

## SYMPOSIUM ON NEW DIRECTIONS IN FEDERALISM

### INTRODUCTION

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Few issues have divided the Rehnquist Court as deeply and visibly as federalism concerns. A narrow majority of the Court (comprised of Chief Justice Rehnquist and Justices Scalia, O'Connor, Thomas, and Kennedy) has molded a new, judicially enforceable federalism. This majority has imposed increasing limits on the political branches of the federal government, striking down some laws because they exceeded Congress's enumerated powers and hence invaded the general police power of the States,<sup>1</sup> while striking down other laws—laws that concededly regulated subjects within the legitimate scope of federal power—because they employed an illegitimate regulatory means, e.g., “commandeering” state officials<sup>2</sup> or subjecting states to private lawsuits.<sup>3</sup> Four justices (Justices Souter, Stevens, Breyer, and Ginsburg) have consistently decried the rise of this judicially enforceable federalism, contending that the political branches alone are responsible for protecting federalism values.<sup>4</sup> The majority's “judicial activism” on behalf of states' rights, these dissenters maintain, “should be opposed whenever the opportunity arises”<sup>5</sup> and they predict that the course charted by the Rehnquist Court's new federalism will be short-lived.<sup>6</sup>

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1. *See, e.g.*, *United States v. Lopez*, 514 U.S. 549 (1995).

2. *See* *Printz v. United States*, 521 U.S. 898 (1997).

3. *See, e.g.*, *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

4. *See, e.g.*, *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. LEXIS 3422, at \*81 (May 15, 2000) (Souter, J., dissenting).

5. *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 654 (2000) (Stevens, J., dissenting).

6. *See Morrison*, 2000 U.S. LEXIS 3422, at \*92 (Souter, J., dissenting).

The Symposium papers that follow address the implications of the Rehnquist Court's new federalism at both a theoretical as well as a practical level. Some papers explore the new federalism for its doctrinal significance and coherence. Others consider the pragmatic consequences of the new federalism for intellectual property rights and environmental law enforcement.

The focus of the Symposium is on the "instrumental" component of the Rehnquist Court's new federalism as reflected in the 1999 sovereign immunity trilogy of *Alden v. Maine*,<sup>7</sup> *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*,<sup>8</sup> and *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*,<sup>9</sup> as well as the Tenth Amendment anti-commandeering cases of *Printz v. United States*<sup>10</sup> and *New York v. United States*.<sup>11</sup> Several of the papers also address the "substantive" component of the new federalism, that is, Court-imposed limitations on the scope of congressional power set forth in cases such as *Lopez*, *City of Boerne v. Flores*,<sup>12</sup> and *Kimel v. Florida Board of Regents*.<sup>13</sup>

As this issue went to press, the Rehnquist Court handed down another landmark federalism decision, *United States v. Morrison*.<sup>14</sup> In *Morrison*, the same five-justice majority struck down the Violence Against Women Act<sup>15</sup> as beyond the reach of the enumerated powers of the federal government. *Morrison* extended the Court's decision in *United States v. Lopez*<sup>16</sup> by further limiting the scope of the Commerce Clause. Under *Morrison*, it will be virtually impossible for Congress to regulate noneconomic activity pursuant to its Commerce Clause power. *Morrison* also narrowed the scope of Congress's power under the Fourteenth Amendment. The Court repudiated dicta commanding a majority in *United States v. Guest*<sup>17</sup> that suggested

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7. 119 S. Ct. 2240 (1999).

8. 119 S. Ct. 2199 (1999).

9. 119 S. Ct. 2219 (1999).

10. 521 U.S. 898 (1997).

11. 505 U.S. 144 (1992).

12. 521 U.S. 507 (1997).

13. 120 S. Ct. 631 (2000).

14. Nos. 99-5 and 99-29, 2000 U.S. LEXIS 3422 (May 15, 2000).

15. 42 U.S.C. § 13981 (1994).

16. 514 U.S. 549 (1995).

17. 383 U.S. 745 (1966).

Congress could regulate private conduct pursuant to its Section 5 power under the Fourteenth Amendment. *Morrison* demonstrates that the Rehnquist Court will continue to try to limit the power of the federal government and will continue to restrict both the ends as well as the means of congressional legislation.

The first set of papers explores the implications of the new federalism from the perspective of constitutional doctrine.

Professor Erwin Chemerinsky exposes what he terms the “hypocrisy” of *Alden v. Maine*. The conservative justices who comprised the majority in *Alden* discovered a new constitutional right for states, the right to be immune from suit brought under federal law in state court. This right is not expressed in the text of the Constitution, it was not articulated by the Framers, and there is no tradition recognizing such a right. And yet these same conservative justices will not extend constitutional rights for *individuals* in the absence of textual support in the Constitution, clear evidence of the Framers’ intent, or an unbroken tradition of protecting the right. Professor Chemerinsky contends that this abrupt shift in constitutional interpretive methodology by the majority can only be explained one way: *Alden* represents nothing more than a value choice by the conservative justices. Professor Chemerinsky further contends that the majority made the wrong value choice: the rule in *Alden* conflicts with both the Supremacy Clause and fundamental due process principles.

