

# New Federalism

## Introduction

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One of the already evident legacies of the current Supreme Court is its imposition, or reimposition, of several judicially enforceable restraints on national government authority. In the past decade the Court has propounded a “new federalism” primarily through a limited cluster of related doctrines—arising from the Constitution’s Commerce Clause,<sup>1</sup> the Tenth and Eleventh Amendments,<sup>2</sup> and Section Five of the Fourteenth Amendment<sup>3</sup>—in which it has found and applied meaningful limits on Congressional power. Chief Justice Rehnquist has described the Court’s project in these cases as delineating, and then policing, the “distinction between what is truly national and what is truly local.”<sup>4</sup>

This federalism turn has been well-noticed and amply critiqued by the legal academy, as the Court’s opinions have spurred continued debate over the proper contours of state and federal sovereignty. The debate has been vigorous, and it has been voluminous: since *Gregory v. Ashcroft*<sup>5</sup> in 1991 signaled the coming federalism revival, almost 1000 academic law journal articles have appeared with the word “federalism” in their titles<sup>6</sup> (and many more have addressed the subject without such titular reference).

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1. U.S. CONST. art. I, § 8; *see also* *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

2. *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (Tenth Amendment); *New York v. United States*, 505 U.S. 144 (1992) (same); *Alden v. Maine*, 527 U.S. 706 (2001) (Eleventh Amendment).

3. *See, e.g.*, *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001); *City of Boerne v. Flores*, 521 U.S. 502 (1997).

4. *See Lopez*, 514 U.S. at 567–68.

5. 501 U.S. 452 (1991).

6. This figure was derived from a Westlaw search on July 21, 2004, in the “Journals and

For all of this existing discourse, several political and legal developments in the past two or three years have reinvigorated the debate about federalism in ways that complicate and may even invert opinions about the proper allocation of federal and state authority among those in the academy, on the bench, and in broader civic society. First, the terrorist attacks of September 11, 2001, and the national response to those actions have significantly altered the terms of the federalism debate. In terms of domestic security policy, the push toward integration of federal, state and local law enforcement functions has done much to undermine the *United States v. Lopez* Court's assertion that it is possible (and normatively desirable) to identify and segregate distinct zones of local and national authority. The Justices themselves are not immune from such influences, and it is difficult, for instance, to imagine that this Supreme Court would, in a case of first impression, issue an opinion like that of *Printz v. United States*<sup>7</sup> today. In *Printz*, a 1997 case, the Court held that even a minimal, and temporary, mandate requiring state law-enforcement officials to assist in conducting background checks prior to gun sales constituted unconstitutional "conscripti[on]" by Congress,<sup>8</sup> a formalism that is far removed from the more pragmatic, integrated norms of post-9/11 law enforcement.

A second notable development in the most recent few years has been the Supreme Court's own willingness to halt the momentum of its federalism jurisprudence. In *Nevada v. Hibbs*,<sup>9</sup> a six-Justice majority brushed aside Nevada's sovereign-immunity defense to hold that Congress could authorize individuals to sue states to enforce the Family and Medical Leave Act.<sup>10</sup> In a major decision in June 2004, the Court held that a federal statute (ERISA) preempted state tort lawsuits against managed care organizations, thus assuring that a major component of health law and policy was divested from state control and left with Congress and the federal courts.<sup>11</sup> To be sure,

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Law Reviews" database, search term "ti(federalism)".

7. 521 U.S. 898 (1997).

8. *Id.* at 935.

9. 123 S. Ct. 1972, 538 U.S. 721 (2003).

10. *See id.*

11. *See Aetna Health Inc. v. Davila*, 124 S. Ct. 2488 (2004) (holding that ERISA preempts state law statutes authorizing suits against managed care organizations for negligence

the Court has not undone any of its major federalism decisions of the past decade, but it appears to have decided that the federalism turn had gone far enough.

The final shift in the federalism debate—and the one perhaps most interesting for future academic and judicial discourse—is the significant recent variation in the *kinds* of state policy choices that are alleged to be beyond congressional reach. For decades, even back into the nineteenth century, assertions of state sovereignty have often been associated with “conservative” substantive politics, while advocates of broad national power have characteristically been more “liberal” (the labels are crude but generally accurate in this context). National power was the force behind emancipation, antidiscrimination laws, wages-and-hours legislation, and various other progressive remedial statutes. The hue and cry of “states’ rights” was frequently invoked in the name of protecting regimes of slavery, segregation, child labor and underenforcement of domestic violence laws. So pervasive is this standard ideological valence in the substantive policies underlying the federalism debates that some academics have considered the question of whether concern for state sovereignty is itself a choice laden with particular substantive values.<sup>12</sup> The composition of the Supreme Court’s controlling majority—five moderate-to-conservative, Republican-appointed judges<sup>13</sup>—in most of its key federalism rulings only serves to confirm this traditional association of conservatism with concern for state sovereignty.

