).

[7] Compare Carter v. Carter Coal Co., 298 U.S. 238 (1936) (striking down the Bituminous Coal Conservation Act of 1935 as beyond Congress' commerce power because the mining of coal was not commerce and because such activity had only an indirect impact on interstate commerce), and Peik v. Chicago & Northwestern Ry. Co., 94 U.S. 164 (1876) (upholding, despite the Dormant Commerce Clause's bar on state regulation of interstate commerce, Wisconsin's regulation of rates of common carriers operating within the state because such activity only that indirectly affected carriers outside its borders conducting interstate commerce) with Wabash, St. Louis & Pacific Ry. Co. v. Illinois, 118 U.S. 557(1886) (reversing the Court's position in Peik and holding that intrastate railroad activity directly affected interstate commerce and thus, could not be regulated by a state under the Dormant Commerce Clause, but only by Congress).

versus sales in United States v. E.C. Knight,[8] and even a liberty of contract theory in Lochner v. New York to bar regulation of labor.[9] In all these cases, the Court attempted to exclude economic activities from the reach of the Commerce Clause based on the in-state or non-sales nature of the activities. All of these tests were swept away in the late New Deal era decisions including Wickard v. Filburn, 317 U.S. 111 (1942), under which a farmer's growing of wheat for personal consumption was held to have a substantial effect on interstate commerce when aggregated with all similar wheat growing by all farmers. At least home-grown wheat was salable on an existing

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[8] Compare United States v. E.C. Knight, 156 U.S. 1 (1895) (rebuffing the government's attempt to use the Sherman Act to dissolve a sugar monopoly, because sugar manufacturing was pre-commerce and thus the Commerce Clause did not authorize congressional regulation of it), and Hammer v. Dagenhart, 247 U.S.251 (1918) (striking down law banning interstate shipment of goods manufactured with child labor because manufacturing was pre-commerce and not subject to regulation under the Commerce Clause) with NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding federal statute guaranteeing collective bargaining for employees engaged in the manufacture of goods to be shipped in interstate commerce), and United States v. Darby Lumber Co., 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act which barred the use of interstate commerce to goods made by workers who were not paid a minimum wage and guaranteed a 40-hour work week).

[9] Compare Lochner v. New York, 198 U.S. 45 (1905) (striking down New York law limiting the working hours of bakers on the theory that the 14th Amendment's due process clause contained an implied right of liberty to contract between employers and employees that could not be regulated by state governments) with West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding Washington state minimum wage law and rejecting the implied liberty of contract right that had been used to strike down such commerce regulation before).

market for wheat. Thus, growing wheat is arguably an "economic" activity.

In 2000, in Morrison, 529 U.S. 598, the Court held that Congress' Commerce Power did not extend to authorizing a federal suit for sexual assault. Assault does not involve buying or selling. Assault does not involve producing something for purchase or sale. Assault itself is not an economic activity. To allow aggregation of non-economic activities for purposes of determining a substantial affect on interstate commerce would subject all activity to regulation by Congress. It would convert Congress' enumerated regulatory power into an unlimited one.

Nonetheless, the Court has acknowledged that Wickard – the personal consumption of wheat case – is still good law. Morrison, 529 U.S. at 610; Lopez, 514 U.S. at 556. Thus, the impact of these cases is that Congress' commerce power reaches 98% of activities instead of 100%. See **Appendix F**.

While there are those who argue that the Supreme Court's recent decisions on the Commerce Clause return the Judiciary to the activist days of the 1930s, NOONAN, at 13, this assertion does not survive review. Unlike the activist decisions prior to Wickard, the Court's recent Commerce Clause decisions do not distinguish

between in-state and out-of-state economic activities as in Gibbons, between indirect versus direct impact of in-state economic activities on interstate commerce as in Carter Coal, or between manufacturing versus sales activities as in E.C. Knight. Further, these decisions do not create a liberty of contract theory as in Lochner to bar regulation of economic activities.

