The Rehnquist Court and Contemporary American Federalism: The Challenge of Dual Sovereignty

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INTRODUCTION

L'élection présidentielle américaine de 2000 a rappelé à l'opinion publique française à quel point le régime politique des États-Unis était fondé sur le consentement des États fédérés à un transfert partiel, et seulement partiel, de souveraineté. Que l'élection du Président des États-Unis soit d'abord l'affaire des États, que les modalités d'une élection nationale varient en conséquence à ce point d'un État à l'autre, et que même les formalités puissent en être différentes selon les comtés d'un même État, a profondément surpris les Français, habitués à un ordre centralisé, égalitaire, et d'apparence rationnelle.

Si la question du fédéralisme intéresse au plus haut point les observateurs et les décideurs français, en particulier depuis que le débat européen l'a remise à l'ordre du jour, peu d'entre eux ont pleinement conscience du fait que ce modèle d'organisation contraint les États-Unis à préserver, plus de deux siècles après l'établissement de la République américaine, deux types concurrents de souveraineté. Celle des États n'est en effet pas abolie par leur consentement à transférer une partie de son exercice à la fédération qu'ils avaient fondée, et principalement à son pouvoir législatif, le Congrès, dont l'une des Chambres, le Sénat, émanation directe des États, est censée contribuer à la défense de leurs droits. C'est bien à une addition de souverainetés concomitantes qu'aboutit le régime américain.

Au cours de l'histoire des États-Unis, les périodes de concentration des pouvoirs fédéraux ont fait suite à des moments « fédéralistes ». La centralisation, si elle est évidemment plus sensible aujourd'hui qu'à l'heure de l'établissement de la République, n'a jamais été une tendance unique. Il n'est pas douteux que la période actuelle est celle d'un retour aux États de beaucoup de leurs prérogatives ou, pour utiliser le langage des fédéralistes, de leurs droits. Il est d'ailleurs frappant de constater que certaines des prérogatives qui ont été rendues aux États par la Cour suprême Rehnquist, comme la peine capitale, sont au contraire, en Europe, de niveau supranational. En l'espèce, il ne s'agit nullement d'une quelconque incursion de l'Union européenne sur la souveraineté des États, puisque ce sont les États-membres du Conseil de l'Europe qui ont décidé,

comme l'avait fait la Cour suprême présidée par le juge Warren, que ce châtiment contrevenait aux droits fondamentaux de la personne. Cela montre simplement que la tendance européenne est à la centralisation, souvent qualifiée en Europe d'« harmonisation », tandis qu'elle est en sens inverse aux États-Unis.

Dans le domaine fiscal également, il est courant d'entendre aujourd'hui, en Europe, que l'Union monétaire mènera inéluctablement à une harmonisation fiscale. L'exemple américain montre clairement qu'il n'y a là aucun automatisme, les niveaux de taxation directe comme indirecte étant très variés d'un État à l'autre aux États-Unis. Les limitations imposées par la Communauté européenne, et mises en œuvre par la Commission en matière de taux de TVA, ne connaissent pas d'équivalent en matière de *sales tax*. Nul ne peut d'ailleurs prévoir si l'actuelle tendance européenne à la centralisation se poursuivra indéfiniment. Il existe suffisamment de signes de résistance pour envisager un renversement de position, surtout si les constructions institutionnelles se stabilisent. C'est là l'un des intérêts majeurs de l'étude du fédéralisme américain.

Dans le cadre de la construction européenne, le débat sur les prérogatives respectives des États et du centre s'est porté sur le concept de subsidiarité, dont la définition est fort imprécise, puisqu'elle consiste, en théorie, à faire assumer les responsabilités par l'autorité du niveau le plus bas possible, sauf à prouver qu'elles seraient plus efficacement exercées à plus haut niveau. Il n'est pas sûr que ce concept soit appliqué dans la réalité, ni d'ailleurs qu'il soit applicable. Aux États-Unis, les États quant à eux prétendent à un pouvoir potentiel équivalent en droit à celui de l'Union. Leur souveraineté est maintenue, et la Cour suprême leur reconnaît aujourd'hui « *la dignité, sinon la pleine autorité, de la souveraineté* ».

Non seulement cette reconnaissance, si elle était reproduite dans un cadre européen, conduirait à une complexité de l'organisation des pouvoirs publics qui représenterait pour les Français une véritable révolution, se manifestant non seulement en termes administratifs mais, plus fondamentalement, en matière de conception de l'autorité de l'État et du rôle du droit. Mais, plus encore, la dilution des centres de décision qui

résulterait inéluctablement d'un régime fédéral naissant aurait pour conséquence de rendre difficile la mise en place d'une véritable politique à l'égard du reste du monde, allant le cas échéant jusqu'à mettre en question l'ambition française traditionnelle de créer une « Europe-puissance ». De ce point de vue, l'expérience américaine, qui n'a permis que très lentement la mise en place d'une véritable politique étrangère, et qui, surtout par crainte d'une excessive centralisation de la décision, demeure attachée à un réel partage des pouvoirs fédéraux, même dans le domaine régalien par excellence que représente la politique étrangère, mérite d'être méditée profondément.

C'est la raison pour laquelle il nous a paru utile de consacrer une étude à ce phénomène complexe et mal connu en France qu'est l'évolution récente du fédéralisme américain, en mettant l'accent, en particulier, sur les conséquences du maintien d'une « double souveraineté » constitutionnelle sur la politique des États-Unis. Pour ce faire, nous avons demandé à Timothy Conlan, professeur à l'Université George Mason, en Virginie, non loin de Washington, et ancien collaborateur de la Commission sénatoriale spécialisée dans les relations entre les États fédérés et la Fédération (qui se nomme de manière significative : *Intergovernmental Relations Committee*), de séjourner quelques semaines au Centre français sur les États-Unis (CFE), à l'IFRI, et d'y entreprendre la rédaction d'un travail sur « La Cour suprême et le fédéralisme américain contemporain : le défi de la double souveraineté ». Pendant son séjour, Tim Conlan a travaillé de façon étroite avec un « thésard » français se spécialisant sur ces questions, François Vergniolle de Chantal, cela de façon à permettre de renforcer l'expertise française dans ce domaine, tout en facilitant sa tâche quotidienne de recherche. Le résultat est un texte précis, clair et tout à fait éclairant sur l'état de la relation entre les États fédérés et la République américaine.

Le professeur Conlan a choisi de mettre l'accent sur le rôle de la Cour présidée, depuis le 26 septembre 1986, par le juge Rehnquist, dont il montre qu'elle a puissamment contribué à l'évolution permettant un retour vers les États de beaucoup des pouvoirs qui avaient été assumés par le gouvernement fédéral depuis la Première Guerre mondiale et surtout depuis le *New Deal*. Cette contribution fut, à son sens, plus

importante que celle de l'Administration Reagan, malgré les déclarations de celle-ci, ou que celle du Congrès, même pendant la période où M. Gingrich assumait les fonctions de *Speaker* de la Chambre des Représentants et où le slogan de la « dévolution » des pouvoirs aux États formait l'une des bases principales du programme républicain. La Cour suprême, qui avait été un instrument de centralisation pendant la présidence du juge Warren, est devenue sous son successeur, en particulier à partir de 1991, le facteur le plus important du retour au fédéralisme, n'hésitant pas pour cela à remettre en cause les « acquis » du *New Deal*.

En cela, la Cour suprême se comporte d'une manière très différente de la Cour de Justice des Communautés Européennes, dont la jurisprudence est marquée par un volontarisme européen qui ne s'est jamais démenti, et dont la tendance à favoriser la concentration des pouvoirs au profit des organes communautaires et au détriment des États-membres est avérée. Il semble difficile aux juges européens d'admettre ce qui forme la base du contrat entre les États américains, à savoir, précisément, la « double souveraineté » de la Fédération et des États la constituant, qui forme l'objet de cette étude. L'existence en Europe de traditions nationales fortes, en particulier dans des pays centralisés comme la France et la Grande-Bretagne, dont les concepts juridiques, quoique très différents, ont été les plus influents en matière communautaire, a sans doute abouti à constituer une mentalité juridique portant à l'harmonisation qui n'a pas d'équivalent exact aux États-Unis. Quand ils pensent en termes européens, les dirigeants et peut-être aussi les peuples des pays européens, y compris ceux qui protestent contre les intrusions bruxelloises, le font encore le plus souvent dans les termes d'organisation des pouvoirs publics qui sont ceux de l'État-nation.

Timothy Conlan a produit pour le *Centre français sur les États-Unis* de l'IFRI un travail d'une grande clarté, mais aussi d'une grande précision, tout en ne se perdant pas dans les exégèses juridiques. Les non-juristes le liront avec profit et sans difficulté. Il montre très bien à quel point le pouvoir judiciaire constitue en réalité la clé des relations entre les États fédérés et l'Union. L'objet de cette étude consiste donc à contribuer à l'animation du débat public sur ces questions, tout en renforçant la connaissance du

système politique américain en France, où elle demeure insuffisante. On espère que sa publication répondra à cet objectif important et nécessaire.

