

CHIEF JUSTICE REHNQUIST AND THE SEARCH FOR JUDICIALLY ENFORCEABLE FEDERALISM

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I went to NYU Law School from 1978 to 1981, when there was no Federalist Society, and Chief Justice Rehnquist—then Justice Rehnquist—was presented as an extremist, stranded off to the right, out of the mainstream, expressing hostility toward constitutional rights, off by himself in dissent—where he belonged. There was much wringing of hands over the anomaly of *National League of Cities*, where somehow he managed to amass a majority and give some clout to the old, archaic notion of federalism, which everyone knew was supposed to be a relic of a time when the Court got everything wrong.¹ Federalism was a word to be feared; approving of it was akin to approving of the worst things the states had done in the past.

At NYU, we students got the message that Justice Rehnquist's ideas were not to be taken seriously. He was marginalized—*as he deserved*—and would continue to be marginalized. *That blot on the case law was National League of Cities—how did that happen? That would need to be removed.*

I had gone to law school expecting to hear a vivid debate about constitutional law, but instead I discovered that everyone seemed to think that the Warren Court had found the right answers and that any retrenchment from its position was loathsome and retrograde. If there were conservatives in the classroom in those days, they cared more about the approval of their professors and peers than about debate.

Personally, I was not a very political or opinionated law student. I had been an artist myself before coming to law school, but I do remember once forcing myself to think, “Which Justice

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1. *Nat'l League of Cities v. Usery*, 426 U.S. 833 (1976).

would I choose if I had to choose one Justice to decide all of the cases?" I picked Justice Potter Stewart, who seemed to me to be a reliable and sensible man. Shortly after I graduated in 1981, Justice Stewart retired and was replaced by Justice Sandra Day O'Connor, a Justice whose work I would follow very closely once I became a law professor three years later.

As a federal jurisdiction professor, I wanted to write about federalism, which had figured prominently in the Court's jurisdiction cases since 1971, when Justice Black wrote the opinion in *Younger v. Harris* and talked about "Our Federalism" and said that it did "not mean blind deference to 'States' Rights'" but a recognition that "the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways."² So, in jurisdiction law, the discussion about federalism was going on from the very beginning of the Burger Court. And I looked forward to hearing the contributions to that discussion that would come from the Court's first woman, especially since she brought her experience as a state legislator and a state judge to the Court.

I began as a law professor in the fall of 1984. Within a few months after I began my work, at the beginning of the next year, the Court overturned *National League of Cities v. Usery*³ in *Garcia v. San Antonio Metropolitan Transit Authority*.⁴ Justice Blackmun, whose vote had determined the outcome in *Garcia*, wrote, "State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power."⁵ That made judicially enforceable federalism the relic that my law professors had said it was. It seemed to drive William Rehnquist back into the margin where they seemed to think he belonged.

Justice O'Connor voted with the dissenting group in *Garcia*.⁶ She wrote a long opinion to say "federalism cannot be reduced to the 'weak essence' distilled by the majority today."⁷ There was no theorizing from Justice Rehnquist, who snipped, "I do not

2. 401 U.S. 37, 44 (1971).

3. 426 U.S. 833 (1976).

4. 469 U.S. 528 (1985).

5. *Id.* at 552.

6. *Id.* at 580 (O'Connor, J., dissenting).

7. *Id.*

think it incumbent on those of us in dissent to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court.”⁸

Federalism remained an active subject in the field of jurisdiction law, where there were intense battles over the role of the federal courts in habeas corpus and sovereign immunity and some other areas.⁹ Four Justices, led by Justice Brennan, argued strenuously for overturning *Hans v. Louisiana*,¹⁰ the 1890 case that recognized state immunity, even in cases arising under federal law, even between citizens of the same state. Though the *Hans* opponents never procured a fifth vote, in 1989, with the help of Justice White, they established in *Pennsylvania v. Union Gas Co.* that Congress had the power to abrogate sovereign immunity, even under the Commerce Clause.¹¹ Of course, in those pre-*Lopez* days, the commerce power appeared completely broad. The notion that Congress was the institution that would protect the interests of federalism seemed to be gaining ground.

