

MADISON'S DOUBLE SECURITY: IN DEFENSE OF FEDERALISM, THE SEPARATION OF POWERS, AND THE REHNQUIST COURT

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Two noted professors of constitutional law, Jesse Choper and John Yoo, one liberal and the other conservative, recently wrote,

Federalism has become the defining issue of the Rehnquist Court. To the extent that its five Justice conservative majority has changed American constitutional law, its reasoning in re-defining the balance of power between the national government and the states will likely prove to be what the Rehnquist Court is best known for.¹

I doubt any legal scholar or serious observer of the Court would disagree with that statement.

Although that assessment is uncontroversial, the federalism jurisprudence itself is another matter. The criticisms of the recent federalism decisions of the Rehnquist Court have come vociferously from liberal legal scholars, such as Harvard Professor Laurence Tribe;² Democ-

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1. Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 844 (2000).

2. See, e.g., *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. app. (2001) (statement of Prof. Laurence H. Tribe) (consisting of an appended Memorandum of Law by Prof. Tribe that addresses "Supreme Court encroachment of congressional power"), available at <http://www.senate.gov/%7Ejudiciary/oldsite/te062601triApndx.htm> (last visited Mar. 10, 2002); 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 3-25, at 529-34 (3d ed. 2000) (supporting the position that the Eleventh Amendment limits only federal diversity jurisdiction); *id.* § 3-26, at 545-47 (criticizing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)); Marcia Coyle & Harvey Berkman, *Justices Weigh in on Side of States: Back to Antebellum Federal Relations, Say Some Critics of Rulings*, NAT'L L.J., July 5, 1999, at A1 (quoting Professor Tribe as warning that the decisions in *Alden v. Maine*, 527 U.S. 706 (1999), *College*

ratic Senators, such as Charles E. Schumer of New York;³ and editorialists at *The New York Times*⁴ and *The Washington Post*.⁵ The Court, of course, has stalwart defenders in the ranks of academia,⁶ politics,⁷ and the media.⁸

The criticisms of the Rehnquist Court do not follow a neat line. The sharpest criticisms come from the Left and are directed at the Commerce Clause interpretations in *United States v. Morrison*⁹ and *United States v. Lopez*,¹⁰ and the decisions that protect the sovereignty and autonomy of state governments such as *Seminole Tribe v. Florida*,¹¹ *Printz v. United States*,¹² and *Board of Trustees of The University of Alabama v. Garrett*.¹³ Some criticisms, however, come from the Right, such as the criticisms of the decision in *City of Boerne v. Flores*,¹⁴ in which the Court declared most of the Religious Freedom Restoration Act unconstitutional.¹⁵ Other criticisms involving charges of hypocrisy

Sav. Bank v. Fla. Prepaid Postsecondary Educ. Bd., 527 U.S. 666 (1999), and Fla. Prepaid Postsecondary Educ. Bd. v. College Sav. Bank, 527 U.S. 627 (1999) could have "pernicious consequences for the enforcement of federal statutes across the board"; *The Supreme Court: Activism in Different Robes*, ECONOMIST, July 3, 1999, at 22 (quoting Professor Tribe as describing the 1999 decisions as "scary. They treat states' rights in a truly exaggerated way, harking back to what the country looked like before the civil war and, in many ways, even before the adoption of the constitution").

3. *Should Ideology Matter?: Judicial Nominations 2001: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the Senate Comm. on the Judiciary*, 107th Cong. (2001) (statement of Sen. Charles E. Schumer), available at <http://www.senate.gov/7Ejudiciary/oldsite/te062601cs.htm> (last visited Mar. 10, 2002).

4. See, e.g., Editorial, *The Court Usurps Congressional Power*, N.Y. TIMES, Feb. 22, 2001, at A24 (criticizing the decision in Bd. of Trs. of The Univ. of Ala. v. Garrett, 531 U.S. 356 (2001)); Editorial, *A Misguided Expansion of States' Rights*, N.Y. TIMES, Jan. 12, 2000, at A22 (criticizing the decision in Kimel v. Fla. Bd. of Regents, 528 U.S. 62 (2000)).

5. Editorial, *Suing Florida*, WASH. POST, Oct. 18, 1999, at A18 (describing the Court's federalism decisions as "troubling" and having had a "perverse effect").