Guillaume Parmentier,
Chef du Centre français sur les États-Unis

EXECUTIVE SUMMARY

For most of the twentieth century, the United States Supreme Court has played a centralizing role in American politics. Since 1991, however, a slim majority of the Supreme Court has engaged in a concerted effort to restructure the post-New Deal balance of power and authority in the American federal system, strengthening the prerogatives of States and modestly curtailing the Constitutional powers of the national government. Although the practical effects of this judicial re-balancing have been limited thus far, the Court's conservatives are seeking to define a new and more active role for the Court in contemporary American federalism. In so doing, their intellectual efforts to construct a working concept of divided sovereignty that can be applied to the complexities of modern government may have implications for European integration as well.

The Rediscovery of Judicial Federalism in the 1990s

In a series of rulings over the past decade, a narrow majority on the U.S. Supreme Court has begun to constrict Constitutional authority of Congress on a number of fronts. The Court has overturned all or portions of federal statutes that were deemed to:

- commandeer the policy making and administrative apparatus of State and local governments;
- infringe on State sovereign immunity;
- exceed Congress's authority to regulate interstate commerce; or
- exceed Congress's power to regulate State action under the 14th Amendment to the Constitution.

Resurrecting State Sovereignty : In *New York v. United States* (1992), the Supreme Court began its recent quest to define a sphere of State institutional autonomy that lies beyond the reach of congressional authority. In this case, the Court overturned a portion of a federal law requiring State governments to dispose of low level nuclear waste

materials, declaring that “the Federal Government may not compel the States to enact or administer a federal regulatory program.” This anti-commandeering theme was reiterated in the 1996 case of *Printz v. United States*.

New York v U.S. and *Printz v U.S.* were based in part on a broad structural and historical interpretation of the U.S. Constitution as a system of divided sovereignty. According to these cases, one attribute of State sovereignty involves judicial protection of States’ legislative and administrative apparatus from federal usurpation. A related set of cases has sought to strengthen the concept of State sovereign immunity from private lawsuits. In particular, the Court has sought to restrict Congress’s authority to make States liable to private lawsuits by individual citizens. In the 1999 case of *Alden v. Maine,* for example, the majority opinion declared that “States’ immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution’s ratification and still retain today.”

New Limits on Congress’s Enumerated Powers : The other important development in recent federalism jurisprudence involves limitations on the scope of the powers delegated to Congress under the Constitution. The most prominent of these cases was the 1995 decision in *U.S. v. Lopez*, which overturned the Gun-Free School Zone Act of 1990 for exceeding the authority of Congress “to regulate Commerce (...) among the several States.” Regulating students’ conduct in the vicinity of local schools, said Chief Justice Rehnquist, was too far removed from commercial activity to meet the constitutional test. This same reasoning was reaffirmed in the Court's 2000 decision in *United States v. Morrison, et. al.,* which overturned portions of the 1994 Violence Against Women Act. Again, the majority argued that ”the Constitution requires a distinction between what is truly national and what is truly local.” A final line of cases has involved Court-imposed limits on Congress's authority to interpret and enforce the 14th Amendment to the Constitution.

A Devolution Revolution?

Whether the Supreme Court's new constitutional interpretations of federalism prove to have important practical effects on public policy and the conduct of politics remains to be seen. The Court's emerging doctrines are works still in progress, and this makes conclusions about their ultimate effects necessarily tentative. At the present time, however, the reach of these cases, both individually and collectively, falls well short of a constitutional revolution comparable to that which allowed the centralization of American government from the 1930s to the 1970s. While unquestionably important, the cases decided thus far are subject to a variety of constraints -- doctrinal, philosophical, and political -- that are critical to understanding their present reach.

Political Constraints : At the present time, the Rehnquist Court confronts significant political constraints on its devolutionary leanings. The most obvious of these political constraints is the narrow margin of the new federalist majority on the Court. Virtually all of the cases discussed in this paper, including *United States v. Lopez, Printz v. United States, Seminole Tribe of Florida v. Florida, Alden v. Maine, Florida v. College Savings Bank,* and *United States v. Morrison* were decided by narrow five to four margins. Thus, George W. Bush's election has great potential to cement and extend the Court's current conservative leanings. There is another, less obvious political constraint on the Court's federalist majority that survives Bush's election, however. This constraint is imposed by the absence of public support for a return to a strict system of dual federalism. Any attempt at radical decentralization by the Court would likely provoke a powerful political backlash that could severely damage the Court's legitimacy.

Doctrinal Limits : In addition to political constraints, a careful examination of the doctrines being fashioned in many of the Court's recent rulings suggests that, in their present form, they are too limited to constitute a full fledged "anti-federalist revival." In *United States v. Lopez* and *United States v. Morrison*, for example, the Chief Justice took pains to work around existing commerce power precedents, not to overturn them. His aim was not to overturn the New Deal but to avoid reading the Commerce Clause so

broadly that it constituted a general police power for the federal government. Similarly, in the sovereign immunity cases, the federal government's power to enforce laws directly was explicitly recognized by the Court. Only the mechanism of private law suits to enforce federal standards was at issue in these cases.

A significant degree of judicial restraint was also present in the Court's recent 10th amendment rulings, such as *New York v. United States* and *Printz v. United States*. These have attempted to define a sphere of State institutional autonomy into which the federal government may not intrude. Significantly, however, these new 10th Amendment rulings do not attempt to wall off the broader and more consequential sphere of "traditional functions" of State and local governments, such as education and law enforcement. Far from restoring constitutional dual federalism, the contemporary Court continues to embrace the concept of "cooperative federalism" in its spending power decisions. Since the 1930s, the Court has ruled that the Constitution allows Congress to spend public funds, through grants to State and local governments, on activities that it otherwise lacks authority to address. Equally important, the Court has also held that Congress is free to attach strings or limitations to the use of such federal grant funds.

The Philosophical Conundrum of Dual Sovereignty : Recent Court doctrines on federalism are rooted in a concept of dual sovereignty which is paradoxical and unstable. Sovereignty is a unitary and absolutist concept of government while federalism, by its very nature, rests on the division of governmental powers between two or more levels of government.

The traditional solution to this problem was the doctrine of judicial dual federalism, in which the powers of government were to be clearly divided between the national government and the States. As Chief Justice Marshall wrote in the classic case of *McCulloch v. Maryland* (1819), each level would be "supreme within its sphere of action." Although this system did not solve the conceptual problem, and a source of higher authority in the Court or the Constitution had ultimately to be drawn upon to deal with conflicts between the spheres, it did help to manage the conflicts inherent in divided

sovereignty and to reduce the amount of friction. But complete dual federalism was never practical nor fully practiced, and it has become thoroughly unworkable as governmental cooperation and intermingling have become commonplace in the late twentieth century.

A second approach to addressing the problem of sovereignty in a federal system is the concept of popular sovereignty which lies at the basis of the French Constitutional tradition. Under this theory, it is the people who hold sovereignty, not the federal or State governments. The people choose, through their Constitution, to divide the powers and functions of government between the nation and the States. But they retain the ultimate source of authority and can alter the arrangements from time to time as they see fit. Popular sovereignty is theoretically powerful and politically attractive, but it is less satisfactory as a constitutional decision making device. It does not provide clear guidance to the Court in most instances when it is called upon to settle specific disputes between the national government and the States.

The Supreme Court's Role in the Federal System

Beyond their specific policy implications, the cases examined in this paper pose a fundamental question about the Supreme Court's proper role in American federalism. Traditionally, the Supreme Court has been viewed as the neutral arbiter of the Constitution. Any federal system based upon divided powers has need of a referee to decide and rule on conflicts that can arise between the institutional parties. Yet the Court is an inherently political institution, composed of justices with individual values, beliefs, and experiences, and constrained by history and contemporary political pressures. Thus, conceptualizing the Court as a neutral arbiter may serve as a useful ideal for lawyers and judges, but most political observers doubt that it serves to adequately describe the Court's actual behavior on matters of federalism.

Several other conceptualizations of the Court's role have been articulated at various times in the Court's history. These include viewing the Supreme Court as an agent of the national government, as an advocate for the powerless, and as a neutral party which leaves the resolution of conflicts between the national government and the States to the elected branches of government. However, the concept that best captures the Rehnquist Court's own vision of its role in federalism matters is that of balancing agent, whose institutional role is to actively intervene to assure the proper balance of power between the central government and the States. As Justice Scalia has said, the Supreme Court has a duty to maintain a "healthy balance of power between the States and the federal government." Conceivably, the Court could favor either party under this conception of its role, but after two generations of political and governmental centralization in the United States, the current Court has weighted its decisions consistently in favor of the States.

Conclusion

Given the structure of the American Constitution, maintaining the intergovernmental balance of power is a natural, and perhaps necessary, role for the Supreme Court to play. In a system where "ambition must be made to counteract ambition," as James Madison put it in *Federalist* 51, the Court's role might well include ensuring that no level of government becomes so powerful as to keep the system of checks and balances from operating. Balance, however, is a subjective judgment that implies a large degree of subtlety and self restraint. If one proceeds too far in any one direction, the sense of balance can easily be lost once again.

