

WHAT IS REHNQUIST FEDERALISM?

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In response to Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006).

Professor Chemerinsky has provided a helpful and insightful template for studying the major doctrinal areas addressed by the Rehnquist Court.¹ He, Professor Tushnet,² and Professor Merrill³ before them, quite appropriately, have begun the task of constructing the larger narrative of how the Rehnquist Court addressed and sometimes altered major areas of the law. This sketching of the big picture is very important.

There is another level that requires attention as well: I am going to move from the macro to the micro level. In this brief commentary, I will confine my comments to one particular set of doctrines—those implicating federalism—during the years Justice and then Chief Justice William Rehnquist served on the Court. My primary question is what, if any, worldview stands behind Rehnquist federalism.

The federalism arena is worth close attention, as it is often thought that the Rehnquist Court radically altered the law in this arena. While it is true that Rehnquist was part of an alteration in the state/federal balance during his tenure at the Court, it is harder to sustain an argument that a radical shift took place, or that a unifying vision can explain the federalism shift that did occur.

Chemerinsky summarizes the federalism cases as follows:

The Court's lack of deference to Congress was most evident in the federalism decisions, where the Court invalidated laws as exceeding the scope of the Commerce Clause, narrowed the scope of Congress's power under Section 5 of the Fourteenth Amendment, revived the Tenth

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¹ Erwin Chemerinsky, *Assessing Chief Justice William Rehnquist*, 154 U. PA. L. REV. 1331 (2006).

² Mark Tushnet, *Assessing Chief Justice William Rehnquist's Court*, 155 U. PA. L. REV. PENNUMBRA 1 (2006).

³ Thomas W. Merrill, *The Making of the Second Rehnquist Court: A Preliminary Analysis*, 47 ST. LOUIS U. L.J. 569 (2003).

Amendment as a constraint on federal power, and expanded the scope of sovereign immunity to limit the enforcement of federal statutes.⁴

What Chemerinsky says is true, of course, but it captures just a slice of federalism in the Rehnquist era, because there were significantly more times that the Court declined to apply federalism than times it did apply it. Far from overseeing a full-blown re-introduction of federalism principles, Rehnquist led the Court down a much narrower path.

If one seeks to identify the worldview behind Rehnquist federalism there are several possibilities. One can identify threads of different views on federalism in dicta sprinkled through the federalism decisions. Obvious possibilities, which I will discuss, are “Reaganite Small Government,” “Reining in Congress,” and “States’ Rights.” Yet, none of these approaches are used consistently through the Rehnquist Court’s jurisprudence. In the end, the Rehnquist adjustment to the Court’s federalism jurisprudence can best be captured by the phrase, “Fair Play Federalism.”

Reaganite Small Government. There might be an argument that Rehnquist federalism was given a significant boost when President Ronald Reagan, who served from 1981 to 1989, sailed into the White House on the message that smaller government is better government. Reagan not only viewed small government as a laudable goal, but he also successfully nominated Justice Sandra Day O’Connor, who would share Rehnquist’s belief in federalism as an important constitutional principle.

The plain message was that big government was corrupt government, and that there needed to be meaningful checks on Congress. In comparison, the relatively smaller state governments appeared more manageable and accountable. For westerners like Reagan, Rehnquist, and O’Connor, it was not difficult to view Washington as a distant and uninformed bureaucracy. They each brought that sensibility with them to the federal government.

The small government thesis is consistent with the “enumerated powers” theory of the Constitution, which limits Congress to the powers listed in Article I and in Section 5 of the Fourteenth Amendment. The Constitution further limits congressional power through the Tenth Amendment. To be sure, a significant number of Rehnquist-era cases use language that reflects these principles to some degree.⁵

⁴ Chemerinsky, *supra* note 1, at 1339.