Adam Cox turns to a different instrumental principle of the new federalism, the “anti-commandeering” rule announced in *New York v. United States* and *Printz v. United States*, which prevents the federal government from enlisting state officials to administer a federal regulatory program, effectively turning them into puppets of the federal government. While the anti-commandeering rule has been criticized by numerous commentators for a variety of reasons, Mr. Cox argues that it upholds important federalism values when it is viewed in light of an expressivist approach to legal analysis. According to Mr. Cox, the prohibition on the federal government’s commandeering of state officials reinforces public perceptions of state autonomy. Such public perceptions of state autonomy, in turn, help preserve the states as vibrant alternative political institutions capable of serving as effective counterweights to the federal government. Thus, when viewed from an expressivist perspective, the anti-commandeering

rule helps maintain a healthy balance of power between the federal and state governments and solidifies the role of the states as a check on federal overreaching.

Professor Evan Caminker explores the scope of Congress's authority under Section 5 of the Fourteenth Amendment through an examination of the Violence Against Women Act (VAWA). Professor Caminker contends that there is no sound basis for a categorical rule preventing Congress from regulating private conduct pursuant to this power, as the Fourth Circuit<sup>18</sup> and now the Supreme Court<sup>19</sup> have done. If we accept the premise—one not challenged by either court—that Congress amassed a factual record demonstrating a constitutionally cognizable “underprotection” of female victims of violence on the part of state and local law enforcement agencies, Congress, according to Professor Caminker, should be able to remedy this unconstitutional state action by proscribing and punishing the underlying private conduct. First, VAWA deters the unconstitutional state (in)action by raising the profile of the issue, with the likely result that state and local officials would be more sensitive to the problem and hence more vigorously pursue perpetrators of violent crimes against women. Further, VAWA quite literally “remedies” the unconstitutional state action by compensating the victims of the unconstitutional conduct. The fact that the compensation comes from private parties rather than from the state actors themselves does not render VAWA any less a remedy. Finally, Professor Caminker notes that VAWA's scheme of private remediation actually creates less tension for federal-state relations.

Professor Melvyn Durchslag explores the doctrinal tension between the Court's substantive federalism decisions and its instrumental decisions such as *Alden*. He argues that the Court's sovereign immunity decisions fail to promote state autonomy, the ultimate objective of federalism, in a doctrinally coherent manner. Further, the decisions entirely ignore the statutory and constitutional rights of individuals. Professor Durchslag advocates a balancing approach

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18. See *Brzonkala v. Morrison*, 169 F.3d 820 (4th Cir. 1999).

19. See *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. LEXIS 3422 (May 15, 2000).

to state immunity, focusing on the intrusiveness of the proposed remedy on legitimate state interests.

The second set of papers focuses on the practical implications of the Court's instrumental federalism decisions, particularly the 1999 sovereign immunity trilogy, for the fields of intellectual property, environmental law, and mass tort reform legislation.

Professor Peter Menell argues that the pragmatic consequences of the Court's state sovereign immunity rulings for owners of intellectual property will be minimal. To begin with, Professor Menell points out that intellectual property owners are not without legal recourse against state infringers. In addition to prospective injunctive relief against state officials under *Ex parte Young*,<sup>20</sup> intellectual property owners may pursue a variety of state inverse condemnation, tort, intellectual property, and contract claims in state court. Professor Menell provides a compendium of the available claims, along with a survey of state statutes and decisional law relating to waivers of state sovereign immunity. In addition, Professor Menell believes that there are inherent institutional constraints on state officials which make widespread state infringement extremely unlikely. Like Justice Kennedy, who believes that the good faith of the states is sufficient to ensure the continuing supremacy of federal law,<sup>21</sup> Professor Menell argues that the social norms of government institutions and the public accountability of state officials provide assurance that states will continue to respect intellectual property rights.

At the same time, Professor Menell suggests that the *Florida Prepaid* decisions may nonetheless pose certain problems for intellectual property enforcement—specifically, in the international arena. He contends that states' immunity from suit for infringement of intellectual property rights is inconsistent with the terms of the TRIPs, NAFTA, and WIPO agreements. It is possible, then, that the *Florida Prepaid* decisions could undermine efforts by the United States to demand that other nations fully comply with these agreements and respect intellectual property rights of United States businesses and citizens.

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20. 209 U.S. 123 (1908).