There is a deeper philosophical dilemma facing the new federalists on the U.S. Supreme Court. Like the choice of alternative roles that courts can play within a federal system, this dilemma has implications for thinking about the concept of federalism outside the United States as well. The Rehnquist Court's conceptual model of federalism as a system of divided sovereignty rests on a logical paradox. It has proven utility as a device for policy making purposes, but it cannot be pushed too far without yielding

absurd conclusions and collapsing upon itself. The Court's new federalists will need to strengthen their intellectual foundation if they hope to build a new judicial federalism for the future.

RÉSUMÉ

Tout au long du XX^{e} siècle ou presque, la Cour suprême a joué un rôle centralisateur dans la vie politique des États-Unis. Mais, depuis 1991, une petite majorité de juges de la Cour a entrepris un effort collectif pour restructurer l'équilibre des pouvoirs qui caractérise le système fédéral américain depuis le *New Deal*. Cet effort a pour but de renforcer les prérogatives des États fédérés et de restreindre modestement les pouvoirs constitutionnels du gouvernement fédéral. Bien que les effets pratiques de ce rééquilibrage judiciaire aient été jusqu'à présent limités, les membres conservateurs de la Cour cherchent aujourd'hui à donner à celle-ci un rôle nouveau et plus dynamique en faveur d'un fédéralisme américain contemporain. Ce faisant, leurs travaux doctrinaux en vue de définir un concept opérationnel de « souveraineté divisée », susceptible de s'appliquer à la complexité des modes de gouvernement modernes, pourraient également trouver certaines applications dans le processus d'intégration européenne en cours.

La redécouverte du « fédéralisme judiciaire » dans les années 1990

Au long d'une série de jugements rendus au cours des dix dernières années, une étroite majorité de juges de la Cour suprême a commencé à restreindre l'autorité constitutionnelle du Congrès dans plusieurs domaines. La Cour a ainsi remis en cause, de façon totale ou partielle, les prérogatives fédérales permettant :

- d'utiliser l'appareil administratif et politique des gouvernements fédérés et locaux ;
- de contrevenir au principe d'immunité de la souveraineté des États ;
- d'élargir les pouvoirs du Congrès pour réguler le commerce entre les États ;
- d'élargir les pouvoirs du Congrès pour réguler l'action des États dans le cadre du 14^{e} Amendement.

Renforcer la souveraineté des États : C'est avec l'affaire *État de New York contre États-Unis (1992)* que la Cour suprême a commencé à chercher à établir un espace

d'autonomie institutionnelle au profit des États, hors d'atteinte des pouvoirs du Congrès. En l'espèce, la Cour avait remis en cause une disposition d'une loi fédérale qui exigeait des gouvernements des États qu'ils limitent leurs déchets nucléaires, considérant que « le Gouvernement fédéral ne peut contraindre les États à mettre en œuvre ou à gérer un programme réglementaire national ». Ce thème anti-centralisateur sera repris en 1996, dans l'affaire *Printz contre États-Unis.*

Ces deux jugements étaient en partie fondés sur une interprétation structurelle et historique de la Constitution des États-Unis, faisant d'elle un système de souveraineté divisée. Selon la Cour, l'une des propriétés de la souveraineté des États est de permettre la protection judiciaire de leur appareil administratif et législatif contre les empiètements du pouvoir fédéral. Toute une série d'affaires comparables ont cherché à étoffer ce principe d'immunité de la souveraineté des États vis-à-vis des plaintes de droit privé. La Cour a tenté, notamment, de restreindre le pouvoir du Congrès d'exposer les États aux recours en justice intentés par des particuliers. Dans l'affaire *Alden contre État du Maine*, en 1999, la majorité des juges a ainsi déclaré que « *l'immunité des États en matière judiciaire était un aspect fondamental de la souveraineté dont ils jouissaient avant la ratification de la Constitution, et [que] cette immunité subsistait encore aujourd'hui* ».

Nouvelles limites aux pouvoirs du Congrès, délégués par la Constitution : L'autre aspect important de la jurisprudence récente en matière de fédéralisme a consisté à limiter l'étendue des pouvoirs délégués au Congrès par la Constitution. Le jugement le plus caractéristique à cet égard fut rendu dans l'affaire *États-Unis contre Lopez* : il remit en cause la loi de 1990 sur les zones scolaires sans armes (*Gun-Free School Zone*) qui permettait au Congrès d'aller au-delà de ses propres pouvoirs afin de « *réguler le commerce (...) au sein des États* ». Le président de la Cour suprême, le Juge Rehnquist, déclara que le fait de réglementer la vie des étudiants autour des écoles avait trop peu de choses à voir avec une activité commerciale pour être constitutionnelle. Ce même raisonnement fut confirmé par la décision de la Cour, dans l'affaire *États-Unis contre Morrison, et al.*, qui contesta certains articles de la loi sur la violence faite aux femmes. De nouveau, la majorité des juges considéra que « *la Constitution exigeait une*

distinction entre ce qui est réellement local et ce qui est réellement national ». Une autre série d'affaires vit la Cour imposer des limites aux pouvoirs du Congrès en matière d'interprétation et de mise en oeuvre du 14e Amendement.

Une révolution pour la « dévolution » ?

Il reste encore à analyser si les nouvelles interprétations constitutionnelles de la Cour suprême en matière de fédéralisme ont eu effectivement des répercussions sur les politiques publiques et la conduite des affaires. La doctrine naissante de la Cour est une sorte d'œuvre inachevée, et les conclusions que l'on peut tirer quant à ses effets ne peuvent être qu'incertaines. Mais il apparaît d'ores et déjà que cette jurisprudence, sur un plan individuel autant que collectif, est loin de constituer une révolution constitutionnelle comparable à celle qui se traduisit par une centralisation de l'exécutif américain entre les années 1930 et les années 1970. Malgré leur indiscutable importance, ces jugements restent soumis à toute une série de contraintes – de nature doctrinale, philosophique et politique – qu'il est essentiel de comprendre si l'on veut évaluer leur portée.

Contraintes politiques : Jusqu'à présent, les interprétations de la Cour Rehnquist en matière de délégation des pouvoirs ont rencontré des contraintes politiques non négligeables. La plus nette d'entre elles résulte de l'étroitesse de la majorité dont disposent les juges qui prônent ce nouveau fédéralisme. À peu près toutes les décisions de la Cour examinées dans cet essai (*États-Unis contre Lopez* , *Printz contre États-Unis*, *Tribu Seminole de Floride contre État de Floride*, *Alden contre État du Maine*, *États-Unis contre Morrison*) ont été rendues à une majorité de cinq voix contre quatre. À cet égard, l'élection de George W. Bush ouvre de larges possibilités à la Cour pour étendre et renforcer ses tendances conservatrices. Mais une autre contrainte politique, moins explicite, va survivre à l'élection du nouveau président : c'est l'absence de soutien de l'opinion publique en faveur du retour à un système fédéral strictement dualiste. Et toute tentative de la Cour allant dans le sens d'une décentralisation radicale risque de provoquer une puissante contre-attaque politique de nature à porter sévèrement atteinte

à la légitimité de la Cour Suprême.

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* * h ’ sans les invalider. Son but n’a pas été de dénoncer le New Deal mais d’éviter d’interpréter la clause sur le commerce de telle façon qu’elle puisse donner des pouvoirs réglementaires généraux au gouvernement fédéral. De même, dans les affaires portant sur les questions de souveraineté, le pouvoir fédéral d’exécution des lois a été reconnu explicitement par la Cour ; mais c’est le mécanisme des procès de droit privé dans le but de rendre exécutoires des normes fédérales qui fut discuté.

Il y a également une part importante de contrainte judiciaire dans les récents jugements de la Cour à propos du 10e Amendement (*cf*. *État de New York contre États-Unis* et *Printz contre États-Unis*). Les juges ont tenté de tracer la frontière de l’autonomie institutionnelle des États au-delà de laquelle le gouvernement fédéral ne peut s’immiscer. Mais ces nouvelles décisions, significativement, n’essaient pas de distinguer strictement la sphère plus large des fonctions traditionnelles des États et des gouvernements locaux, comme l’éducation ou l’exécution des lois. Loin de restaurer le double fédéralisme constitutionnel, les juges continuent de respecter le concept de « fédéralisme coopératif » dans leurs décisions sur le pouvoir budgétaire. Depuis les années 1930, la Cour considère ainsi que la Constitution autorise le Congrès à engager des dépenses publiques, à travers des subventions aux États et gouvernements locaux, même dans des domaines où il n’a pas, normalement, de compétence pour intervenir. Il est également significatif que la Cour considère que le Congrès est libre de limiter ou de conditionner l’usage des fonds publics fédéraux.

L’impasse philosophique de la « double souveraineté » *:* Les récentes théories de la Cour sur le fédéralisme trouvent leur origine dans le concept de « double souveraineté » qui est à la fois instable et paradoxal. La souveraineté renvoie à un concept de gouvernement unitaire et absolu, tandis que le fédéralisme, par nature,

repose sur la division du pouvoir exécutif entre deux ou plusieurs niveaux de gouvernement.