⁵ See *Printz v. United States*, 521 U.S. 898, 933 (1997) (holding that a requirement that state and local governments perform background checks before issuing firearm permits is an unconstitutional infringement on state power); *City of Boerne v. Flores*,

Ultimately, though, the small government principle was not evident in cases where it logically should have been. For example, while the Court found in a limited number of cases that Congress exceeded its Article I enumerated power under the Commerce Clause,⁶ no other enumerated power was treated to such a narrow construction during the Rehnquist era. The most glaring example is the Spending Clause.⁷

The power of the purse is always an important power, and, in Congress's case, it is enormous. If the Rehnquist philosophy of federalism was intended to achieve small government, one would have thought that the Court not only would have placed limits on the exercise of the Commerce Clause power, but also (and even more so) on the exercise of the spending power. Not a single case, however, has found that Congress had exceeded its power under the Spending Clause—despite Congress's increasingly creative ways to extend its power through the purse. To the contrary, the Court's rhetoric opened the door to increased spending power. During the Rehnquist era, the Court upheld rather aggressive spending legislation with conditions that burdened states and individual rights, including a new regulatory interpretation of Title X of the Public Health Services Act, which for-

521 U.S. 507, 536 (1997) (holding that the Religious Freedom Restoration Act of 1993 is not a proper exercise of Congress's Section 5 enforcement powers because the Act "contradicts vital principles necessary to maintain separation of powers and the federal balance"); *United States v. Lopez*, 514 U.S. 549, 552 (1995) (noting that the Constitution creates a federal government of enumerated powers to ensure the protection of fundamental liberties); *New York v. United States*, 505 U.S. 144, 153, 177 (1992) (holding that the Low-Level Radioactive Waste Policy Act's "take title" provision, requiring states to exercise ownership of waste or regulate according to the instructions of Congress, is "outside Congress' enumerated powers" and inconsistent with the Tenth Amendment); *see also* THE FEDERALIST NO. 45, at 292 (James Madison) (Clinton Rossiter ed., 1961) (explaining that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State government are numerous and indefinite.").

⁶ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001) (holding that the Eleventh Amendment protects state governments from suit for alleged violations of Title I of the Americans with Disabilities Act of 1990); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (holding that state governments could not be sued for violating the Age Discrimination in Employment Act of 1967); *United States v. Morrison*, 529 U.S. 598, 602 (2000) (holding unconstitutional the civil damages provisions of the Violence Against Women Act of 1994 for exceeding the scope of Congress's Commerce Clause power); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (holding that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."); *Lopez*, 514 U.S. at 561 (invalidating the Gun-Free School Zones Act of 1990 on the grounds that such a regulation exceeds Congress's Commerce Clause powers because it "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms").

⁷ U.S. CONST. art. I, § 8, cl. 1.

bade doctors receiving federal funding from discussing abortion with patients;⁸ the Solomon Amendment, which withdrew virtually all federal funding from any school that refused to permit military recruiters on campus;⁹ the federal statute that outlawed bribery of state and local officials where the relevant government has taken at least \$10,000 in federal funds;¹⁰ the Low-Level Radioactive Waste Policy Amendments Act of 1985, which ordered states to take title to waste;¹¹ and the law that conditioned a percentage of federal highway funds on states choosing to raise the minimum drinking age.¹²

It is hard, if not impossible, to argue that Rehnquist federalism rests on a solid small government philosophy in light of the Rehnquist Court's Spending Clause doctrine.

Reining in Congress. Reaganite Small Government may not pan out as a theory to explain Rehnquist federalism, but perhaps the lesser notion of Reining in Congress might.

The most articulate proponent for this worldview was Representative Newt Gingrich, who crafted the Contract with America in 1995, which stated, in summary form:

FIRST, require all laws that apply to the rest of the country also apply equally to the Congress;

SECOND, select a major, independent auditing firm to conduct a comprehensive audit of Congress for waste, fraud or abuse;

THIRD, cut the number of House committees, and cut committee staff by one-third;

FOURTH, limit the terms of all committee chairs;

⁸ See *Rust v. Sullivan*, 500 U.S. 173, 193 (1991) (upholding a 1988 interpretive regulation limiting the scope of Title X funding to preventative family planning, in order to require doctors receiving federal medical funding to refrain from discussing abortion).

⁹ See *Rumsfeld v. Forum for Academic & Inst. Rights*, 126 S. Ct. 1297, 1305 (2006) (holding that the federal government could constitutionally withdraw federal funds from educational institutions that refused to provide equal "access to campuses" and "access to students" to the military for interviewing students on campus).

¹⁰ See *Sabri v. United States*, 541 U.S. 600, 605 (2004) (holding constitutional 18 U.S.C. § 666, which criminalizes bribery of an official of a state, local, or tribal government entity that receives \$10,000 or more in federal funds).

