

The Supreme Court's Federalism

By Michael S. Greve

Federalist Outlook No. 1 argued that a federalism of state competition and enumerated, limited national powers depends on judicially enforced limitations on the national government's power. The Supreme Court's just-concluded term indicates that the five moderate-conservative justices who provide reliable votes for federalism comprehend their central role in restoring federalism—for the most part.

Continuing a trend that has been underway since 1995, the Supreme Court's 1999–2000 term revolved primarily around the structural principles of the Constitution—that is, the principles that govern the allocation of power among the branches of government. The Court brought doctrinal clarity to central federalism questions and, in so doing, laid the groundwork for further limits on congressional power. Most important, the 1999 term suggests that the Court's federalist majority is prepared to enforce federalist principles against powerful nationalist constituencies.

The principal threat to the sustained pursuit of constitutional federalism lies in the Supreme Court's tendency to lapse into an antidemocratic imperialism that is inimical to federalist tenets—most notably, the wholesale nullification of state-enacted bans on partial birth abortions in *Stenberg v. Carhart*. One must hope, but one cannot be certain, that *Stenberg* and other such escapades will prove only temporary detours on the road toward constitutional federalism.

Drawing Lines

United States v. Morrison was the most significant federalism decision of the Supreme Court's 1999 term. The federalist majority (Chief Justice

William H. Rehnquist and Justices Anthony M. Kennedy, Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas) invalidated the civil remedies provision of the 1994 Violence against Women Act (affectionately known as "VAWA"), which authorized the victims of gender-motivated violence to sue their aggressors for damages in federal court. In the course of holding that neither the Fourteenth Amendment nor the Commerce Clause authorizes Congress to enact that provision, the Court clarified important legal questions concerning, respectively, the scope of the Fourteenth Amendment, the scope of the Commerce Clause, and the role of Congress. The justices are ready to replace muddled standards with firm lines, because they believe that they can make them stick.

State Action. *Morrison* posed the question whether the Fourteenth Amendment permits Congress to enforce the guarantees of the amendment—due process, equal protection, and privileges and immunities—only against the states or also, as the *Morrison* plaintiff argued, by regulating private actors and conduct (such as individual acts of violence against women). The *Morrison* Court firmly declared that the amendment reaches only state action. Basing its ruling both on the text of the amendment and on cases decided shortly after its enactment, the Court swept aside Warren Court precedents that suggest the opposite conclusion. Combined with an earlier ruling to the effect that Fourteenth

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Amendment laws must be “proportionate” to, and “congruent” with, the evil they purport to remedy, *Morrison* sharply limits the powers of Congress to reach into the lives of private citizens.¹

It’s Not the Economy. The Supreme Court’s 1995 decision in *United States v. Lopez* invalidated the federal Gun Free School Zones Act, prohibiting the possession of guns in and around school grounds, as beyond the reach of Congress’s authority to regulate interstate commerce. *Lopez* was the first case in almost six decades in which the Court struck down a federal law on those grounds. Not knowing where that innovation might lead, the *Lopez* Court left much doubt about the scope and the grounds of the decision—so much doubt that only one among scores of post-*Lopez* appellate decisions found a federal enactment beyond the scope of the Commerce Clause. *Morrison* replaces the *Lopez* muddle with a reasonably clear and manageable test: without a plausible jurisdictional element that ties the regulated conduct to interstate commerce, Congress may not regulate noneconomic conduct under the Commerce Clause.

That interpretation of the Commerce Clause remains quite generous toward Congress—more generous, perhaps, than one might wish. (For instance, Congress may still “aggregate” trivial instances of economic but wholly in-state conduct and proceed to regulate that conduct.) Still, the distinction between economic and noneconomic regulation has bite. Federal statutes criminalizing the mere possession of marijuana or guns, for instance, are almost certainly unconstitutional under the *Morrison* analysis. Another likely fatality—assuming a plausible plaintiff can be found—is in Title 18, chapter 43, of the *United States Code*, criminalizing the false impersonation of a 4-H Club member.