La solution traditionnelle à ce problème était la doctrine du double fédéralisme judiciaire ; selon celle-ci, le pouvoir exécutif doit être clairement divisé entre l'État fédéral et les États fédérés. Comme l'a écrit le président Marshall dans le jugement classique *McMulland contre État de Maryland* (1819), chaque niveau du pouvoir est « *absolument souverain dans sa sphère de compétences* ». Bien que ce système ne résolve pas le problème conceptuel - et une source d'autorité plus grande, issue de la Cour ou de la Constitution, devra finalement être imaginée pour arbitrer le conflit entre les différentes sphères -, il permet de gérer les conflits inhérents à une souveraineté divisée et de réduire le degré de friction. Mais un double fédéralisme total n'a jamais été ni pratiqué, ni praticable, et ce système est devenu tout à fait inexploitable au fur et à mesure que la coopération et la confusion des pouvoirs sont devenues de plus en plus courantes à la fin du siècle dernier.

Il existe une autre façon d'aborder le problème de la souveraineté dans un système fédéral : c'est le concept de souveraineté populaire, cher à la tradition constitutionnelle française. Selon cette théorie, la souveraineté appartient au peuple, non au gouvernement fédéral ou à celui des États. Or le peuple a choisi, à travers sa Constitution, de diviser le pouvoir et les fonctions de l'exécutif entre l'Union et les États. Mais c'est lui qui reste la source première et suprême de l'autorité, et il lui est loisible d'en modifier les différents aménagements de temps à autre et selon son gré. La souveraineté populaire est théoriquement forte et politiquement séduisante, mais elle est beaucoup moins satisfaisante en tant qu'instrument constitutionnel de prise de décision. Dans la plupart des cas, elle n'offre pas à la Cour d'indications claires lui permettant de trancher les conflits particuliers de compétence entre les États et l'Union.

Le rôle de la Cour suprême dans le système fédéral

Au-delà de leurs implications particulières en termes d'action politique, les affaires examinées dans ce « policy paper » posent une question fondamentale quant au rôle de la Cour suprême dans le fédéralisme américain. Traditionnellement, la Cour est vue

comme un arbitre neutre de la Constitution. Tout système fédéral fondé sur la division des pouvoirs a besoin d'une instance arbitrale pour juger les conflits qui peuvent survenir entre ses différentes composantes institutionnelles. Mais la Cour est également une institution fondamentalement politique, composée de juges ayant leur propre système de valeurs, leurs propres croyances et leur propre expérience - de juges qui sont également influencés par l'histoire et font l'objet de pressions politiques. Certes, le fait de concevoir le rôle de la Cour comme celui d'un arbitre au-dessus des parties peut constituer un idéal utile pour les magistrats et les avocats, mais la plupart des observateurs politiques doutent fortement que cela permette de décrire justement le comportement effectif de la Cour dans les questions de fédéralisme.

D'autres théories sur le rôle de la Cour ont été élaborées à différentes époques de l'histoire de l'institution ; elles ont fait de la Cour tantôt un agent de l'exécutif fédéral, tantôt un avocat des minorités, tantôt encore un acteur neutre laissant le soin de résoudre les conflits entre l'Union et les États aux instances élues de gouvernement. Mais le concept qui permet le mieux de saisir la vision qu'a la Cour Rehnquist de son rôle dans les questions portant sur le fédéralisme est celui d'« agent d'équilibre » : sa mission institutionnelle est d'intervenir activement dans le but d'assurer un équilibre adéquat du pouvoir entre l'exécutif national et les États. Comme l'a dit le juge Scalia, la Cour Suprême a le devoir de préserver « *un équilibre salutaire du pouvoir entre les États et l'exécutif fédéral* ». Selon cette conception, il serait tout à fait concevable que la Cour puisse favoriser l'une ou l'autre partie ; mais, après deux générations de centralisation politique et administrative aux États-Unis, la Cour actuelle a constamment fait pencher la balance en faveur des États.

Conclusion

Compte tenu de la structure de la Constitution américaine, il revient naturellement, et peut-être nécessairement, à la Cour Suprême, de préserver l'équilibre des pouvoirs

entre les États et l'Union. Dans un système où « *l'ambition doit servir à limiter l'ambition* », ainsi que l'écrit James Madison dans le N° 51 des *Federalist Papers*, le rôle de la Cour pourrait bien inclure celui de veiller à ce qu'aucun niveau de gouvernement ne devienne si puissant qu'il empêche le système d'équilibre des pouvoirs de fonctionner. Mais la notion d'équilibre est subjective, et sa définition suppose un large degré de subtilité et d'autocontrôle. Si l'on va trop loin dans un sens, la perception de l'équilibre peut aisément devenir à nouveau confuse.

Mais les nouveaux fédéralistes de la Cour suprême sont confrontés à un dilemme philosophique encore plus profond. À l'instar du choix du rôle alternatif que peuvent jouer les Cours dans un système fédéral, ce dilemme a des implications sur la façon de réfléchir au concept de fédéralisme en dehors même des États-Unis. Le modèle conceptuel de fédéralisme privilégié aujourd'hui par la Cour Rehnquist, c'est-à-dire un système de souveraineté divisée, repose sur un paradoxe logique. Il a prouvé son utilité en tant qu'instrument permettant de définir le champ de l'action politique, mais il ne peut être poussé trop loin sans aboutir à des conclusions absurdes et s'effondrer sur lui-même. Les nouveaux fédéralistes de la Cour vont devoir renforcer les fondements intellectuels de leur théorie, s'ils souhaitent bâtir pour l'avenir un nouveau fédéralisme judiciaire.

Confronting the Challenge of Dual Sovereignty[2]

The Rehnquist Court and Contemporary American Federalism:

The Republican party took control of the U.S. Congress in 1995, promising to make dramatic changes in American government. Whole federal departments were scheduled for elimination; hundreds of federal grant-in-aid programs were slated for termination or reform; large reductions in federal spending were advocated; and sweeping regulatory reforms were proposed. As Newt Gingrich, the architect of the new Republican majority, put it: “We are going to rethink the entire structure of American society, and the entire structure of American government. (...) This is a real revolution.”[1] Academic observers agreed that big changes were underway. Richard Nathan dubbed the Republican program a “devolution revolution,” because of its proposed reductions in the size and power of the federal government and the anticipated return of governmental responsibilities to the States. Even President Bill Clinton conceded in early 1996 that “the era of big government is over.”

In the end, the Republican revolt stalled and its revolutionary changes were avoided. Bill Clinton was reelected president, while Newt Gingrich ultimately lost his leadership position and left office in 1998. Few federal programs and agencies were abolished during the aborted "revolution," and federal spending growth resumed.

Away from the spotlight of attention on Congress and the White House, however, the U.S. Supreme Court had opened a second front in the devolution battles of the 1990s. In recent years, the Supreme Court has overturned a growing list of congressional statutes on the grounds that they intruded into protected spheres of State sovereignty or exceeded Congress’s delegated powers under the Constitution. These decisions have had important policy implications for issues as diverse as abortion rights,

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gun control, and nuclear power. Even more importantly, they have reopened fundamental questions about the appropriate roles of the federal and State governments in the American federal system, and about the Supreme Court's role in that system.

Critics of the Court's recent rulings believe they are an attempt to tilt public policy in a more conservative direction by weakening national authority and devolving power to what they assume to be more conservative State and local governments. They have also revived old arguments questioning the legitimacy of appointed justices who substitute their policy judgments for the decisions of elected representatives. In contrast, supporters of the Court's new activism have generally applauded its decisions as part of a long overdue effort to restore balance to a federal system that they believe has become overly centralized. Both sides agree, however, that the Court has launched what one political scientist has termed "the most fundamental debate over federalism since the 1930s."[2]

What can the Supreme Court's recent cases tell us about the core tenets of this new judicial federalism? To what extent can a careful analysis of the Court's recent rulings help to define the limits of this still evolving federalist revival? Finally, what do these decisions say about the Court's own role in defining the contours of American federalism and, by extension, the role of other judicial institutions in other federal entities? This paper will examine these questions, beginning with a brief synopsis of the Supreme Court's doctrines shaping federalism during the 20th century, an assessment of the recent cases decided by the Rehnquist Court, and an analysis of their significance for American federalism and the Court's own role in the U.S. constitutional framework.

The Supreme Court and the Centralization of American Federalism

The American federal system has evolved dramatically over the past two hundred years. With surprisingly few formal amendments to the Constitution, the national government has grown from a tiny federal establishment "out of sight and out of mind"[3]

into the nerve center of a military superpower and the dominant partner of a domestic welfare State. It transfers nearly $300 billion annually to State and local governments, which in turn have become the chief agents of implementation for scores of federal programs.