¹¹ See *New York v. United States*, 505 U.S. 144, 167 (1992) (holding that the behavior regulated only needs to "bear some relationship to the purpose of the federal spending").

¹² See *South Dakota v. Dole*, 483 U.S. 203, 206 (1987) (upholding a federal statute, 23 U.S.C. § 158, conditioning the disbursement of federal highway funds on recipient states' decisions to raise the minimum drinking age).

FIFTH, ban the casting of proxy votes in committee;

SIXTH, require committee meetings to be open to the public;

SEVENTH, require a three-fifths majority vote to pass a tax increase;

EIGHTH, guarantee an honest accounting of our Federal Budget by implementing zero base-line budgeting.¹³

Taken on its face, the Contract sought to find meaningful ways to force Congress to be accountable to the people and for the larger public good. It was also aimed at reducing perceived corruption in Congress.

There is a similar sense in some of the federalism cases that Congress had lost sight of all limitations. Perhaps the federalism revival was really just intended as a wake-up call to Congress to increase its awareness of the parameters of its constitutionally appointed role. On this theory, the Court viewed Congress as a body that had become drunk with its own power and blind to the limits placed on it by the Constitution, in part because earlier Courts had

bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road, giving great deference to congressional action. . . . [W]e decline here to proceed any further.¹⁴

The Court would only place “outer limits”¹⁵ on the exercise of that power in limited circumstances, and would not take on the onerous project of charting Congress’s power altogether. On this theory, the federalism cases were a shot over the bow, but not much more.

In *Lopez*, the Court chided Congress for failing to consider explicitly what power it was implementing with the Gun-Free School Zones Act. “To uphold the Government’s contentions here, we would have to pile inference upon inference in a manner that would . . . convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.”¹⁶ In *Boerne*, the Court explained that its practice of deference to Congress rested on the assumption that Congress considered whether its enactments were constitutional. There, the Court noted that Congress has a constitutional duty to consider the constitutionality of its own actions:

¹³ See 140 CONG. REC. H9879-10, H9880 (daily ed. Sept. 27, 1994) (statement of Rep. Hoekstra) (outlining the principles of the Contract with America).

¹⁴ *United States v. Lopez*, 514 U.S. 549, 567 (1995).

¹⁵ *Id.* at 557.

¹⁶ *Id.* at 567.

When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution James Madison explained that “it is incontrovertibly of as much importance to this branch of the Government as to any other, that the constitution should be preserved entire. It is our duty.” 1 Annals of Congress 500 (1789). Were it otherwise, we would not afford Congress the presumption of validity its enactments now enjoy.¹⁷

These are not-so-subtle warnings to Congress to take heed of the larger constitutional scheme and the limitations that scheme places on it. They are only warnings, however, and they number few and far between if one considers the large number of cases decided during the Rehnquist era.

Even this weaker notion that the Rehnquist Court intended to rein in Congress, or to give it fair warning of its limited powers, though, is belied by the Rehnquist era’s treatment of the nondelegation doctrine. If the Court’s vision was to rein in Congress—either through warnings or the placement of actual limits on its power—one would have thought that the Court would have embraced and revived the nondelegation doctrine. The nondelegation doctrine stands for the principle that Congress must make substantive law and may not shift difficult public policy choices to administrative agencies.¹⁸ Like federalism until the late 1980s, since the 1930s it had become a doctrine with no force or content. While the Court has never overruled the doctrine, it has been watered down to stand for the proposition that Congress need give no more than an “intelligible principle” for administrative agencies to follow to satisfy its obligation to make substantive law.¹⁹

When given the opportunity to rein in Congress’s inclination to pass off policy making to administrative agencies, the Rehnquist Court showed no inclination to revive or invigorate the nondelegation doctrine to any degree.²⁰ Nor did the Court issue any warnings about lim-

¹⁷ *City of Boerne v. Flores*, 521 U.S. 507, 535 (1997).

¹⁸ *See* *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) (holding unconstitutional the delegation of authority over the mining industry at the local level); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) (emphasizing that delegation to administrative agencies “cannot be allowed to obscure the limitations of the authority to delegate”); *see also* DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* 155-64 (1995) (arguing normatively against the constitutionality of delegation).