What became of that prediction that judicially enforceable federalism would, in time, command the support of the majority of the Court? Justice Rehnquist became Chief Justice in 1986, and Justice Antonin Scalia and later Justice Anthony Kennedy joined the Court. And though Justice David Souter joined the Justices who would defer to Congress on federalism matters, when Clarence Thomas joined the Court in 1992, it seemed that a majority existed to return to the judicial enforcement of federalism, in matters of substance as well as jurisdiction. Surely, by 1992, the Court had a majority of Justices who did not think Congress was the right institution to set the final balance and determine the meaning of federalism.

But I do not think it is odd that the Court never proceeded to overrule *Garcia*, as seemingly predicted in Justice Rehnquist’s dissent in *Garcia*.¹² One of the reasons for overruling *National League*, after all, had been that it had proved unworkable. Judges were required to determine which state government functions

8. *Id.* (Rehnquist, J., dissenting).

9. *See, e.g.,* *Teague v. Lane*, 489 U.S. 288 (1989) (limiting the application of “new rules” of constitutional law at the habeas stage); *Atascadero v. Scanlon*, 473 U.S. 234 (1985) (rejecting limitations on state sovereign immunity).

10. 134 U.S. 1 (1890).

11. 491 U.S. 1 (1989).

12. 469 U.S. 528, 579 (Rehnquist, J., dissenting).

ought to count as “traditional,”¹³ and the balancing test articulated in Justice Blackmun’s *National League* concurrence always undercut the clarity of the immune enclave that Justice Rehnquist wanted.¹⁴

So, a better version of federalism doctrine was needed. Moreover, the new majority for judicial enforcement of federalism was not monolithic. Both Justices O’Connor and Kennedy favored a more pragmatic approach to federalism¹⁵ that I like to call “normative federalism.”¹⁶ This approach would not be “blind deference to ‘states’ rights,”¹⁷ but a more flexible analysis of what would work well and produce desirable results. They contributed their votes to the *Lopez* majority—Justice Kennedy wrote a concurring opinion joined by Justice O’Connor—and emphasized the value of state and local government as laboratories of democracy, that might have good policy experiments, that would be especially workable on the decentralized level, and that would be better than perhaps a statute like the Gun-Free School Zones Act, which merely federalized an ordinary crime and dealt with the problem not in a creative way but with a harsh prison sentence.¹⁸

Chief Justice Rehnquist’s opinion in *Lopez*, by contrast, with its cry for the preservation of “first principles” of constitutional structure, was not able to get a majority.¹⁹ So it was not a monolithic group of Justices who supported the judicial enforcement of federalism. There were some who looked at it one way and there was a middle group that had a more flexible, pragmatic interpretation. And all were needed for the cases to come out in favor of the federalism values.

In 1996, one year after *Lopez*, the Chief Justice wrote the opinion in *Seminole Tribe* that overturned *Union Gas* and scaled

13. See *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976) (holding “that insofar as the challenged amendments operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by Art. I, § 8, cl. 3”).

14. See *id.* at 856 (Blackmun, J., concurring) (noting that “it seems . . . that [the majority] adopts a balancing approach”).

15. See, e.g., *United States v. Lopez*, 514 U.S. 549, 568 (Kennedy, J., concurring) (arguing for a flexible Commerce Clause test).

16. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793 (1996).

17. Cf. *Younger v. Harris*, 401 U.S. 37, 44 (1971).

18. *Lopez*, 514 U.S. at 570–83.

19. See *id.* at 552 (“We start with first principles.”).

back Congress's power to abrogate sovereign immunity.²⁰ After *Seminole Tribe*, if Congress wanted individuals to be able to sue the states for retrospective relief, it would need to use its power under Section Five of the Fourteenth Amendment. And in 1997, relieving the states of the constrictions of the Religious Freedom Restoration Act, the Court tightened up the Fourteenth Amendment analysis in *City of Boerne v. Flores*.²¹ Those years in the mid-90s were the high point of federalism enforcement on the Rehnquist Court. The anti-commandeering case, *Printz*, is also from the mid-90s.²²

But what happened next? *Boerne* and *Seminole*, taken together, led to a line of cases in which the Court said that one federal statute after another did not fit the Fourteenth Amendment power, and therefore could not abrogate sovereign immunity.²³ These were appealing statutes barring discrimination based on age and disability, for example.²⁴ Cases like these made it easy for opponents of the enforcement of federalism to dominate the public discourse denouncing the Court. Try explaining sovereign immunity and the Fourteenth Amendment doctrine to nonexperts. Ordinary people cannot understand it, and if they do follow you, they will think it is quite strange and over-complicated.