6. See, e.g., Thomas H. Odom & Marc R. Baluda, *The Development of Process-Oriented Federalism: Harmonizing the Supreme Court's Tenth Amendment Jurisprudence from Garcia Through Printz*, 31 URB. LAW. 993 (1999); Ronald D. Rotunda, *The New States' Rights, the New Federalism, the New Commerce Clause and the Proposed New Abdication*, 25 OKLA. CITY U. L. REV. 869 (2000); John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997).

7. My several speeches and writings in defense of the Court can be found on the website of my office. See Alabama Attorney General Bill Pryor, *Speeches & Articles*, at <http://www.ago.state.al.us/speeches.cfm?Method=Choose> (last visited Apr. 5, 2002); see also William H. Pryor Jr., *Federalism, Statutory Construction and the 2000 Term*, 32 CUMB. L. REV. 361 (2002).

8. See, e.g., George F. Will, Editorial, *The Case for Bush*, WASH. POST, Nov. 5, 2000, at B7 (characterizing the Court's decisions as "modest attempts to revitalize federalism").

9. 529 U.S. 598 (2000).

10. 514 U.S. 549 (1995).

11. 517 U.S. 44 (1996).

12. 521 U.S. 898 (1997).

13. 531 U.S. 356 (2001).

14. 521 U.S. 507 (1997).

15. See, e.g., *Protecting Religious Freedom after Boerne v. Flores: Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (1997) (testimony of Charles W. Colson, President, Prison Fellowship Ministries), available at

sometime come from commentators on both sides of the political spectrum. The criticism of this kind involves, for example, the decisions of the Court in the presidential election controversy¹⁶ and several preemption cases.¹⁷

Although I do not always agree with the decisions of the Rehnquist Court, I am its loyal defender in matters of federalism. The jurisprudence of the Rehnquist Court in matters of federalism is principled, coherent, and true to the text and structure of the Constitution. That is not to say that all of the criticisms of the federalism decisions are somehow unprincipled or incoherent. Indeed, the criticisms are usually rooted in perspectives from critical junctures of American constitutional history.

In defending the federalism jurisprudence of the Rehnquist Court, I hope to put it in historical context with a political framework that can be traced back to the adoption of the Constitution itself. In this context, the federalism decisions of the Rehnquist Court are best understood as being from a classical liberal perspective consistent with the vision of James Madison, the Father of the Constitution. Two competing visions—(1) the nationalist perspective of cooperative federalism from the New Deal, and (2) the States' Rights perspective of John C. Calhoun and, more recently, southern populist politicians such as Governor George C. Wallace—provide the alternative perspectives of federalism.

I. THE VISION OF JAMES MADISON: THE DOUBLE SECURITY OF THE CONSTITUTION

A discussion of James Madison's perspective of federalism is itself controversial. I adhere to the view of Professor Lance Banning that James Madison has been misunderstood by many constitutional historians. In his award-winning book,¹⁸ Professor Banning persuasively ar-

<http://www.house.gov/judiciary/232304.htm> (last visited Mar. 10, 2002); Michael W. McConnell, Comment, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997).

16. *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000). For a selection of criticisms of these decisions, see BUSH V. GORE: THE COURT CASES AND THE COMMENTARY (E.J. Dionne & William Kristol eds., 2001); RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* (2001); THE VOTE: BUSH, GORE & THE SUPREME COURT (Cass R. Sunstein & Richard A. Epstein eds., 2001); Linda Greenhouse, *Learning to Live with Bush v. Gore*, 4 GREEN BAG 2D 381 (2001); Nelson Lund, *The Unbearable Rightness of Bush v. Gore*, 23 CARDOZO L. REV. (forthcoming 2002).

17. See, e.g., Dahlia Lithwick, *Supreme Court Dispatches: Supreme Court Hissy Fits* (June 29, 2000), at <http://slate.msn.com/default.aspx?id=52653&entry=85272> (last visited Mar. 10, 2002).

18. LANCE BANNING, *THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC* (1995).

gued, several years ago, that if he were alive today, James Madison would be "perplexed by modern scholarly agreement that he changed from an expansive to a strict construction of the Constitution, from a centralizing to a states' rights stance."¹⁹

Much of the modern scholarship about Madison's perspective of the Constitution revolves around Madison's famous contribution of *The Federalist No. 10* as part of his work with Alexander Hamilton. The modern liberal argument, based on *No. 10*, is that "Madison, like Hamilton, preferred a unitary national government, pursued this preference at the Constitutional Convention, and defended the completed Constitution in the hope that it would gradually evolve into a wholly national system, changing his position only after 1789."²⁰ This argument, however, ignores other evidence of Madison's thinking during the operation of the Articles of Confederation and even other aspects of his writings in *The Federalist*.