¹⁹ *See* *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001).

²⁰ *See id.* at 474 (holding the scope of discretion conferred by the Clean Air Act to be within the limits of the nondelegation doctrine).

its on congressional power in this arena. The Reining in Congress thesis, therefore, does not have much purchase beyond isolated statements in a limited category of congressional power cases.

States' Rights. Perhaps Congress is the wrong focus, and it would instead make more sense to focus on the Rehnquist era's direct treatment of the states. (Even though the Constitution only accords individuals "rights," it has been popular to refer to federalism as "states' rights."²¹ The more appropriate appellation is "state power." Here, again, the Rehnquist Court did not follow this possible vision that might have provided the theoretical basis for the federalism revival.

There were ample opportunities. For example, in *Sabri*, the Court could have ruled that the federal government had no power to criminalize bribery of state and local officials, because criminal law generally belongs to the states, especially where the crime is directed at state and local elected officials. The Court also could have held that the federal government was intruding on matters inherently local, subject to local and state law, and traditionally belonging to local government. Many thought *Sabri* a golden opportunity to bring some measure of proportion to the spending power doctrine. Instead, the Court opened the door to federal regulation at an inherently local level, reasoning that, since money is fungible, any local bribery would have affected the recipient government.²² The fungibility argument is not hard to follow, but it is a stretch to say that a mere \$10,000, even in a small community budget, justifies such federal intervention into an arena traditionally left to state and local governments.

Tightening up the standards by which the federal government may preempt state law is another avenue the Court could have followed if it intended to strengthen state power. States would have more latitude to operate without federal intervention were federal preemption doctrine narrowed. As others have pointed out, the next logical step following the Commerce Clause, Section 5, and Tenth Amendment cases was to place limits on the extent to which Congress could preempt state law. This simply did not happen.²³

²¹ See, e.g., David J. Barron, *Fighting Federalism with Federalism: If it's Not Just a Battle Between Federalists and Nationalists, What is it?*, 74 *FORDHAM L. REV.* 2081 (2006); William M. Carter, Jr., *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 *HARV. C.R.-C.L. L. REV.* 17 (2004); 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).

²² *Sabri v. United States*, 541 U.S. 600, 606 (2004).

²³ See *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246 (2004) (holding that a Local Fleet rule attempting to regulate the purchase or lease of vehicles was preempted by the federal Clean Air Act because treating the purchase of vehicles differently from their manufacture made no sense); *Lorillard Tobacco Co. v.*

Fair Play Federalism. Rehnquist federalism, in the end, appears to be a much less ambitious project than any of the preceding theories would support. Instead of the more difficult project of rearranging the boundaries of power between Congress and the states, perhaps it is more accurate to describe the new doctrine as one of “fair play.” If one looks at the laws invalidated and the theories set forth, it starts to appear that the value being vindicated is not so much federalism as a category, but rather fair play between Congress and the states.

Take a look at the laws that were invalidated. *Lopez* invalidated the Gun-Free School Zones Act. The Court noted that criminal law and schools are areas of traditional control for the states,²⁴ so this was a synergistic takeover of state lawmaking prerogatives. And, with all due respect to its drafters, it seemed like a particularly unnecessary piece of legislation, as local law enforcement would remove those with guns near schools anyway. In *Printz*, the Court invalidated the Brady Act, which required states to provide manpower and money to do background checks for gun owners. While the policy of tracking gun owners itself did not make the law constitutionally suspect, the heavy-handed fashion in which the federal government tossed off a policy objective and then told the states to carry it out crossed the line.²⁵ The Court invalidated the Religious Freedom Restoration Act, in part, because the Act imposed its requirements (which were intended to undermine many neutral, generally applicable laws for the benefit of religious entities) on every single law in a state. Its scope and breadth and consequent enormous burden on the states alone made it suspicious and unfair.²⁶

The Court invalidated the civil remedy provisions of the Violence Against Women Act, because they were beyond Congress’ power.²⁷ From the Court’s viewpoint, it appears that Congress leapfrogged over a legitimate exercise of its powers in that arena—it could have enforced the civil rights of victims against local police who ignored rape

Reilly, 533 U.S. 525 (2002) (finding a Massachusetts law regulating the advertisement of cigarettes within one-thousand feet of schools or playgrounds to be preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA)); *United States v. Locke*, 529 U.S. 89 (2000) (holding Washington statutes regulating oil-tanker design and operating requirements to be preempted by the Ports and Waterways Safety Act of 1972 and the Oil Pollution Act of 1990); *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88 (1992) (holding that an Illinois statute regulating licensing provisions for handlers of hazardous waste was preempted by OSHA).