Many of the members of the founding generation did not believe that such changes would be possible without major amendments to the Constitution. Antifederalist opponents of the federal Constitution, early presidents like Jefferson and Madison, and their successors in the early Democratic party, all believed and sometimes insisted that formal constitutional amendments were required to go beyond a literal, minimalist reading of Congress's powers in Article I, section 8. Jefferson, for example, questioned the constitutionality of the Bank of the United States and sought a constitutional amendment to legitimate the purchase of Louisiana from the French. Madison and Monroe vetoed bills for "internal improvements," which they otherwise supported, out of deference to their narrow view of the national government's authority under the Constitution. Both called for passage of amendments to the Constitution to permit such projects in the future.[4]

In contrast, the early Supreme Court, especially under chief Justice John Marshall, took a more expansive view of the powers of Congress and the new national government. Equally important, the court proceeded to address such issues through the process of judicial review -- seeking to settle such policy differences through its interpretation of the Constitution's expansive and often ambiguous language. Ultimately, all parties came to accept this judicial role as legitimate, and subsequent constitutional battles typically focused on interpretive issues like the scope of the interstate commerce clause,[5] the meaning of the so-called "elastic clause",[6] whether the tax and spending powers comprised independent grants of power,[7] and the substance of the tenth amendment,[8] rather than formal amendments to the Constitution.[9]

Within the latitude afforded by the Constitution's broad language, great swings have occurred in the Court's reigning doctrines. The Supreme Court was an agent of

centralization under John Marshall in the early 19th century. It assumed the role of protector of property rights and defender of capitalism in the post-Civil War era. By the early 1930s, the court was the last bastion of conservative opposition to social change.

Box 1

Important Federalism-Related Provisions of the U.S. Constitution

Spending Power: "The Congress shall have Power To lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Article I, Section 8.

Interstate Commerce Clause: "The Congress shall have Power (...) To regulate Commerce (...) among the several States." Article I, Section 8.

Elastic Clause: "The Congress shall have Power (...) to make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States." Article I, Section 8.

Supremacy Clause: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Article VI, Clause 2.

Tenth Amendment: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Amendment X.

Eleventh Amendment: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Amendment XI.

Fourteenth Amendment: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (...) The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." Amendment XIV.

The Court's modern era began in the mid 1930s, when it once again became an engine of centralization. This was an era of great social and economic upheaval in the United States, as elsewhere. The U.S. was in the depths of the deepest and most prolonged economic depression in the nation's history. President Roosevelt and a new Democratic Congress were experimenting with a broad agenda of structural economic reforms, new economic regulations, emergency jobs and relief programs, and social insurance protections for the unemployed and the elderly. As a result, the Supreme Court faced difficult questions of how to adapt an 18th century Constitution, written for a largely agrarian nation, to the needs of a rapidly changing industrial society. It initially refused to accept Roosevelt's reforms, striking down several of the principal enactments of the New Deal. When this sparked attacks on the Court that threatened its very legitimacy, the Supreme Court began to modify its doctrines to accommodate the new political and economic demands confronting it and the country at large.

It did so first in a permissive way, interpreting key provisions of the Constitution expansively and allowing the elected branches of government to proceed with the construction of a modern welfare State. Congress's power to regulate "commerce among the several States" had previously been deemed to exclude manufacturing, wages and

working conditions, and other “indirect” effects on the exchange of goods and services. Now the phrase came to be read broadly, which allowed Congress to regulate such areas as collective bargaining, industrial and agricultural production, and wage and hour restrictions. By 1942, Congress’s reach over interstate commerce was read so expansively that it applied even to a farmer who grew grain to feed to his own livestock.[10] Similarly, the power to “lay and collect taxes and spend for the general welfare” was upheld as an independent grant of power under the Constitution, allowing Congress to establish and fund a social security system.[11] And the 10th Amendment to the Constitution, which states that “powers not delegated to the United States (...) are reserved to the States,” was no longer held to constitute an independent check on Congress’s power but was reduced to a mere “truism.”[12] In short, the court now granted an activist President and Congress new and wider latitude to establish a modern welfare State, limited only by Congress’s ability to demonstrate a rational basis for its regulations. As Martin Shapiro put it: “The New Deal Court had effectively announced the constitutional demise of federalism as a limit on the power of the national government.”[13]

These legislative and judicial actions gave rise to a new conceptualization of American federalism. The traditional 19th century model is often referred to as “dual federalism”, because it was based on a strict division of responsibilities between the central government and the States. The two levels were viewed as independent and distinct sovereign entities, each with its own unique functions and resources, with little overlap or mutual interdependence between them. As the Supreme Court described the model in the 1859 decision of *Abelman v. Booth*:

> “The powers of the general government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separate and independent of each other, within their respective spheres”.[14]

The New Deal ushered in a different model of federalism known as cooperative federalism. This model assumes that most functions will be shared among all levels of

government, with each bringing its own competencies to bear. For example, through the use of financial grants-in-aid to State and local governments, the federal government is now deeply involved in most of the functions that were once nearly exclusive responsibilities of State governments, such as education, law enforcement, and social services. Similarly, in many regulatory fields involving public health and the environment, the federal government now enacts minimum national standards, while States implement those standards in ways most appropriate to their economies.

Following World War II, the Court became a powerful centralizing force in its own right. Increasingly, it viewed its role as a defender of minority rights, as a protector of civil liberties, and as a promoter of political equality. In the process, it ventured aggressively into spheres that had heretofore been the province of State-level policy making. In the words of Philip Kurland: “The Warren Court stands in the great tradition of (...) transferring areas of governmental control from the States to the Nation. Every one of its major constitutional developments falls in this category. The school desegregation cases, the criminal procedure cases, the reapportionment cases, all emphasize this single theme of restraint on State power.”[15]

Partly as a result of these constitutional developments, the contours of American federalism were greatly altered from their pre-New Deal outlines. Between 1929 and 1980, federal expenditures rose from less than 3% of GNP to over 21 % of GNP, and the federal share of government spending rose from 34% of State and local expenditures to 197%. During this same period, the number of federal grant-in-aid programs to State and local governments grew from approximately 30 to over 490, the number of federal regulatory agencies increased from 15 to 41, and the number of intergovernmental regulatory statutes grew from 0 to 37.[16] Thus, by the 1960s and 1970s, some scholars went so far as to argue that “in fact, if not in form, we live today under a national, not a federal, Constitution.”[17]

The Rediscovery of Federalism in the 1990s

Today, such assessments are being reassessed. Since 1991, a slim majority of the U.S. Supreme Court has been engaged in a concerted effort to restructure the post-New Deal balance of power and authority in the American federal system. In a series of rulings, a narrow Court majority has begun to constrict Congress's authority on a number of fronts, overturning all or portions of federal statutes that were deemed to:

- exceed Congress's authority to regulate interstate commerce;
- commandeer the policy making and administrative apparatus of State and local governments;
- infringe on State sovereign immunity; or
- exceed Congress's power to regulate State action under the 14th Amendment to the Constitution.

As Paul Gewirtz has observed: "Something very large is at work... The judicial branch is [engaged in] an across-the-board restriction on national government power on every front and a bolstering of State sovereign authority."[18]

Transition to the Rehnquist Era:

These new cases follow in the wake of a transitional era between the expansive centralization of the Warren Court and the contemporary Rehnquist Court. This transitional period, from the early 1970s to the late 1980s was marked by inconsistency and indecision in the Court's federalism rulings. Nothing underscored this period of ambivalence more than the noted case of *National League of Cities (NLC) v. Usery*. Here, the Court held that Congress's attempt to apply the wage and hour provisions of the Fair Labor Standards Act (FLSA) to State and local government employees was an unconstitutional violation of the 10th Amendment. Overturning an earlier case and challenging the reigning post-New Deal dictum that the 10th Amendment was merely "a truism," the Court held in *NLC v. Usery* that the 10th Amendment protects the "integral government functions" of State and local governments:

> Congress has sought to wield its power in a fashion that would impair the States' "ability to function effectively in a federal system." (...) This exercise of congressional authority does not comport with the federal system of government embodied in the Constitution.[19]

This was a bold decision that attracted great attention at the time, since it seemed to portend a sharp turn from the Court's philosophy on the 10th Amendment. Yet that promise went unfulfilled as the Supreme Court declined to apply or extend its ruling in subsequent cases. Over the next several years, the Court rejected 10th Amendment challenges to federal surface mining regulations, energy conservation requirements, and age discrimination laws.[20]

Finally, in 1985, the Court reversed *National League of Cities v. Usery* altogether. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court held that the wage and overtime provisions of the FLSA *could* be applied to State and local government employees. Most important, the new majority in *Garcia v. San Antonio* rejected as "unsound in principle and unworkable in practice" the attempt in *NLC v. Usery* to carve out a sphere of State government autonomy based on the "'traditional,' 'integral,' or 'necessary' nature of governmental functions."[21] Instead, the Court now sided with legal scholars who had argued that the interests of State governments are protected through political representation in the elected branches of the federal government rather than by judicial circumscription.[22] As Justice Blackmun argued for the Court's five member majority:

> The composition of the Federal government was designed in large part to protect the States from overreaching by Congress. (...) States' sovereign interests [are] more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power. [Any] substantive restraint on the exercise of Commerce Clause powers [must] be tailored to compensate for possible failings in the national political process rather

than to dictate a 'sacred province of State autonomy.' (...) The political process insures that laws that unduly burden the States will not be promulgated.[23]

Garcia v. San Antonio was issued by a sharply divided court in which the switch of a single Justice made the difference from the *National League of Cities* decision a decade earlier. The four dissenting justices chastised the majority's rejection of "the basic precepts of our federal system." Other observers questioned whether empirical evidence supported the Court's claim that State interests were adequately protected in the federal legislative process.[24] Most tellingly, however, Chief Justice Rehnquist said in his dissent that he was "confident" the federalist principles that had been expressed in *National League of Cities* would "in time again command the support of the majority of this Court."[25]