Next to federal criminal law, environmental law is the likeliest area of conflict between the Supreme Court’s federalism and congressional or agency ambitions. If violence against women is beyond the purview of the Commerce Clause, why should violence against woodpeckers and wetlands fall within that ambit?

The justices have already agreed to hear *Solid Waste Agency v. Army Corps of Engineers*, a case concerning the question whether a local pond that is unconnected to federal waterways is subject to Commerce Clause legislation because it serves as a migratory bird habitat. The Court of Appeals for the Seventh Circuit said yes, but that

pre-*Morrison* ruling may prove short-lived. Barring the unexpected appearance of a bald eagle shopping for suitable headgear at a nearby Wal-Mart, the doings of migratory birds cannot possibly subject the locus of their transactions to interstate commerce regulation. The Supreme Court’s decision to hear the case bodes ill for the ecologically ambitious: the federalist justices are long past the point of granting certiorari in cases that might derail their federalism agenda.

Court versus Congress. Before the 1999 term, the Supreme Court’s federalism jurisprudence evidenced a preoccupation with the prerogatives of the states and a corresponding reluctance to enforce the enumerated powers constraints the Constitution imposes on the federal government. The constitutional baseline was something like the following: Congress is and forever shall be omnipotent, provided only that state (and to some extent local) governments remain exempt from federal impositions in a few select areas. Even *Lopez*, the Court’s most aggressive federalism stance until *Morrison*, suggested that the Court would defer to Congress in assessing the constitutionality of questionable federal statutes, so long as Congress provides legislative findings that link the regulated conduct to interstate commerce. A concurring opinion by Justices Kennedy and O’Connor, moreover, suggested that congressional power was effectively unlimited unless Congress intruded into the remaining state enclaves.

Morrison dispels those suggestions. Confronted with four years of congressional findings on the alleged effects of violence against women on interstate commerce, the Court responded, “Findings, shmfindings.” (I paraphrase.) And, unlike *Lopez*, the *Morrison* opinion focuses squarely on the central issue of enumerated powers. It contains barely a hint at traditional state concerns as a distinct barrier to congressional action. Of the judicial hand wringing over important national purposes and deference to the judgments of Congress that used to accompany the invalidation of federal statutes, *Morrison* bears no trace. One might say that the Supreme Court is at long last paying Congress the respect it deserves.

Federalism’s Foes

That last remark notwithstanding, the justices have in fact pursued their federalism agenda with an eye toward political acceptability—and reasonably so. The

Supreme Court cannot for any length of time enforce federalism against the will of dominant political interests. The Court learned that lesson in 1937, when it had to surrender constitutional constraints to the nationalist ambitions of the New Deal.

Mindful of the specter of 1937, the modern Supreme Court has tended to enforce federalism when it does not matter—that is, in cases that are unlikely to prompt a massive, organized attempt to legislate around constitutional impediments. The Gun Free School Zones Act struck down in *Lopez* was a symbolic statute of no practical consequence or interest to a tangible, organized constituency. (Even so, Congress promptly reenacted the statute, having made cosmetic changes.) In *Printz v. United States* (1997), an expansive interpretation of the Tenth Amendment’s implied prohibition against the federal “commandeering” of state officials invalidated modest federal gun registration requirements that were scheduled to expire in any event. *Seminole Tribe v. Florida* (1996), the *fons et origo* of a long and controversial line of cases broadly construing the states’ Eleventh Amendment immunity from lawsuits under federal statutes, dismissed the Seminoles’ action under the Indian Gaming Regulatory Act. Tough luck, but not the kind of stuff that sends potent interest groups on the warpath.

The Court’s 1999 term suggests a judicial resolve to assert federalism norms even in the face of powerful nationalist interests. Business, alone among those interests, is still granted a dispensation, for reasons and in ways that will be the subject of an upcoming *Outlook*. With that one exception, however, the Supreme Court is now willing to confront constituencies that have the wherewithal to fight back—but evidently lack the will to do so.