This traditional ideological gloss on the federalism question makes several recent developments more interesting. As Congress and the White House become more conservative since 2000, the conventional arguments for limited federal authority and decentralized state-by-state decisionmaking have been invoked in service of a new range of policies typically associated with “liberal”

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in benefit provision).

12. See Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L. J. 75, 133–62 (2002).

13. On studies of the ideological array of the current nine Justices, see generally Theodore W. Ruger, Pauline T. Kim, Andrew D. Martin & Kevin M. Quinn, *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157–59 (2004).

politics. Most notable in this respect is the ongoing debate over same-sex marriage, where arguments for individual states' freedom to define marriage in accord with local norms predominate the opposition to federal proposals to define marriage as exclusively heterosexual.<sup>14</sup> States have taken the lead in regulating such pressing health policy areas as prescription drug pricing and managed care, and advocates for patients' rights have urged greater state regulatory autonomy against claims of statutory or Dormant Commerce Clause preemption.<sup>15</sup> The Supreme Court has agreed to review a case next Term that asks whether medical marijuana grown solely for medicinal use (not for sale) is beyond the federal Commerce Clause regulatory power.<sup>16</sup> The character of these new substantive claims have invigorated the traditional federalism debates, and may lead some academics—and perhaps even some Justices—to modify the positions taken in years past.

Taken together, all of these developments over the past three years illustrate that there remain many open questions regarding the proper scope of federal and state authority. This symposium reflects the vitality of that ongoing debate, as participants draw on various perspectives to address a diverse array of issues.

Erwin Chemerinsky's essay takes note of one of the recent developments described above—the Court's apparent braking of its push toward limited federal power in the 2003 *Nevada v. Hibbs*<sup>17</sup> decision. In *Hibbs*, the Court surprised many observers by holding that Congress could, consistent with its powers under Section Five of the Fourteenth Amendment, make states amenable to suits brought by individual citizens in federal courts. Chemerinsky applauds the Court's result in *Hibbs*, but illuminates various problematic features of its reasoning in that case and in related cases. The Court has

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14. For an early exponent of this position, see Jonathan Rauch, Editorial, *Give Federalism a Chance: The Case for Same-Sex Marriage*, NAT'L REV. ONLINE, Aug. 2, 2001, at <http://www.nationalreview.com/comment/comment-rauch080201.shtml>.

15. See *Pharm. Research & Mfrs. of America v. Walsh*, 123 S. Ct. 1855, 538 U.S. 644 (2003) (Dormant Commerce Clause challenge to state drug pricing plan); *Kentucky Ass'n of Health Plans v. Miller*, 123 S. Ct. 1471, 538 U.S. 329 (2003) (ERISA preemption challenge to state "any willing provider" law applied to HMOs).

16. See *Raich v. Ashcroft*, 352 F.3d 1222 (9th Cir. 2003), cert. granted, 124 S. Ct. 2909 (2004).

17. 123 S. Ct. 1972, 538 U.S. 721 (2003).

permitted Congress remedial authority over some kinds of discrimination but not others, and in Chemerinsky's view has not adequately justified its categorical distinctions. In addition to its skillful substantive critique of the Court's doctrinal framework, the essay reminds us that federalism cases, although nominally about vertical (federal-state) allocation of authority, also present a horizontal separation-of-powers question: which entity, the Court or Congress, is the proper arbiter of the boundaries of federal power? Despite support in the academy and among some dissenting Justices for a deferential attitude toward congressional choices in this area,<sup>18</sup> the majority of the Court has cast itself as the ultimate authority on the federal-state allocation of power, and nothing in *Hibbs* suggests any change in this position.