Although *No. 10* is a key to understanding Madison's brilliant vision, another key to understanding his constitutional vision is *The Federalist No. 51*, which relates to my thesis. In *No. 51*, James Madison explained how the structure of federalism would protect individual freedom. Madison called it the "double security" of the Constitution. He wrote,

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. 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.²¹

Madison's double security is, in modern parlance, the separation of powers federalism. Madison saw that these structural restraints would work both in isolation and in combination. The federal and state governments would check each other and the three branches would control each other at each level.

19. *Id.* at 7.

20. *Id.* at 207. Professor Larry Kramer has argued persuasively that, regardless of Madison's vision in *No. 10*, Madison's subtle argument was not widely understood by the other Founders and his argument did not contribute to the ratification of the Constitution. Larry D. Kramer, *Madison's Audience*, 112 HARV. L. REV. 611, 637-71 (1999).

21. THE FEDERALIST NO. 51, at 67 (James Madison) (Lester DeKoster ed., 1976).

The federalism decisions of the Rehnquist Court are Madison's "double security" in modern operation. The Court is performing its role as a check of the abuse of power by the federal government itself. The states are performing their role as a check of the abuse of federal power, and the federal government is operating as a check of the abuses by the states. True to Madison's vision, each of these structural restraints of government abuse protects our freedom.

II. THE CONFLICTING VISIONS OF FEDERALISM

Before I address several of the specific decisions of the Rehnquist Court, I want to put Madison's vision of federalism in a contemporary context. Madison's vision has faced two significant challenges in American history. Both are statist perspectives: the first is a decentralized or States' Rights perspective, and the second is a centralized or National rights perspective. The contrast between these visions of American government and those of Madison helps to illustrate the superior promise of Madisonian or competitive federalism.

A. *The States' Rights or Calhoun/Wallace View: Confederacies*

In the early nineteenth century, a more decentralized view—the States' Rights view—emerged. Proponents of this view, most notably John Calhoun of South Carolina, sought to increase state sovereignty and power at the expense of the federal government and succeeded to some extent in the Jacksonian period.²² Ultimately, of course, the southern attempt to restrain federal authority on the question of slavery was rejected, and the Civil War ensued. The States' Rights view then lay dormant for almost a century, only to resurface in the wake of *Brown v. Board of Education*²³ as southern politicians sought a justification for ignoring federal court mandates to integrate public schools and other governmental activities. Apologists for segregation resurrected the flawed doctrines of interposition and nullification advanced by Cal-

22. See generally FORREST McDONALD, STATES' RIGHTS AND THE UNION, IMPERIUM IN IMPERIO 1776-1876, at 97-120 (2000). Madison, of course, contributed to the problems posed by Calhoun's arguments. Jefferson and Madison protested the blatantly unconstitutional Alien and Sedition Laws by attempting to rally the political opposition of the States, beginning with the resolutions of the Kentucky and Virginia legislatures. Madison and others, however, rejected Jefferson's radical call for "nullification," and "[i]n consequence, years later, Madison would have good ground for his insistence that he never said that any single state could constitutionally impede the operation of a federal law." BANNING, *supra* note 18, at 388. Still, the Virginia resolutions would "haunt their author to his grave, as John Calhoun and his associates employed them to elaborate a doctrine that the aging champion of Union thoroughly condemned." *Id.* at 393; see also STANLEY ELKINS & ERIC MCKITTRICK, THE AGE OF FEDERALISM 719-26 (1993).

23. 347 U.S. 483 (1954).

houn.²⁴ This project, too, eventually came to naught, and the States' Rights view of federalism has been discredited except in some recent dissenting opinions of the Court.

This is as it should be. The States' Rights view was fatally flawed by its misunderstanding of the Supremacy Clause,²⁵ the availability and propriety of judicial review,²⁶ and the structural protections for individual liberty. Moreover, the States' Rights view typically betrayed no understanding of the competitive benefits of Madison's system. The constitutional ideas of John Calhoun and George Wallace cannot provide a theoretical framework for a workable federalism for the twenty-first century. The adherents of national power, however, enjoy mischaracterizing the federalism of the Rehnquist Court as a resurrection of the States' Rights view. I will explain in a moment how wrong they are.