Instead, the Court has simply stated that it will not take the additional step beyond Wickard of allowing the aggregation of *non*-economic activities (e.g., possession of a firearm, assault) with economic activities (e.g., sale of firearms, medical treatment for assault) for the purposes of expanding Congress' power to regulate "commerce." To allow the commerce power to reach non-economic activities simply because those activities are related to economic activities would allow Congress to use its commerce power to regulate all human activities which might relate to commerce. For example, under such an approach Congress could regulate catching a cold, which would require you to buy medicine, sleeping in your bedroom, which prevents you from working, and reading a book, which may require the purchase of a book. But the Constitution only allows Congress to regulate the activities that involve "commerce," as opposed to activities that do not.

Further, the interpretation of the word "commerce" in the Constitution is not a proper function of the Congress to be performed through the making of findings of fact. Indeed, Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), settled nearly two centuries ago that "[i]t is emphatically the province and duty of the judicial department to say what the law is" – to say what "commerce" is.

Conclusion

The Supreme Court's recent federalism jurisprudence is deeply rooted in our Constitution and its history, does not return to the activism of the 1930s, and protects individual rights by preventing a concentration of governmental power. Blackstone, Madison, Hamilton, and Marshall all understood that a sovereign government – as distinguished from a political dependency – must have control over its functions and its funds. The Court's sovereign immunity jurisprudence recognizes the historic constitutional design under which the States did not yield their control over their funds. The Court's decisions under Section 5 of the 14th Amendment simply confirm that while the 14th Amendment altered the federal-state balance of power, Congress must still show that remedies are proportional to the injuries they are intended to rectify. Further, instead of returning to the activism of the 1930s, the Court's recent Commerce Clause decisions simply refuse to extend to commerce power to activities that are not economic, not commercial, in nature.

In contrast to the conservative judicial activism of the 1930s that barred regulation of economic activities and the liberal activism of the 1960s that barred prayer by children in schools, the Court's federalism jurisprudence does not impose an unbreakable rule that no local, state, or federal legislative body can change. Instead, the Court's modest federalism decisions simply return to the original design of the Constitution under which the state legislatures make decisions, liberal or conservative, about state functions and state funds. This division of power between the federal and state governments may sometimes be inconvenient, but by avoiding a concentration of governmental power, it stands as a bulwark of security for the rights of the people.

Appendix A

State Right/Power	States Rights Theory	Constitutional Federalism
•To impair contracts	Yes	No
•To lay general tariffs	Yes	No
•To coin money	Yes	No
•To make treaties	Yes	No
•To deny equal protection	Yes	No
•To deny due process	Yes	No

Appendix B

LIBERAL JUDICIAL MANDATES
People Can't Make Decisions
•No School Prayer
•Flag Burning
•Virtual Child Pornography
•No Death Penalty?
•Gun Control?
UNITED STATES SENATE