That prediction was not immediately realized. Three years after *Garcia v. San Antonio,* the Court reiterated its logic in a decision that overturned longstanding precedent and removed the federal income tax immunity for interest earned on State and local bonds.[26] But, beginning in 1991, the Rehnquist Court issued the first of what became a growing and nearly uninterrupted series of decisions that breathed life into the old concept of judicial dual federalism. These cases have touched on issues as diverse as nuclear waste disposal, gun control, religious freedom, and Indian gambling casinos, but they have all developed along two general themes. The first theme involves efforts to define a sphere of State sovereignty that is protected from federal regulation and intrusion. The second involves efforts to limit the scope of Congress's powers under Article 1, section 8 and the 14th Amendment.[27]

Resurrecting State Sovereignty:

In *New York v. United States*,[28] the Court began its recent quest to define a sphere of State institutional autonomy that lies beyond the reach of congressional authority. In this case, the Court overturned a portion of the Low Level Hazardous Waste

Policy Amendments of 1985, declaring that "the Federal Government may not compel the States to enact or administer a federal regulatory program."[29]

This case involved a law in which Congress sought to encourage States to form interstate compacts for the disposal of low level radioactive waste. Congress provided a set of financial and regulatory incentives for States, or groups of States, to dispose of such wastes that were generated within their borders. As a last resort, the law required States to "take title" and assume the costs and responsibility for all low level wastes generated within their borders if they had not established an acceptable disposal site by 1996. New York objected to this provision and sued.

In its decision, delivered by Justice O'Connor, the Court accepted the law's system of financial incentives to the States as "an unexceptional expression of Congress's power." It also upheld Congress's power to allow compact members and other compliant States to discriminate against non-compliant States. But the "take title" provisions was deemed to be "of a different character":

> Congress may not simply "commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *Hodel v. Virginia Surface Mining & Reclamation Assn., Inc.* (...) While Congress has substantial powers to govern the Nation directly, including in areas of intimate concern to the States, the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions.[30]

This anti-commandeering theme was reiterated in the 1996 case of *Printz v. United States*. This case involved Congress's attempt, under the Brady Handgun Violence Prevention Act, to require that local law enforcement authorities conduct background checks of prospective gun purchasers. Once again, the Court declared that:

> The Federal Government may neither issue directives requiring the States to

address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy making is involved, and no case by case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty.[31]

State Sovereign Immunity:

New York v U.S. and *Printz v U.S.* were based in part on the 10th Amendment and in part on a broader structural and historical interpretation of the Constitution as a system of divided sovereignty. As these cases made clear, one attribute of State sovereignty involves judicial protection of States' legislative and administrative apparatus from federal usurpation. A related set of cases has sought to strengthen the concept of State sovereign immunity from private lawsuits. In particular, the Court has sought to restrict Congress's authority to make States liable to private rights of action under federal law.

In *Seminole Tribe of Florida v. Florida*, the Supreme Court voided provisions of the Indian Gaming Regulatory Act that authorized Indian Tribes to sue States in federal court if they failed to negotiate in good faith the establishment of a tribal-State compact to regulate Indian gambling within the State. A majority of the Court held that Congress lacked power under the Indian Commerce Clause to abrogate States' sovereign immunity under the 11th Amendment:

> The 11th Amendment prohibits Congress from making the State of Florida capable of being sued in Federal court. Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against non consenting States.[32]

The *Seminole Tribe* case, which overturned an earlier Supreme Court decision

granting Congress the power to abrogate State sovereign immunity under the interstate commerce clause,[33] was reinforced in several 1999 decisions, *Alden v. Maine, Florida v. College Savings Bank*, and *College Savings Bank v. Florida*. *Alden v. Maine* has attracted the most attention. It dealt with a group of State employees who were suing Maine under the federal Fair Labor Standards Act. They had first brought their suit in federal court, but after the *Seminole Tribe* decision they switched to the State court system, as authorized under the FLSA. Thus, in *Alden v Maine*, the Court was asked to consider whether Congress has the power under Article I to authorize private suits against the States *in their own courts.* This is a question not addressed in the language of the 11th Amendment.[34]

The Supreme Court's response was in keeping with its other recent decisions touching on State sovereignty. Writing for the majority, Justice Kennedy wrote that, in the absence of explicit text, the answer could be found in the "structure and history" of the Constitution:

> We hold that the powers delegated to Congress (...) do not include the power to subject non consenting States to private suits for damages in State courts... The Constitution's structure and history (...) make clear that States' immunity from suit is a fundamental aspect of the sovereignty they enjoyed before the Constitution's ratification and still retain today.[35]

Despite the 11th Amendment's silence on the issue, he argued that: "a congressional power to authorize suits against States in their own courts would be even more offensive to State sovereignty than a power to authorize suits in a federal forum."[36]

Limitations on Delegated Powers:

The other important development in recent federalism jurisprudence involves so-called "internal" limitations on the scope of Congress's constitutional powers. Unlike the

State autonomy and State immunity cases, where Congress's authority is circumscribed because it is deemed to invade a constitutionally protected sphere of State sovereignty, internal limits are inherent within the very powers delegated to Congress by the Constitution.

The most prominent of these cases was the 1995 decision in *U.S. v. Lopez*, which involved a challenge to the Gun-Free School Zone Act of 1990. Alfonzo Lopez was convicted under the act for carrying a concealed handgun to his school, and his lawyers challenged the law for transcending the scope of Congress's powers under the Constitution. A majority of the Supreme Court agreed and reversed his conviction, holding that "the Act exceeds the authority of Congress 'to regulate Commerce (...) among the several States."[37] As was widely noted at the time, this marked the first occasion since the New Deal when the Court had invalidated a congressional statute for exceeding the Commerce power.

Writing for a sharply divided Court, Chief Justice Rehnquist argued that the decision was grounded in the constitutional "first principle" of enumerated powers. The law in question exceeded those powers because it "neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce."[38] According to Rehnquist, prior decisions of the Court had defined three categories of activities that Congress could regulate under the Commerce power: the channels of interstate commerce, such as roads and restaurants; the instrumentalities of commerce, such as railroads; and activities with a substantial effect on interstate commerce. Historically, this last category has been the most controversial and difficult to define, but the Court declared that the Gun-Free School Zone Act had overstepped the boundaries, however vague:

> We do not doubt that Congress has authority under the Commerce Clause to regulate numerous commercial activities that substantially affect interstate commerce and also affect the educational process. That authority, though broad, does not include the authority to regulate each and every aspect of local

schools.[39]

The reasoning in Lopez was reaffirmed in the Court's recent decision in *United States v. Morrison, et. al.* This case dealt with a portion of the 1994 Violence Against Women Act, which established a federal cause of action against any person "who commits a crime of violence motivated by gender."[40] Congress based this provision in part on its powers to regulate interstate commerce under Article 1, § 8. The court rejected this authorization by the same 5-4 margin that decided Lopez. After applying the test laid out in Lopez for determining the scope of interstate commerce, Chief Justice Rehnquist wrote for the majority that:

> We accordingly reject the argument that Congress may regulate non economic, violent criminal conduct based solely on the conduct's aggregate effect on interstate commerce. The Constitution requires a distinction between what is truly national and what is truly local... In recognizing this fact we preserve one of the few principles that has been consistent since the Clause was adopted. The regulation and punishment of intrastate violence that is not directed at the instrumentalities, channels, or goods involved in interstate commerce has always been the province of the States.[41]

Limiting Congress's Enforcement Powers Under the 14th Amendment

A fourth line of cases with important federalism implications involves Court-imposed limits on Congress's authority to interpret and enforce the 14th Amendment. This issue was posed most directly in the 1997 case of *City of Boerne v. Flores*,[42] but it subsequently has become intertwined with other strands of the Court's federalism jurisprudence as Congress has attempted, largely unsuccessfully, to use its enforcement powers under section 5 of 14th Amendment to circumvent the Court's Commerce Power and 11th amendment holdings.

City of Boerne v. Flores involved a case brought under the Religious Freedom Restoration Act of 1993 [RFRA], which prohibited government, including State and local governments, from

> "substantially burdening" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."[43]

In enacting this law, Congress sought to reestablish and strengthen via statute a 1963 Supreme Court holding in *Sherbert v. Verner*, which established a stringent test for evaluating State laws - even of general applicability - that substantially affect a person's free exercise of religion. The Court itself had rejected the application of this test in a 1990 case, *Employment Div., Dept. of Human Resources of Ore. v. Smith*, in which it upheld an Oregon law criminalizing peyote use despite its consequences for native American religious practice. Accordingly, the Court saw passage of the RFRA as a congressional intrusion into its own prerogatives, and it declared it to be in violation of the Constitutional framework of separation of powers.