21. See *Alden v. Maine*, 119 S. Ct. 2240, 2266 (1999).

Professor Robert Bone, like Professor Menell, does not predict widespread state infringement of intellectual property rights in the wake of the *Florida Prepaid* decisions, but he nevertheless believes that these decisions will produce substantial indirect costs, particularly in the context of public university-private sector partnerships. While avenues of legal recourse remain for intellectual property owners aggrieved by state officials and agencies, Professor Bone points out that these avenues, such as state intellectual property laws and federal injunctive relief, offer much less than full protection. Private parties desiring to enter into research partnerships with state universities will accordingly have to devise other strategies in order to protect themselves in the event of infringement. These strategies include demanding a premium from their state partners; keeping their intellectual property secret for a greater period of time; and formulating alternative research programs. Each of these strategies involves substantial social costs. Further costs result from states' immunity from declaratory relief where the state is the owner of the intellectual property in question. Professor Bone concludes with the observation that, under *Florida Prepaid*, Congress's options for dealing with the costs of sovereign immunity are all the more limited to the extent that these costs are felt in ways other than widespread state infringement.

Professor William Araiza considers the implications of state sovereign immunity, as set forth in cases such as *Alden* and *Seminole Tribe v. Florida*,<sup>22</sup> for enforcement of federal environmental law. Professor Araiza observes that state sovereign immunity is one of several structurally based constitutional rules developed by the Rehnquist Court to restrict private parties' ability to bring suit to enforce federal law. While these rules include limitations on the availability of both prospective injunctive relief as well as retrospective damages, Professor Araiza argues that state sovereign immunity will pose much greater problems for liability-creating statutes such as CERCLA than for statutes establishing ongoing regulatory programs. Professor Araiza concludes that Congress may effectively circumvent the problems created by *Alden* and *Seminole Tribe* by

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22. 517 U.S. 44 (1996).

conditioning the states' participation in federal environmental programs on their waiver of sovereign immunity.

Professor Georgene Vairo turns to an exploration of congressional federalism—specifically, the federalism implications of congressional proposals to limit state court jurisdiction over mass tort claims. Professor Vairo provides an overview of the ebb and flow of mass tort class action suits in the federal courts. Currently, the class action plaintiffs' bar regards state courts as the favored forum to resolve mass tort cases. Professor Vairo points out that congressional efforts to preclude state court jurisdiction over such cases are not only ironic, given that the proponents of these proposals are often conservative, states' rights advocates, but they may even run afoul of the Rehnquist Court's new federalism.

The final set of papers looks ahead to consider potential future directions for the Rehnquist Court's new federalism.

Professor Richard Levy explores the limits of the major sources of congressional power other than the Commerce Clause: the Reconstruction Amendments and the Spending Clause. With the Court narrowing the scope of Congress's lawmaking authority under the Commerce Clause, Professor Levy contends that these other sources of federal power will come under increased scrutiny. In fact, as this issue went to print, the Supreme Court reaffirmed the *Civil Rights Cases*<sup>23</sup> holding that Congress may not regulate private conduct pursuant to its authority under Section 5 of the Fourteenth Amendment.<sup>24</sup> Together with the restrictive "congruence and proportionality" test the Court has adopted to analyze the "appropriateness" of congressional legislation passed pursuant to Section 5,<sup>25</sup> Congress would seem to be left with little prophylactic power under Section 5. Further, Professor Levy notes that Section 5 will not likely be an effective basis for legislation passed prior to the Rehnquist Court's new federalism for the simple fact that Congress had no reason to suppose it necessary to develop a factual record sufficient to meet the current "congruence and proportionality" test.

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23. 109 U.S. 3 (1883).

24. See *United States v. Morrison*, Nos. 99-5 and 99-29, 2000 U.S. LEXIS 3422 (May 15, 2000).

25. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Professor Levy suggests that Congress's power under the Spending Clause may be next to receive the Rehnquist Court's attention. In particular, the stage may be set for the Court to apply heightened scrutiny to Congress's conditional spending programs, currently analyzed under the rather deferential test articulated in *South Dakota v. Dole*,<sup>26</sup> effectively translating the doctrine of unconstitutional conditions to the realm of federalism. For example, the Court may insist on a closer connection between the condition and the purposes of the expenditure. The Court may also review the "coercive" nature of the condition with heightened scrutiny. On the whole, however, Professor Levy believes that the new federalism will not substantially limit the scope of congressional power; rather, it will most likely have the salutary affect of increasing the attentiveness of lawmakers to federalism concerns.

Professor Michael Wells engages in a close reading of *Florida Prepaid* and argues that the case may be interpreted as an effort by the Court to create a new, higher standard for stating a substantive due process claim. Professor Wells suggests that *Florida Prepaid* may have broad significance for constitutional litigation generally, presaging a more constricted interpretation of Fourteenth Amendment rights and further limits on Congress's authority to control the jurisdiction of the federal courts.

Finally, Professor James Wilson returns to the theme raised by Professor Chemerinsky: the Court's sovereign immunity doctrine can be regarded as a simple expression of the majority's value choices and hostility to constitutional or federal statutory rights. In this regard, Professor Wilson notes the ironic convergence of the Court's federalism jurisprudence with the criticism of "rights talk" by left-leaning academics such as Richard Rorty. Professor Wilson predicts that the Rehnquist Court is likely to create further limits on individual rights in the coming Terms.

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26. 483 U.S. 203 (1987).