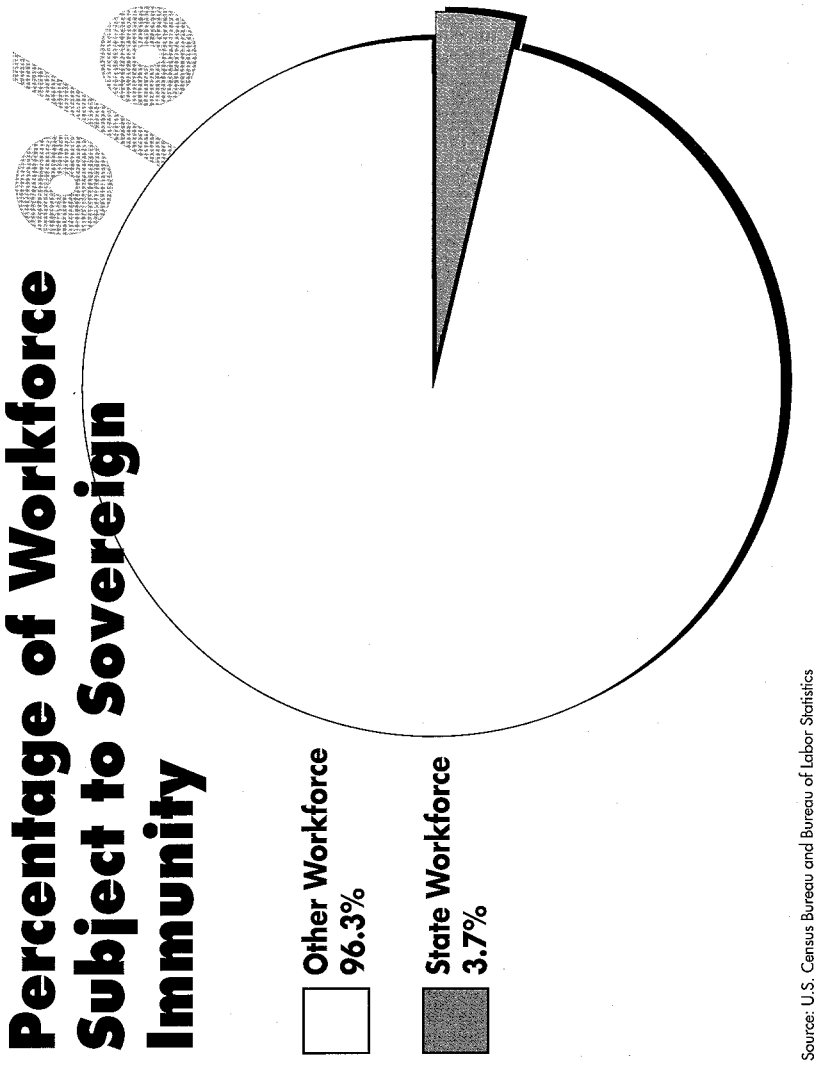
Appendix C

CONSERVATIVE FEDERALISM

People Can Make Decisions

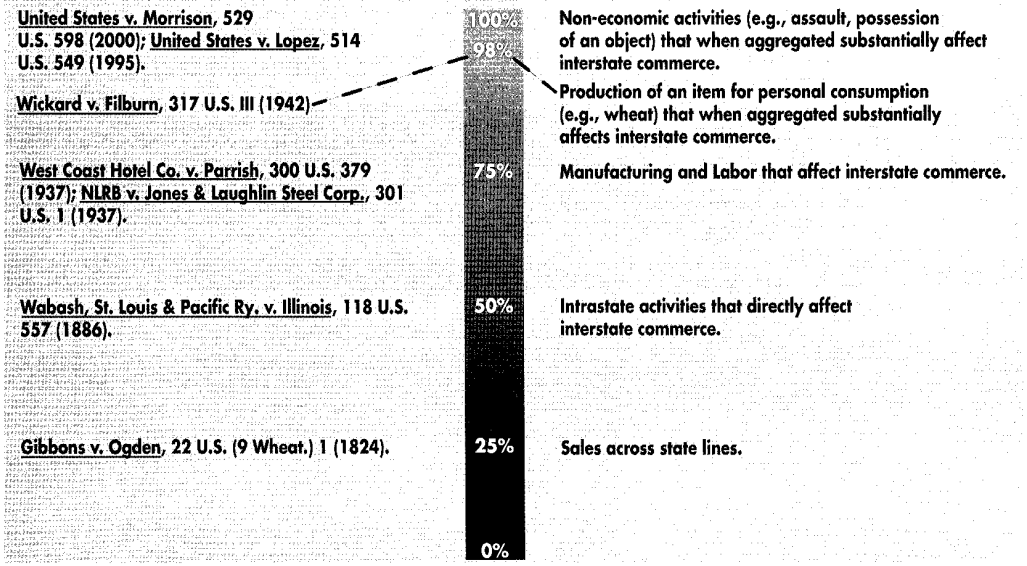
- For 3% + of employees who are state employees, states can provide disability, age discrimination, and other benefits.
- For arson of private homes, states can provide criminal punishment.
- For copyright infringement, states can provide for money damages.
- For assaults, states can provide criminal punishment and a civil cause of action.

Appendix D


Percentage of Workforce Subject to Sovereign Immunity
Other Workforce 96.3%
State Workforce 3.7%
Source: U.S. Census Bureau and Bureau of Labor Statistics

REMEDIES AGAINST A STATE

Remedy	Sovereign Immunity
• Federal court injunction against state officer to stop violation	OK
• Federal government can sue state government for money damages	OK
• Federal government can use spending power to influence states	OK
• State governments can provide private action for money damages	OK
• Federal provision of private action for money damages	NO

The Reach Of The Commerce Clause

"Congress hall have Power...To Regulate Commerce... among the several States...." U.S. Const, art. I § 8. cl. 3.