According to the Court's fragmented majority (there were two concurring and three dissenting opinions), RFRA violated both the vertical and horizontal separation of powers. First, the Court rejected Congress's attempt to "decree the substance of the [14th] Amendment's restrictions on the States... Congress does not enforce a constitutional right by changing what the right is."[44] Congress has only the power to "enforce" the 14th Amendment and must leave "the power to interpret the Constitution (...). in the Judiciary."[45] Concerning federalism and the vertical separation of powers, the majority held that:

> RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance... Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest

> is the most demanding test known to constitutional law... This is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens. [46]

Two subsequent cases have dealt with Congress's attempts to use its powers under the 14th amendment to circumvent the Court's other federalism rulings. In *Kimel et. al. v. Florida Board of Regents et. al.*, the Court rejected Congress's attempt to subject States to employee lawsuits under the Age Discrimination in Employment Act [ADEA].[47] The Court held earlier that States, as employers, are covered by federal regulations under the ADEA and are subject to enforcement actions by the Equal Employment Opportunities Commission.[48] But enforcement of the act by abrogating State sovereign immunity was rejected in this case. Because age has not been considered a "suspect classification" under the 14th amendment, "States may discriminate on the basis of age without offending the 14th Amendment if the age classification in question is rationally related to a legitimate State interest."[49] Given this context, the majority held, in a discussion marked by careful distinctions and considerable second guessing, that the ADEA's sweep was too broad and that Congress had not developed a sufficiently strong case to justify the abrogation of sovereign immunity in this particular instance. The Court also rejected a 14th Amendment basis for the Violence Against Women Act in *United States v. Morrison*, discussed above. The 14th Amendment is directed to State action, not private conduct, and so fails to provide adequate basis for a statute directed at criminal conduct by individuals.[50]

A Devolution Revolution?

What should we make of this rediscovery of federalism on the High Court? Does it constitute a new judicial revolution on a par with that of the 1930s? Clearly, some observers – and participants – think so. Justice John Paul Stevens, reading his dissent in a 1999 sovereign immunity case from the bench, compared the Court's new doctrines to the "period of confusion and crisis [under] the Articles of Confederation."[51] *New York*

Times columnist Anthony Lewis called the Court's slim federalist majority "a band of radical judicial activists determined to impose on the Constitution their notion of a proper system of government."[52] A *New York Times* editorial went so far as to denounce the Morrison decision as "Violence against the Constitution."[53]

Ultimately, what the critics fear are the policy implications of a major shift in judicial interpretation. A return to an earlier, narrow reading of the Constitution could restrict or reverse the Court's New Deal jurisprudence and reintroduce judicially-imposed dual federalism, with a constricted role for Congress and the national government. This would undermine the legal foundations of the welfare State and threaten the Court's own policy initiatives that have promoted civil liberties, abortion rights, and civil rights.

Given the mounting number of "new federalist" decisions emanating from the Court since 1992, the predictions - and fears - of dramatic change may well prove to be correct. However, the emerging doctrines are works still in progress, and this makes conclusions about their final status necessarily tentative. At the present time, the reach of these cases, both individually and collectively, falls well short of a "devolution revolution." While unquestionably important, the cases decided thus far are subject to a variety of constraints - doctrinal, philosophical, and political - that are critical to understanding their present reach. Moreover, it is important to remember that the Court has not been single minded in its federalism related cases. In the most recent term, a seven member majority in *Dickerson v. United States* upheld the Warren Court's 1966 ruling in *Miranda v. Arizona*, one of the landmarks of judicial activism long targeted by movement conservatives. Similarly, in *Crosby v. National Foreign Trade Council*, a unanimous Court rejected State efforts to intrude into the federal government's authority to make foreign policy by barring State agencies from purchasing goods and services from companies doing business in Burma.

Political Limits on the Court's New Federalism

At the present time, the Rehnquist Court confronts significant political constraints on its devolutionary leanings. The most obvious of these political constraints is the narrow margin of the new federalist majority on the Court. Virtually all of the cases discussed in this paper, including *United States v. Lopez, Printz v. United States, Seminole Tribe of Florida v. Florida, Alden v. Maine, Florida v. College Savings Bank, and United States v. Morrison* were decided by narrow five to four margins. The same core of justices (Rehnquist, O'Connor, Scalia, Kennedy, and Thomas) provided the majority in almost every case. Of the major cases, only *New York v. United States* was decided by a marginally more comfortable six to three majority.

These narrow margins mean that such decisions are highly vulnerable to erosion or reversal. A single member's change of heart, or the replacement of a single justice in the majority block, can lead the Court to an abrupt U-turn in its philosophy. This is exactly what happened in 1985, when a single justice – Harry Blackmun – changed his position from *National League of Cities v. Usery* ten years earlier. The Court reversed its 10th Amendment stand in *National League of Cities* and replaced it with the highly permissive, nationalist doctrine laid out in *Garcia v. San Antonio*. Similarly, Justice Kennedy's defection from the federalist bloc in *U.S. Term Limits Inc. v. Thornton* was responsible for the nationalist outcome in that case.

Considering the age and health of several current justices on both sides of the recent federalism cases, the future of what might be termed the "Rehnquist restoration" will almost certainly depend on the appointments made by the next President of the United States.[54] At least three members of the current Court are likely to retire in the next four years, including two members of the current federalist majority (Rehnquist and O'Connor), and one member (Justice Stevens) of the liberal bloc. Thus, George W. Bush's apparent election has great potential to cement and extend the Court's current conservative leanings, especially if he follows through on his implicit promises to nominate future justices as conservative as Clarence Thomas and Antonin Scalia. Even

so, it is worth remembering that it is impossible to predict a judicial appointee's behavior with absolute certainty. Presidents Ford and Bush appointed two justices who ultimately became members of the Court's liberal bloc (Justices Stevens and Souter), so future decisions by the Court always remain somewhat unpredictable.

There is another, less obvious but vitally important political constraint on the Court's federalist majority. This constraint is imposed by the absence of public support for a return to a strict system of dual federalism. Since the 1960s, it has been clear that large majorities of Americans support a broad range of federal policy initiatives in education, law enforcement, economic development, and other traditional State and local functions. This is true even among many Americans who consider themselves to be philosophical conservatives.[55] The continuing strength of such views is evident in contemporary polls and levels of popular support for many of President Clinton's initiatives in these policy areas. Although public dissatisfaction with the national government reached serious levels in the mid-1990s, this pattern of support for cooperative federalism remains as firmly ingrained in the hearts of Americans as it does in the structure of domestic programs.[56]

Doctrinal limits

Putting aside potential changes that may emerge from future appointments to the Supreme Court, what should we make of the Court's rulings to date? A careful examination of the doctrines being fashioned in many of the Court's recent rulings suggests that, in their present form, they are too constrained to constitute a full fledged "anti-federalist revival."[57] This outcome could result from several causes, with very different implications for the future. It might reflect an incremental strategy by the Court's conservatives, who hope to limit opposition to their cause by biting off just a little more national authority with each case. It could instead reflect the political constraints of a narrow conservative majority on the Court, whereby the least conservative member of the coalition determines the scope of each decision. Or it might flow principally from the

policy conservatism inherent in stare decisis, which sees the Court struggling to carve out room for modest devolution within the framework of precedents from the post New Deal era of centralization. Regardless of the cause, the outcome at the moment is one of cases fraught with significant, though in some cases shrinking, limits on their current reach.

In *United States v. Lopez* and *United States v. Morrison*, for example, the Chief Justice took pains to work around existing precedents, including *Wickard v. Filburn*, which he acknowledged represents "the most far reaching example of commerce Clause authority over intrastate activity."[58] His opinion made no attempt to recreate past distinctions between manufacturing and commerce or other such discredited notions. Rather, he acknowledged that "where economic activity substantially affects interstate commerce, legislation regulating that activity will be sustained."[59]

Indeed, only one Justice has openly professed a willingness to go farther and reopen settled law regarding the economic scope of the Commerce Power. Justice Thomas, in his concurrence to *Lopez*, stated that the Court took a "wrong turn" in the 1930s. "At an appropriate juncture," he wrote, "I think we must modify our Commerce Clause jurisprudence."[60] He reaffirmed this position in *Morrison*. Significantly, not one other member of the Court joined him in this opinion.

In contrast, the essence of the Chief Justice's argument in *Lopez* and *Morrison* was to avoid reading the Commerce Clause so broadly that it constituted a general police power for the federal government.[61] For example, Harvard University law professor Laurence Tribe has agreed that the *Lopez* decision was "probably right" because to "permit Congress to regulate anything and everything that in any way relates to or affects commerce [would] essentially reject the principle of limited national authority embodied in (...) the Constitution."[62] The difficulty, of course, lies in developing an unambiguous test of what constitutes activities with "a substantial relation to interstate commerce."[63] The dissenters in *Morrison* and *Lopez* clearly regard the majority's efforts thus far to be unpersuasive and subjective.