²⁴ *United States v. Lopez*, 514 U.S. 549, 561 n.3, 567 (1995).

²⁵ *Printz v. United States*, 521 U.S. 898, 933-34 (1997).

²⁶ *City of Boerne v. Flores*, 521 U.S. 507, 518-20 (1997).

²⁷ *United States v. Morrison*, 529 U.S. 598, 602 (2000).

cases.²⁸ Instead, Congress chose to ignore this root problem, which appropriately could have justified federal attention, and decided instead to regulate the relationship between the perpetrator and the victim by creating, for all intents and purposes, a new tort remedy—where individual torts are traditionally the domain of the states. The Court invalidated Title I of the Americans with Disabilities Act in the *Garrett* case where the record was replete with evidence of discrimination against the disabled in the private sector, but lacked meaningful proof that the states had engaged in the same behavior.²⁹ As Justice Kennedy noted, it hardly seemed fair to subject the states to the ADA’s burdens when the record suggested that the vast majority of the states were enacting civil rights laws for the disabled, not violating them.³⁰

The fair play rationale works in the other direction as well. When the state was acting as a participant in the market for information, the Court had no problem with Congress regulating the state like all other market participants under the Drivers Privacy Protection Act.³¹ Moreover, when fundamental rights were at stake, the Court was much more likely to give Congress latitude to regulate the states than if the right at issue was significantly less valuable. For example, in *Tennessee v. Lane*, the Court vindicated the application of Title II of the ADA against the states where the right at issue was the fundamental right of access to the courts.³² In another case, the Court had little patience for the states’ attempts to provide for medical marijuana when the federal government had already built an enormous drug-fighting edifice.³³ Finally, the Court has repeatedly stated that the Voting Rights Act, which rests on the long, ignominious history of racism in the United States, is no violation of federalism principles.³⁴ If there ever

²⁸ *Id.* at 626.

²⁹ *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001).

³⁰ *See id.* at 375-76 (Kennedy, J., concurring) (arguing that “[i]f the states had been transgressing the Fourteenth Amendment by their mistreatment or lack of concern for those with impairments, one would have expected to find . . . extensive litigation. This confirming judicial documentation does not exist.”).

³¹ *See Reno v. Condon*, 528 U.S. 141, 151 (2000) (holding that the Driver’s Primary Protection Act may regulate states because it is generally applicable to the market of information suppliers).

³² *See Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (holding that “Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress’ § 5 authority to enforce the guarantees of the Fourteenth Amendment”).

³³ *See Gonzales v. Raich*, 125 S. Ct. 2195, 2203-04 (2005) (describing the declaration of the “war on drugs” and the subsequent enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970).

³⁴ *See Lopez v. Monterey County*, 525 U.S. 266, 282 (1999) (recognizing that the Voting Rights Act intrudes into “sensitive areas of state and local policymaking,” but

was a judgment based on an intuitive sense of fairness, that is it.

What can be said for certain is that the federalism jurisprudence from the Rehnquist era is not a strong version. Nor is it an ideological version. It is more intuitive and a creature of common sense, seemingly motivated by a desire to warn Congress from overplaying its power against the states. The Rehnquist Court should not go down in history as making radical changes to protect or enlarge state power or to limit congressional power. Congressional power remains enormous, and rarely checked by judicial doctrine.

The most interesting question now is whether the Roberts Court will move from this Fair Play Federalism jurisprudence toward one of the stronger theories discussed above, continue with the Rehnquist Court's Fair Play Federalism, or simply retrench on federalism altogether. At this point in history, all three options are live possibilities.

noting "that the Reconstruction Amendments by their nature contemplate some intrusion into areas traditionally reserved to the States."); *see also* *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (classifying the Voting Rights Act as "legislation which deters or remedies constitutional violations" and thus falls within Congress's enforcement power).