B. *The National Statist or New Deal View: Cooperative Federalism*

Madison's second challenger appeared in the early twentieth century, with the rise of the Progressive Movement and later the New Deal. The adversaries of Madisonian federalism sought increased centralization of government power in the national government. I will call this view the "National Statist" vision of federalism. New Dealers have referred to it as "cooperative federalism."²⁷ Where States' Rights federalism was centrifugal, National Statist or cooperative federalism was (and is) centripetal. The key development in the rise of National Statist federalism was the move away from any real sense that Congress is constrained by Article I, Section 8 of the Constitution. Thus unleashed, Congress entered a multitude of public policy areas once understood to be the exclusive domain of state governments, including a wide variety of business regulation and, more recently, matters of criminal law and public education. State governments' authority was curtailed. At the limit, state governments have been treated as little more than convenient districts for the administration of the federal government's policies,

24. See, e.g., TAYLOR BRANCH, *PARTING THE WATERS: AMERICA IN THE KING YEARS 1954-63*, at 380-81 (1988) (describing the writings of Richmond, Virginia, *News Leader* editor James J. Kilpatrick on this subject); see also DAN T. CARTER, *THE POLITICS OF RAGE: GEORGE WALLACE, THE ORIGINS OF THE NEW CONSERVATISM, AND THE TRANSFORMATION OF AMERICAN POLITICS* 86-87 (1995) (describing the work of legislators in Mississippi and Alabama to pass a "Resolution of Interposition" in tandem with Kilpatrick's writings).

25. JACK N. RAKOVE, *ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION* 171-77 (1996) (discussing Article VI, clause 2, of the United States Constitution).

26. See *id.* at 175 ("No account of this doctrine [of judicial review] that slights its connection to federalism can do justice to the great question that is often treated as *the* critical issue of American constitutional history: whether judicial review was originally intended or understood to be part of the Constitution.").

27. Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 21 (1950).

much like the German model.

We are all familiar with National Statist federalism. Indeed, in spite of the Supreme Court's recent interest in the condition of our federalism, it is fair to say that the National Statist version of federalism continues to dominate most aspects of American government. This is, perhaps, unsurprising. Americans have lived with the idea of an unlimited national government for roughly sixty-five years. We have become accustomed to the idea that the federal government can, even if we think it ought not, become involved in virtually any public policy controversy that arises.

National Statist federalism, by promoting the growth of the federal government's authority, shrinks the role of the states and thus limits the amount of competition that can be generated among states. The result: a single, nationwide policy choice replaces fifty varied state policy choices. The ability of voters, workers, and investors to vote with their feet and seek out the best possible location for their purposes is undermined, and we are left with a single solution imposed from Washington, D.C.

The Supreme Court's recent federalism decisions give reason to hope that we may be able to reclaim Madison's brilliant solution to the problem of designing a federal system. For National Statist federalism to meet the same fate as States' Rights federalism will require more than court decisions, however. All Americans need to learn more about their Madisonian heritage and reflect on the beneficial effects of competition in the realm of federalism, as in other areas of life.

C. *The Classical Liberal or Madisonian View: Competitive Federalism*

To the extent that our federal system is faithful to Madison's vision of federalism, Americans enjoy the benefits of a government that disciplines itself through the division of power. Madison was unsure how the compromise of the Constitutional Convention, which relied upon judicial review and the Supremacy Clause to resolve structural conflicts, would work precisely.²⁸ But Madison supported its promise of double security. One of the unforeseen and subtle benefits of that double security is competition between the states. Under a system of "competitive federalism,"²⁹ states compete to attract residents and business activity by providing more attractive combinations of legal regimes, government services, and tax bills. This is the same kind of competition as is referenced by the more familiar (to lawyers) term, the

28. RAKOVE, *supra* note 25, at 171-77.

29. MICHAEL S. GREVE, *REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN* 1-3 (1999).

"laboratory of the states," but it is wider in scope than that phrase suggests.