Trade Unions and the Entitlement Lobbies. Labor consistently favors national entitlements. It cannot accomplish its redistributionist objectives so long as capital can vote with its feet, or, for that matter, so long as state and local governments must, in compensating their own employees, take account of taxpayer sentiments and other such annoyances. Those entitlement programs have been prime targets of the Supreme Court’s federalism, and the targeted programs have become progressively more broad-based and visible.

The Fair Labor Standards Act, a New Deal war horse, was held effectively unenforceable against state governments a year ago. This past year, in *Kimel v. Board of Regents*, the Court placed state employers

beyond the reach of lawsuits for damages under the Age Discrimination in Employment Act. The Family and Medical Leave Act is likewise unenforceable. Next year, in a case that the Supreme Court has already agreed to hear, core provisions of the Americans with Disabilities Act may well meet the same fate. Only civil rights statutes at the heart of the Fourteenth Amendment—those dealing with race discrimination—will probably remain intact.

Feminists. Among the few fixed stars in the modern constitutional universe is the rule that feminist litigants get whatever they ask for: sexual harassment rules fabricated from whole cloth; remedies for sexually oriented or abortion-related speech that, though constitutionally protected, is perceived as hostile; access to sex-segregated military academies; civil rights laws that guarantee “equality” in college sports by compelling colleges to abolish men’s athletic teams; and, of course, abortion rights (about which more anon).² *Morrison* is a rare exception to the feminists-win rule. It is not a trivial decision: VAWA’s civil remedies provision was a feminist crown jewel. That it turned into a constitutional pumpkin is a measure of the Court’s seriousness about federalism.

Environmentalists. Environmentalists are hard-core centralists. Everything, they claim, is connected to everything else and must therefore be regulated nationally.³ The Supreme Court has disavowed that premise in a variety of contexts. For federalism purposes, the Court has already explained in *Lopez* and *Morrison* that some connections warrant Commerce Clause regulations, while others do not. For reasons mentioned, environmentalists will likely lose next year’s migratory bird case. In another appellate case, *Gibbs v. Babbitt*, the Fourth Circuit Court of Appeals deemed Endangered Species Act regulations prohibiting the private “taking” of red wolves a legitimate exercise of federal authority. The Court reasoned that private violence against wolves might affect the wolf count, hence the tourist attraction of wolf-howling programs and, at the end of a long chain of implausible events, interstate commerce. That decision, too, may prompt Supreme Court review, depending on the pace at which the justices intend to pursue their federalism course.

Congress could easily, though perhaps awkwardly, circumvent the Court’s rulings—for example, by conditioning the states’ receipt of federal funds under federal

spending programs on their continued compliance with the invalidated provisions. (Existing constitutional doctrines pose no serious obstacle to that stratagem.) Little of the sort has happened, however. Labor and its congressional patrons have made no serious effort to legislate around the Supreme Court's rulings. A mere two days after the *Morrison* decision, Senator Joseph Biden, VAWA's chief congressional champion, declared himself at a loss to find a legislative means of resurrecting the civil remedies provision in some form—even though Justice Stephen Breyer's dissent in the case suggests several such means.

The silence may signify nothing. Labor may have more pressing problems, from China trade to school choice. Feminist ardor for a renewed national debate on violence against women was probably chilled by the unfortunate course of the last such debate (the one involving the president's conduct, for the duration of which feminist leaders left the country). Judicially imposed federalism curbs on environmental regulations might yet prompt a congressional backlash.

Much more likely, though, the ho-hum responses to the Supreme Court's federalism advances are testimony to a political malaise—specifically, the collapse of institutional veto points that would prevent the enactment of the symbolic and transparently silly laws that have drawn the Supreme Court's intervention. Few federal legislators actually believe that rampant misogyny requires a federal remedy for “gender-based” violence, that the planet demands federal controls over mud puddles, or that large segments of the American work force would hit skid row without the Fair Labor Standards Act and its federal minimum wage. It is just that legislators can no longer bring themselves to say no. Few of them mind, though, and many are relieved, when the Supreme Court does the dirty deed.

Judicial invalidations of congressional enactments have the potential to remobilize the constituencies that agitated for those enactments. Even lobbyists get bored, though; nothing is as interesting or important the second time around. Moreover, judicial interventions shift the legislative equilibrium point just enough to preclude a prompt reenactment⁴—for instance, by providing fence-sitting legislators with cover to drag their heels and, in a crunch, to vote no.