Such judicial supremacy does not exist in the subconstitutional context of statutory interpretation, where Congress is free to revise, or outright overrule, the Supreme Court's construction of a statute. But as David Schwartz's symposium essay underscores, such statutory decisions can have a profound impact on the federal-state balance of power. A vast amount of individual and commercial behavior in the United States is concurrently regulated by both states and the federal government. A federal statute that preempts related state regulation effectively strips the state of a component of its active sovereignty as applied to that field. And although the decision to preempt by statute is formally vested in Congress, many federal laws contain preemption clauses that are vague and contradictory, such that federal courts have great interpretive latitude in deciding the preemptive effect of a national regulatory scheme. With particular focus on the Federal Arbitration Act, Schwartz assesses this subconstitutional dimension of the Court's federalism jurisprudence, and finds—as others have<sup>19</sup>—that this Court and other federal courts have been significantly less solicitous of state sovereignty in preemption cases than in more prominent constitutional decisions. In

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18. See *United States v. Lopez*, 514 U.S. 549, 616–20 (1995) (Breyer, J., concurring).

19. See, e.g., Ruth Colker & Kevin Scott, *Dissenting States? Invalidation of State Action During the Rehnquist Era*, 88 VA. L. REV. 1301, 1343–45 (2002); Daniel J. Meltzer, *The Supreme Court's Judicial Passivity*, 2002 S. CT. REV. 343, 367–72.

Schwartz's account, it falls to state judges to more robustly protect state regulatory autonomy when questions of preemption arise.

Both Professor Chemerinsky and Professor Schwartz critique the choices the Justices have made in specific federalism cases. Central to such normative critique is the idea that the Justices, in those cases and others, possessed meaningful interpretive discretion to choose a different (and better) result. Occasionally defenders of the Court's choices, even the Justices themselves, will point to a reading of the original choices the Constitution's Framers made as requiring a certain judicial result. Such originalist claims, which deny meaningful contemporary discretion by judges, rest on two related propositions—first that there is a clear historical intent on the issue at hand, and second that if clear intent exists modern judges are obliged to follow it. Whatever one's position on the second point, Conrad Weiler's essay casts significant doubt on the former in the context of the federalism debate. In his detailed survey of Framing-era conceptions of such terms as "commerce," and "economic" power, Weiler illustrates how contested and unclear historical attitudes on these questions were. And as Weiler's account shows, to the extent any clear eighteenth-century consensus on these issues is discernable at all, the Court's jurisprudence is untethered from those original assumptions.

These first three contributions, and most discussion of federalism generally, relate in one way or another to the allocation of authority between two different sovereignties—state and federal governments. This is neither surprising nor inappropriate, as both the Court's jurisprudence and the Constitution's sparse textual commands speak of an allocation of authority between two different kinds of sovereignties. John Brigham's paper reminds us, however, that federalism-style concerns are relevant even in the allocation of decisional power *within* a single unitary sovereignty spread over a large enough area. Stripped from the specificities of the American constitutional tradition, several of the most persuasive abstract justifications for federalism would support a degree of decentralized decision-making in the administration of national power. In a polity where preferences are heterogeneous and distributed in uneven geographic fashion, devolution of authority to smaller local units may increase overall policy satisfaction. Moreover, as famously noted by

Justice Brandeis, disaggregation of regulatory authority permits small-scale policy experimentation and innovation at relatively low social cost. Both of these theoretical considerations apply full well in the dual sovereignty context, and are often invoked in support of state power, but their normative support for decentralized authority is not dependent on a dichotomous governmental structure.

The benefits of decentralization have long been evident with respect to individual United States Attorney's offices, which historically have had wide independent latitude to make their own investigation, charging, and sentencing decisions in most cases. Professor Brigham's paper takes up this concern with respect to the ultimate prosecutorial decision—whether or not to seek the death penalty. As he notes, the coupling of a new federal death penalty with a centralized push for uniform application from the Department of Justice has resulted in a clash of norms. The federal death penalty is now being sought and applied even in regions of the country where local preferences—clearly expressed in state law and practice—are against the death penalty. His essay raises a number of interesting possibilities about how this clash of sovereignties might play out in the context of American federalism.

Taken together, the contributions to this symposium demonstrate that several intriguing and difficult questions about the federal-state allocation of power remain open even as we apparently near the end of the particular Rehnquist Court's federalism initiative. New Justices on the Court and new initiatives by federal and state elected officials in the future will reshape this debate in ways that are perhaps unexpected and currently unforeseen. That the essays here are topically and methodologically diverse exemplifies the variety of this ongoing debate, which promises to continue throughout the next decade and beyond.