Competitive federalism, according to Michael Greve, the director of The Federalism Project of the American Enterprise Institute, "operates at all levels of government and irrespective of whether citizens consume government services as business owners, investors, workers, or for that matter as retirees or welfare recipients."³⁰ The ability of citizens to move from lesser to more attractive locations, to "vote with their feet," will, according to Greve, "discipline government in the same way in which consumer choice . . . disciplines producers. By harnessing competition among jurisdictions, federalism secures in the political arena the advantages of economic markets—consumer choice and satisfaction, innovation, superior products at lower prices."³¹

With an appreciation of the benefits of competition in the marketplace, the Founders devised a competitive system that promotes individual liberty. As Professor Stephen Calabresi has written, "[j]urisdictional competition . . . is also beneficial because it leads to the protection of liberty. If I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a different state with less tyrannous laws."³² Professor Michael McConnell provides the following example of how federalism promotes economic development:

[S]maller units of government have an incentive, beyond the mere political process, to adopt popular policies. If a community can attract additional taxpayers, each citizen's share of the overhead costs of government is proportionately reduced. Since people are better able to move among states or communities than to emigrate from the United States, competition among governments for taxpayers will be far stronger at the state and local than at the federal level. Since most people are taxpayers, this means that there is a powerful incentive for decentralized governments to make things better for most people. In particular, the desire to attract taxpayers and jobs will promote policies of economic growth and expansion.

It is well known, for example, that families often choose a community on the basis of the school system; a better school system encourages development and raises property values.

30. *Id.* at 3.

31. *Id.*; see also ADAM D. THIERER, *THE DELICATE BALANCE: FEDERALISM, INTERSTATE COMMERCE, AND ECONOMIC FREEDOM IN THE TECHNOLOGICAL AGE* 8 (1998) ("State sovereignty textualists would argue that . . . [s]tate and local experimentation will likely produce the optimal result for consumers and producers.").

32. Stephen Calabresi, "A Government of Limited and Enumerated Powers": In Defense of *United States v. Lopez*, 94 MICH. L. REV. 752, 776 (1995).

Competition among communities is therefore likely to result in superior education (as well as more cost-effective ways of providing it). This is especially likely given the strong business support for education. Because of the need for a well-educated work force, businesses often choose to locate in communities with a superior educational system and push for improved education in communities where they already have facilities. The chairman of Xerox Corporation has been quoted as saying, "Education is a bigger factor in productivity growth [rates] than increased capital, economies of scale or better allocation of resources."³³

Madison's version of federalism promotes such competitive federalism by attempting to prevent the over-centralization of American government. The first line of defense is the concept of enumerated powers: Congress's authority to legislate extends only to those matters specifically enumerated in Article I, Section 8 of the Constitution. This limitation of the federal government's power left the states free to make law (or not) with respect to the remainder of what was historically understood as the "police power" of every sovereign government, and that is indeed a broad range of action. This basic arrangement is tempered by certain limitations on state governments in Article I, Section 10, of the Fourteenth Amendment, and the Supremacy Clause of Article VI. But Madison's fundamental design for competitive federalism was, in sum, for a national government of limited scope but unquestioned supremacy as to those policy decisions within its purview, with state governments exercising the remainder of sovereign authority within the constraints of competition from sister states.

III. UNDERSTANDING THE JURISPRUDENCE OF THE REHNQUIST COURT

To understand better the perspective of competitive federalism of the Rehnquist Court, consider the decisions of the Court in two general categories. The first category of cases involves the federal judicial review of state abuses of power. The second category of cases involves the judicial review of federal abuses of power. On both of these fronts, the Court actively polices violations of the Constitution.

A. *Judicial Review of State Abuses*

The Rehnquist Court cannot fairly be characterized as a champion

33. Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498-99 (1987) (reviewing RAOUL BERGER, *FEDERALISM: THE FOUNDERS' DESIGN* (1987)) (alteration in original) (footnotes omitted).

of the John C. Calhoun or George C. Wallace perspective of States' Rights. In case after case, the Rehnquist Court has not hesitated to remedy violations of fundamental civil rights by state governments. These decisions involve, for example, matters of religion, speech, association, and voting.

If there is one constant in recent decisions about church-state relations and the freedom of religion, it is this: the State loses. On the one hand, there are decisions about the state sponsorship of religion, such as *Lee v. Weisman* where the Court prohibited a public high school from sponsoring and writing a prayer for its graduation ceremony,³⁴ and *Sante Fe Independent School District v. Doe* where the Court prohibited a public high school from sponsoring a prayer before a football game.³⁵ On the other hand, there are decisions about state censorship of religious expression, such as *Rosenberger v. Rector & Visitors of the University of Virginia* where the Court prohibited the University of Virginia from denying student activity fees to a student-run Christian newspaper,³⁶ and *Good News Club v. Milford Central School* where the Court prohibited a public elementary school from denying after-hours access to its facilities for meetings of a student Bible club.³⁷ Justices O'Connor and Kennedy are the pivotal decision-makers in this area.