The fact that no one but the Supreme Court can say no is a powerful spur and justification for judicial attempts to revive the structural constraints of the Constitution. The fact that few meant to say yes in

the first place provides ample opportunity to act on that insight.

Federalism's Constituencies

The Supreme Court's federalism depends not only on the Court's willingness to face down nationalist constituencies but also on its ability to make friends—to find a constituency for federalism. The only such force in American politics is what Republican strategist Grover Norquist has called the “Leave-Us-Alone” coalition. It consists of constituencies whose principal demand of government—especially of the national government—is that it stay out of the way. Those tend to be socially conservative, populist constituencies—gun owners, home schoolers and school choice groups, property rights advocates, and religious organizations.

The Supreme Court—more precisely, Justices O'Connor and Kennedy—has been prone to set aside antinationalist, state-based experiments that run counter to the Supreme Court's own projects and ambitions, rather than those of Congress. The 1999 term proved no exception. Witness *Stenberg v. Carhart*, the partial birth abortion decision: Justice O'Connor joined the four liberal justices in striking down bans that had been enacted, in various forms, by thirty states.

It is no surprise that *Stenberg* lacks a constitutional basis or even the pretense thereof. That has been true of the “law” in that area for many years. What amazes is Justice O'Connor's continued failure to comprehend, even at this stage, that dogmatic abortionism threatens the Court's federalism agenda—and hers. A judicial insistence on having the final, nationally binding word on intensely controversial issues—even when the Constitution is silent or inconclusive—alienates profederalist constituencies and, at some level, borders on the schizophrenic. The promise of *Morrison*—to give federalism meaning for ordinary citizens—is that in the noneconomic areas beyond the reach of Congress, citizens in the various states will be able to govern themselves. That promise is empty, and federalism is meaningless, if the Court then insists on superintending state-based experiments in self-governance.

The consolation is that the Court's abortion jurisprudence has lost its connection not only to the Constitution but also to political reality. *Roe v. Wade* was the centerpiece of a judicial strategy to make common cause with the (liberal) forces of progress and to disenfranchise the constituencies who opposed the Supreme Court's idea of

progress.⁵ The Court abandoned that strategy a decade ago and replaced it with a federalist agenda for a more open, experimental politics. Along the way, the Supreme Court has abandoned progressive constituencies, such as civil rights groups and now even feminist groups, so long as the case at hand was not about abortion but recognizably “about” federalism. At the same time, the Court has made more room for nonprogressive, Leave-Us-Alone constituencies. For example, the Court has inched toward First Amendment doctrines that would permit, and perhaps even require, the inclusion of religious parents and children in school choice or voucher programs. This past term, in *Mitchell v. Helms*, the justices took another step in that direction and held that the Establishment Clause of the First Amendment permits the inclusion of religious schools in certain federal funding programs.⁶ Against that backdrop, *Stenberg* is an untenable absurdity.

The case is the Court’s second attempt to settle the abortion issue through an *ipse dixit*: in *Planned Parenthood v. Casey* (1992), a plurality of justices expressed dismay with the sustained resistance to *Roe v. Wade* and sternly warned that the people would be “tested by following” the Court’s abortion edicts. The people flunked that test; some of them persuaded their representatives to ban partial birth abortions. Far from heeding the *Stenberg* majority’s renewed injunction to shut up, they are already agitating for alternative means of regulating abortions. The abortion question will come back to the Court. So long as the Court sustains its federalism agenda, the matter will eventually be settled in a way that is consistent with that agenda and its particular logic.