This perplexing line of cases—federalism as a combination of sovereign immunity and the Fourteenth Amendment doctrine—characterized the final phase of Rehnquist Court federalism. The Court began with a series of harsh decisions, but then it seemed to get cold feet.²⁵ I think the sovereign immunity and Fourteenth Amendment combination did not work particularly

20. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996).

21. 521 U.S. 507 (1997).

22. *Printz v. United States*, 521 U.S. 898 (1997) (holding that Congress unconstitutionally commandeered a state executive).

23. *See, e.g.*, *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001) (holding that the abrogation of state sovereign immunity in the Americans with Disabilities Act of 1990 exceeded Congress's authority under the Fourteenth Amendment); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000) (holding that the abrogation of state sovereign immunity in the Age Discrimination in Employment Act of 1967 exceeded Congress's authority under the Fourteenth Amendment).

24. *Id.*

25. *See, e.g.*, *Tennessee v. Lane*, 541 U.S. 509 (2004) (holding that states could be sued under certain provisions of Title II of the Americans with Disabilities Act); *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721 (2003) (holding that the states could be sued for violations of the Family and Medical Leave Act of 1993's twelve-week family leave provision).

well, especially for those who are concerned about normative federalism and the value of the states as decentralized laboratories of democracies. Cities don't even enjoy sovereign immunity protection,²⁶ so a major part of the appeal of enforcing federalism is lost. Moreover, the cases were simply incomprehensible to people and gave critics of the Court a lot of room to make the Court look out of touch and hostile to individual rights (even though the rights in question were only statutory rights).

In 2003, Chief Justice Rehnquist wrote his stunning opinion in *Nevada Department of Human Resources v. Hibbs*, holding that Congress did have Section Five power to require the states to give employees up to twelve weeks of leave to take care of sick family members.²⁷ To fit the doctrine of the earlier cases, the Family and Medical Leave Act was supposed to work as the remedy for the states' violations of constitutional rights. I have studied Chief Justice Rehnquist's opinion long and hard, and I think Justice Kennedy got it right in the dissenting opinion: the Family and Medical Leave Act is a nice benefit for employees—one that women may especially be interested in obtaining—but it does not function as a remedy for unconstitutional sex discrimination.²⁸

So, in his last phase on the Court, I would say, Chief Justice Rehnquist's federalism mellowed and became more like Justice O'Connor's—malleable and sensitive to the context of particular cases. This centrist position has some appeal for me. As I said, I liked Justice Stewart; I have always liked the center of the Court, but it is plagued by bewildering doctrinal complexities. One year after *Hibbs*, Chief Justice Rehnquist voted on the opposite side of a very similar case in *Tennessee v. Lane*.²⁹

I honor Chief Justice Rehnquist's long service on the Court and his efforts over the years to articulate a judicially enforceable federalism. But I must confess to feeling dissatisfied

26. See *Lincoln County v. Luning*, 133 U.S. 529 (1890) (holding that state sovereign immunity does not extend to political subdivisions of the state).

27. 538 U.S. 721, 737 (2003).

28. See Ann Althouse, *Vanguard States, Laggard States: Federalism and Constitutional Rights*, 152 U. PA. L. REV. 174 (2004).

29. 541 U.S. 509 (2004) (Rehnquist, C.J., dissenting in part) (the majority held that Title II, as it applied to the class of cases implicating the fundamental right of access to the courts, constituted a valid exercise of Congress's authority under Section Five of the Fourteenth Amendment).

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that it never reached a stable and clear doctrinal form. But the Rehnquist era is over, and the conversation about federalism must continue with the newly reconfigured Court. I look to them to sharpen the analysis and take the duty to bring coherence to the law seriously.

For now, I will express my appreciation for the way Chief Justice Rehnquist revived federalism in his early years on the Court and led the Court through an elaborate and conscientious struggle about how the Court might enforce the benefits of federalism.