The Court is also active in remedying state violations of first amendment freedoms of speech and association. The last two terms of the Court provide good examples of its steadfastness in putting aside state-sponsored political correctness in the preservation of individual liberty. In *Lorillard Tobacco Co. v. Reilly*, the Court struck down state regulations prohibiting advertisements of tobacco products within certain distances from schools or playgrounds.³⁸ In *Boy Scouts of America v. Dale*, the Court declared unconstitutional a New Jersey law that required the Boy Scouts to admit an openly homosexual scoutmaster.³⁹ The Calhoun/Wallace perspective of States' Rights was advanced in the *Boy Scouts* case in the dissenting opinion of Justice Stevens, in which Justices Souter, Ginsburg, and Breyer joined.⁴⁰

The Rehnquist Court is also vigilant in the protection of voting rights from state-sponsored discrimination. In *Shaw v. Reno* and *Miller v. Johnson*, for example, the Court ruled that states cannot draw election districts for a predominantly racial purpose.⁴¹ In *Buckley v. Ameri-*

34. 505 U.S. 577, 599 (1992).

35. 530 U.S. 290, 315-17 (2000).

36. 515 U.S. 819, 837-46 (1995).

37. 121 S. Ct. 2093, 2107 (2001).

38. 121 S. Ct. 2404, 2422, 2430 (2001).

39. 530 U.S. 640, 659 (2000).

40. *Dale*, 530 U.S. at 678-85 (Stevens, J., dissenting).

41. *Shaw*, 509 U.S. 630, 649 (1993); *Miller*, 515 U.S. 900, 920-21 (1995).

can Constitutional Law Foundation, Inc., the Court struck down several Colorado regulations of the process for gathering signatures for initiative and referendum petitions.⁴² In that vein, despite the hullabaloo of last year, it should not have been a surprise when the Court, in *Bush v. Gore*, halted the arbitrary recounts of votes in Florida during the presidential election.⁴³ Again the Calhoun/Wallace perspective of States' Rights was advanced by Justice Stevens in his dissenting opinion in *Bush v. Gore*.⁴⁴

B. Judicial Review of Federal Abuses

Although the Rehnquist Court has not been reticent about prohibiting state violations of fundamental rights, the Court is not an apologist for the broad use of federal power at the expense of state power. The Rehnquist Court is as aggressive in prohibiting Congress from exercising powers reserved to the states as the Court is in requiring the states to respect the constitutional rights of individuals. The decisions of the Rehnquist Court in the promotion of federalism are, in fact, driven by the same concern for individual liberty.

These decisions can be divided into three categories. The first category involves limiting Congress to the use of its enumerated powers in Article I of the Constitution. The second category requires political accountability for Congress. The third category preserves the notion that, apart from fundamental rights expressly protected by the Constitution, the states are free to operate as laboratories of social and economic policies.

1. Enumerated Powers

The most important federalism decisions of the Rehnquist Court do not involve cases where a state government was even a party. In *United States v. Lopez*, the Court held that Congress lacked the authority under the Commerce Clause to enact the Gun-Free School Zones Act.⁴⁵ Five years later, in *United States v. Morrison*, the Court followed up with a ruling that Congress lacked the authority to create a civil remedy for sexual assault in the Violence Against Women Act.⁴⁶ In each instance, an individual challenged the abuse of federal power, and the Court defied notions of political correctness and held that Congress lacked the

42. 525 U.S. 182, 205 (1999).

43. 531 U.S. 98, 110 (2000).

44. 531 U.S. at 123-29 (Stevens, J., dissenting).

45. 514 U.S. 549, 556-67 (1995).

46. 529 U.S. 598, 605, 619 (2000).

authority to intrude upon matters of state and local law enforcement.⁴⁷ These blockbuster decisions are fundamentally the result of Congress abdicating its responsibility to concentrate on truly national concerns and instead gauging its priorities based on the politics of the moment. In each case, the Court held that, under the Constitution, Congress can exercise only those powers enumerated in Article I.⁴⁸

In these decisions, the Court protected the authority of the states regardless of the willingness of at least some states to abdicate that authority. In the *Morrison* case, I was the one State attorney general to file an amicus curiae brief in support of the argument for federalism. Thirty-six of my colleagues filed briefs in support of the power of Congress to regulate traditional matters of state criminal law.