The Shape of Fights to Come

August 2000: An emerging constitutional federalism. Ample room for the Supreme Court to build on its precedents. An inevitable demise of constitutional outliers such as *Stenberg*. The picture is cheerful—but, alas, not fully persuasive. Cornell professor Jeremy Rabkin has depicted the contemporary Court’s output, especially this past term, as a string of ham-fisted, more or less random exercises of raw authority.⁷ His grim, plentiful evidence includes, of course, the *Stenberg* holding that the Constitution requires abortion on demand because the justices said so. The evidence also includes *Dickerson v. United States*, where seven justices declared that Congress has no right to provide for the admissibility of voluntary confes-

sions without *Miranda* warnings—even while conceding that those warnings were not required by the Constitution but only by the Court. Add a slew of other *we-said-sos*, and *Morrison*, too, looks like a display of judicial arrogance, its constitutional basis being a coincidence. Which is it, then: constitutionalism with lapses or judicial imperialism?

A Gore presidency and the replacement of a conservative justice will render the question academic. Federalism will fall, and the Court’s extraconstitutional edicts will stand. The question will become urgent, however, if the next nominee is George W. Bush’s. Liberals will reverse-Bork that nominee on the charge of “judicial activism.” The federalism cases will be their exhibit A. Too conflicted to respond that liberals have no business griping about activism unless and until they repudiate *Roe*, conservatives will fall back on the theme of judicial restraint. Witness candidate Bush’s promise to appoint “strict constructionists.”

The trouble is that the Supreme Court’s federalism requires an active constitutionalism—a willingness to confront Congress time and again and a willingness to overrule some of the nationalist precedents of the past. A restraint-based nomination fight will find conservatives and their nominee scampering from constitutional federalism. (Liberals will pocket the victory and proceed to demand adherence to *Roe* and *Stenberg*, in the name of *stare decisis* and restraint.) A coherent defense of the Supreme Court’s federalism must rest on a principled distinction between constitutionalism and judicial imperialism. It is the Court’s business to intervene when Congress transgresses its enumerated powers—and to let citizens in the various states govern themselves when the Constitution is silent.

The boundary between robust constitutionalism and judicial imperialism is difficult to ascertain and defend under the best of circumstances. The justices’ extraconstitutional escapades threaten to render the boundary elusive. It is still possible to articulate a coherent constitutional defense of the Supreme Court’s federalism. It would not hurt if the justices were to lend a helping hand. Their federalism, and ours, depends on it.

Notes

1. The earlier ruling is *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997). A fine thumbnail analysis of the *Morrison* holding on the scope of congressional powers under the Fourteenth

Amendment is Michael E. Rosman, "Bounds Back," *Legal Times*, May 29, 2000.

2. See, for example, *Meritor Savings Bank v. Vinson*, 106 S. Ct. 2399 (1986) (sexual harassment); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla., 1991) (hostile workplace speech); *Hill v. Colorado*, 000 U.S. 98-1856 (2000) (abortion protests); *United States v. Virginia*, 116 S. Ct. 2264 (1996) (military academy's admission policy); *Cohen v. Brown*, 101 F.3d 155 (1st Cir., 1996) (discrimination in intercollegiate athletics programs).

3. For a classic exposition of the ecological premise of universal interconnectedness, see, but do not read, Barry Commoner, *The Closing Circle* (New York: Knopf, 1971). Read, instead, my woefully ignored critique of environmentalist presumptions and the Supreme Court's rejection thereof: *The Demise of Environmentalism in American Law* (AEI Press, 1996).

4. An excellent demonstration of this point is in Matthew McCubbins, Roger Noll, and Barry Weingast, "Structure and

Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies," *Virginia Law Review*, vol. 75 (1989), p. 431.

5. See Alexander Bickel's bitter and prescient analysis, *The Supreme Court and the Idea of Progress* (New Haven: Yale University Press, 1978).

6. They took a step in the opposite direction this term in *Santa Fe School District v. Doe* by holding that student-led, possibly religious invocations at public high school football games might make dissenting students uncomfortable and therefore violate the Constitution. For all its silliness, that decision does not affect the analysis in this writing. In the fight for a more competitive, federalist politics, school choice is a crucial battleground. Public school reform is not.

7. "The Supreme Mess at the Supreme Court," *Weekly Standard*, July 17, 2000. An analysis along similar lines is Ramesh Ponnuru, "Out of Order: How the Supreme Court Hijacks American Democracy," *National Review*, July 31, 2000.