In both *Lopez* and *Morrison*, an individual accused of a violation of federal law challenged the authority of Congress to regulate his behavior.⁴⁹ Liberal scholars who tend to defend the civil rights of individuals against state oppression were silent about the abuse of power by the federal government. Conservatives who ordinarily decry the release of criminals or other wrongdoers on technical legal grounds rose to defend the individuals accused of possession of firearms on school grounds and rape.

The amicus brief that Jeffrey S. Sutton and I filed on behalf of the State of Alabama in *Morrison* argued that the Court must restrain both federal and state abuses of power.⁵⁰ We noted that, in cases of rape, such as *Miranda v. Arizona*⁵¹ and *Coker v. Georgia*,⁵² the Court had restrained the power of states to prosecute wrongdoers, and we argued that the same principle must apply where Congress has exceeded its authority to punish cases of rape.⁵³

The Rehnquist Court, however, has not curtailed the power of Congress to regulate true commerce. Indeed, when the subject of federal regulation is virtually any economic activity, the Court sustains the power of Congress to regulate that activity. That is why the Court rejected the federalism argument in *Reno v. Condon*, which involved the regulation of an article of commerce—drivers' license information.⁵⁴ Similarly, in *Lorillard Tobacco Co. v. Reilly*, the Court struck down some of the state regulations of tobacco advertisements on the ground

47. *Lopez*, 514 U.S. at 561 n.3; *Morrison*, 529 U.S. at 615-19.

48. *Lopez*, 514 U.S. at 552-53; *Morrison*, 529 U.S. at 607.

49. *Lopez*, 514 U.S. at 551-52; *Morrison*, 529 U.S. at 604.

50. Brief for the State of Alabama as Amicus Curiae in support of Respondents, 1994 U.S. Briefs LEXIS 5, at *22-*25, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

51. 384 U.S. 436 (1966).

52. 433 U.S. 584 (1977).

53. Brief for the State of Alabama at *22-*25, *Morrison* (Nos. 99-5, 99-29).

54. 528 U.S. 141, 149-51 (2000).

of pre-emption (i.e., the already extensive federal regulation of tobacco advertisements).⁵⁵

2. *Political Accountability*

A second aspect of the federalism decisions of the Rehnquist Court demands political accountability for the legitimate exercise of power by Congress. Political accountability means that Congress has to be clear and open about the exercise of its enumerated powers. Congress cannot be allowed to impose unfunded mandates or responsibilities on the states without accepting its own burdens of responsibility. This aspect of the federalism decisions arises in interpretations of the Tenth and Eleventh Amendments and in the construction of statutes that purport to disrupt the balance of federal-state power.

a. *Tenth Amendment*

One aspect of the demand for political accountability is the respect for dual sovereignty under the Tenth Amendment. In 1992, in *New York v. United States*, the Court ruled that Congress cannot commandeer state legislators to enact a waste disposal program as if they are employees of mere subdivisions of the federal government.⁵⁶ In 1997, in *Printz v. United States*, the Court ruled that Congress cannot commandeer state executive officials to administer and enforce the Brady Handgun Law.⁵⁷

These decisions require Congress to create and fund its own mandates rather than passing that burden to state officials. If Congress wants a federal background check for handgun purchases, then Congress can create and fund the bureaucracy for that program. Citizens then know whom to hold accountable for the costs and burdens of that program.

b. *Eleventh Amendment*

Another aspect of the demand for political accountability is the respect for state sovereign immunity under the Eleventh Amendment. In *Seminole Tribe v. Florida*, in 1995, the Court ruled that Congress lacked the authority to subject state governments to lawsuits filed by private parties concerning Indian gaming in federal courts.⁵⁸ In 1999, in *Alden v. Maine*, the Court ruled that Congress lacked the authority to

55. 121 S. Ct. 2404, 2419 (2001).

56. 505 U.S. 144, 188 (1992).

57. 521 U.S. 898, 933 (1997).

58. 517 U.S. 44, 62-63, 72 (1996).

subject state governments to private lawsuits in their own courts under the Fair Labor Standards Act.⁵⁹

These decisions protect the taxpayers of state governments from the burdens of liability from federal lawsuits, but Congress can remove that protection by accepting responsibility for the burdens. Rather than hiding behind the cloak of lawsuits by private parties, the federal government can authorize and prosecute its own cases against state governments. Congress can then openly acknowledge its responsibility for the rising tax burden and inefficiency caused by that litigation at both the federal and state levels.

c. Statutory Construction

A final but important aspect of the demand for political accountability arises in cases of statutory construction. Even when Congress has the power to impose a burden on state governments or to regulate in a field that is the traditional domain of the states, the Court requires a plain or clear statement of that intent from Congress. This rule of statutory construction allows the Court to avoid more difficult issues of the constitutional limits of federal power.

There are a host of examples of this well-established kind of federalism decision-making, which now enjoys wide support on the Court. Over twenty years ago in *Pennhurst State School & Hospital v. Halderman*, the Court held that Congress had not expressed a clear intent to abrogate the sovereign immunity of state governments and exercise the remedial power of Congress under the Fourteenth Amendment in enacting the Developmentally Disabled Assistance and Bill of Rights Act.⁶⁰ In *Gregory v. Ashcroft*, more than ten years ago, the Court held that Congress had not expressed a clear intent to override the mandatory retirement laws for state judges.⁶¹ And last year, in *Jones v. United States*, the Court held that Congress had not expressed a clear intent to prosecute a defendant for the arson of a personal residence, a traditional area of state criminal jurisdiction.⁶²

It should be remembered that the Rehnquist Court has not recently expressed any desire to overrule its decision in *Garcia v. San Antonio Metropolitan Transit Authority*.⁶³ There the Court refused to declare the minimum wage and overtime provisions of the Fair Labor Standards Act, as applied to state government employees, as violative of the

59. 527 U.S. 706, 759-60 (1999).

60. 451 U.S. 1, 15-17 (1981).

61. 501 U.S. 452, 470 (1991).

62. 529 U.S. 848, 858 (2000).

63. 469 U.S. 528 (1985).

Tenth Amendment.⁶⁴ The *Garcia* Court reasoned that "[t]he political process ensures that laws that unduly burden the States will not be promulgated."⁶⁵ By requiring clear statements of an intent to disrupt the balance of federal-state power, the Court is giving the states—and the people—a better opportunity of protecting themselves in the political process as described in *Garcia*.

3. *Laboratories of the States*

In addition to its restoration of respect for enumerated powers and its demand for political accountability from Congress, the Rehnquist Court has protected the principle that the states enjoy considerable freedom to compete as laboratories of social and economic policies. The Rehnquist Court has refused to allow Congress to create new civil rights that override state policies under the guise of enforcing the Fourteenth Amendment. In *City of Boerne v. Flores*, in 1997, the Court held that Congress lacked the power to impose on the states more stringent protections of religious freedom than provided by the Constitution itself.⁶⁶ Beyond the guarantees of the First Amendment, the states can experiment with adopting more or less stringent protections for religious freedom. After the *Boerne* decision and with my support, Alabama, for example, adopted a constitutional amendment that provides greater protections for religious freedom than required by the First Amendment.⁶⁷ Similarly, in *Kimel v. Florida Board of Regents*⁶⁸ and *Board of Trustees of the University of Alabama v. Garrett*,⁶⁹ the Court refused to allow Congress to abrogate the sovereign immunity of the states, under the guise of enforcing the Fourteenth Amendment, to address matters of age and disability discrimination in the absence of evidence of substantial unconstitutional discrimination by the states.⁷⁰

CONCLUSION

In its respect of federalism, the Supreme Court must perform its duty as faithfully as it would in respecting any other aspect of the Constitution. The Court must base its decisions on the text and structure of the Constitution, regardless of either the politics of the moment or the result of the specific controversy. True to Madison's vision of competi-

64. *Garcia*, 469 U.S. at 555-57.

65. *Id.* at 556.

66. 521 U.S. 507, 534-36 (1997).

67. ALA. CONST. amend. 622.

68. 528 U.S. 62 (2000).

69. 531 U.S. 356 (2001).

70. *Kimel*, 528 U.S. at 91; *Garrett*, 531 U.S. at 373-74.

tive federalism, the Rehnquist Court has exercised the power of judicial review to remedy the abuse of power by both the states and the federal government. The Court has properly left the Calhoun/Wallace perspective of States' Rights dormant and instead challenged the National Statist vision of cooperative federalism with a restoration of Madison's double security. There lies the promise of liberty.