For many, the Court's rulings on State sovereign immunity have raised greater concerns than *Lopez*. It was this line of decisions that prompted Justice Steven's allusions to the Articles of Confederation, and it has incited similar objections from outside observers. [65] Yet, even here, the Court's rulings have recognized limitations on the sovereign immunity doctrine. For example, the *Alden* decision did not extend immunity to municipalities or other local government jurisdictions, which employ the vast majority of State and local government employees. Nor does protection extend to individual State government employees, who remain subject to lawsuits in their individual capacities. And, finally, sovereign immunity does not absolve States from the obligation to comply with federal law. The opinion in *Alden v. Maine* emphasized that

> A State's constitutional privilege to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law. States and their officers are bound by obligations imposed by the Constitutional and federal statutes that comport with the constitutional design.[66]

The federal government's power to enforce such laws directly was explicitly recognized by the Court. Although this constitutes a more costly and difficult enforcement option for the Congress than the strategy of providing private rights of action under federal law, it does provide an alternative remedy in such cases.

A significant degree of judicial restraint has also been present in the Court's recent 10th amendment rulings. As noted earlier, these rulings, such as *New York v. United States* and *Printz v. United States,* have attempted to define a sphere of State institutional autonomy into which the federal government may not intrude. In the words of *NLC v. Usery*, these rulings protect the "States as States," as co-sovereign entities in the federal system. The federal government may not "commandeer" their policy making and administrative machinery.

Significantly, however, these new 10th Amendment rulings do not attempt to wall off the broader and more consequential sphere of "traditional functions" of State and local governments, such as education and law enforcement. This was the approach that the pre-New Deal Court took in cases such as *Hammer v. Dagenhart* (1918), which struck down a federal ban on child labor, and *U.S. v. Butler*, which overturned the Agricultural Adjustment Act in 1936. But it is not the approach that has been adopted by the present Court. When the opportunity to do so presented itself in *Lopez,* the majority opinion chose to focus on the fuzzy outer limits of the Commerce Power rather than attempt to resurrect a wall of functional separation through the 10th Amendment. Likewise, in *New York v. United States*, the majority acknowledged that "Congress has substantial power to govern the nation *directly*, including in areas of intimate concern to the States."[67] Thus, the institutional focus of the Court's contemporary dual sovereignty doctrine defines a far smaller orbit of State autonomy than the old judicial concept of dual federalism, with its separate and distinct spheres of national and State governmental responsibility.

Conditional Grants and the Court's New Federalism

Far from restoring constitutional dual federalism, the contemporary Court continues to embrace the concept of "cooperative federalism" in its spending power decisions. The result has been to provide Congress with effective alternatives for accomplishing many of the same objectives that the Court precludes on other grounds.

In the 1930s, the Court settled the question of whether the welfare clause of the Constitution is an independent grant of power to the Congress. It is, said the Court, and it allows Congress to spend public funds, directly or through grants to State and local governments, on activities that it otherwise lacks authority to address. This laid a legal foundation for the dramatic post New Deal expansion of federal grants-in-aid to State and local governments and to the rise of cooperative federalism. Equally important, the Court has also held that Congress is free to attach strings or limitations to the use of

such federal grant funds.

Over time, the Supreme Court has consistently given Congress wide latitude in the types of conditions and requirements that it attaches to federal grant funds. This was most recently demonstrated in the 1987 case of *South Dakota v. Dole*. Here the Rehnquist Court upheld, by a 7-2 decision, a congressional requirement that States raise their minimum drinking age to twenty-one. If they did not, they would suffer a loss in federal highway funds. South Dakota objected that this amounted to coercive federal interference into a domain of State responsibility, but the Court rejected the argument. Writing for the majority, Chief Justice Rehnquist argued that even "a perceived 10th Amendment limitation on congressional regulation of State affairs did not concomitantly limit the range of conditions legitimately placed on federal grants."[68] Although the Chief Justice acknowledged that "the spending power is of course not unlimited," the restraints placed upon it are very broad and largely undefined. To a large extent, the Court continues to maintain, as it first did in *Massachusetts v. Mellon* (1923), that States are free to avoid restrictive grant conditions simply by refusing to accept the grant.

Because the Rehnquist Court continues to accept spending power doctrines that give Congress the ability to regulate States through conditions of aid, in ways that it could not do directly, a major loophole exists in the Court's State autonomy exclusions. Justice O'Connor emphasized this in her dissent to *South Dakota v. Dole*. She acknowledged this point, as well, in her majority opinion in *New York v. United States*. Her opinion in that case upheld the provisions of the Low Level Radioactive Waste Amendments that were based on conditional incentives to the States, while it rejected the law's direct order that States "take title" of their radioactive wastes:

> Our cases have identified a variety of methods, short of outright coercion, by which Congress may urge a State to adopt a legislative program consistent with federal interests... First, under Congress' spending power, "Congress may attach conditions on the receipt of federal funds."[69]

Similarly, had Congress made the Brady Bill's background check requirements, which were overturned in *Lopez*, a condition of existing federal aid to law enforcement rather than a simple mandate to police, it presumably would have been upheld by the Court.

Philosophical Constraints: The Conundrum of Dual Sovereignty

Recent Court doctrines on federalism are rooted in a concept of dual sovereignty which, although it is not new, is inherently paradoxical and unstable. Sovereignty means "supremacy of authority or rule." Both historically and conceptually, it is a unitary and absolutist concept of government. Yet federalism, by its very nature, rests on the division of governmental powers between two or more levels of government. Thus, building a theory of federalism based on the concept of sovereignty–especially divided sovereignty–poses inherent conceptual problems.[73] In one recent case, for example, Justice Kennedy was reduced to arguing that States retain "the dignity, though not the full authority, of sovereignty" – a pale version of the concept indeed.

One traditional solution to this problem was merely to embrace it. Under the doctrine of judicial dual federalism, the powers of government were to be clearly divided between the national government and the States. As Chief Justice Marshall wrote in the classic case of *McCulloch v. Maryland* (1819), each level would be "supreme within its sphere of action."[74]

Although this system did not solve the conceptual problem, and a source of higher authority in the Court or the Constitution had ultimately to be drawn upon to deal with conflicts between the spheres, it did help to manage the conflicts inherent in divided sovereignty and to reduce the amount of friction. But complete dual federalism was never practical nor fully practiced. Although scholars debate how well the concept ever described the realities of 19th century American federalism, there were important departures from the model almost from the beginning.[76] More importantly, the idea of a rigid division of governmental power and responsibilities between the federal government

and the States has been thoroughly discarded in 20th century practice, and it would be tremendously difficult and unpopular to attempt a restoration. Nor, as our earlier discussion of 10th amendment cases makes clear, does the current Court, Justice Thomas excepted, wish to do so. Even among the Court's new federalists, this is a "solution" with few advocates.

There is a second approach to addressing the problem of sovereignty in a federal system that has enjoyed support over the course of American history. This is the concept of popular sovereignty. As the name suggests, it is the people who hold sovereignty under this theory, not the federal or State governments. The people choose, through their Constitution, to divide the powers and functions of government between the nation and the States. But they retain the ultimate source of authority, and can alter the arrangements from time to time as they see fit. This theory resonates deeply with American political culture, and it has been present in some form from the nation's very beginning. As Madison wrote in Federalist 46: "The Federal and State governments are, in fact, but different agents and trustees of the people, constituted with different powers, and designed with different purposes."[77] A modern variation can be drawn from Samuel Beer:

> My argument is that this curious arrangement of a constitutionally protected vertical division of power is an intentional and functional institution – not an historical accident or the upshot of mere compromise – of the self-governing American people as they seek over time to make and remake themselves as a nation.[78]

For all its theoretical power and political energy, this model does not provide clear guidance to the Court in most instances when it is called upon to settle specific disputes arising under the Constitution. Accordingly, new federalists on the Court have been prone to fall back on a constricted version of judicial dual federalism. Their decisions refer to "attributes of State sovereignty,"[80] the "Constitutional system of dual sovereignty,"[81] and, as noted, States' retention of "the dignity, though not the full

authority, of sovereignty."[82]

On the one recent occasion when the Court did draw directly on the theory of popular sovereignty, it failed miserably to reach consensus about the implications of this theory for the federal system. In *U.S. Term Limits Inc v. Thornton*, the Supreme Court grappled with the question of whether a State or its voters could impose term limits on members of Congress from that State. The majority held that only a Constitutional amendment could impose such limits because the Constitution derives its authority from the people as a whole and "gives the representatives of all the people the final say in judging the qualifications of the representatives of any one State."[83] In his dissent, which was joined by 3 other members of the Court, Justice Thomas argued that "nothing in the Constitution deprives the people of each State of the power to prescribe the eligibility requirements for the candidates who seek to represent them in Congress."

He based this conclusion in part on a very different view of popular sovereignty: "The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole."[84] With such "dueling sovereignties" on the Court, even the concept of popular sovereignty has failed to quiet the contradictions inherent in melding the institution of federalism with doctrines of sovereignty. In his concurring opinion, Justice Kennedy – voting with the liberals in this case – observed that the task before the Court required it to "split the atom of sovereignty." The explosive potential of this metaphor speaks volumes about the philosophical tension that inhabits the Courts new federalist rulings.

The Supreme Court's Role in the Federal System

Beyond the particulars of the cases examined in this paper, these contemporary decisions pose a fundamental question about constitutional government. What is the Supreme Court's proper role in American federalism? At least five potential roles are candidates for the job, having been articulated at various times in the Court's history: Neutral Arbiter, Agent of the National Government, Advocate for the Powerless, Benign Neglect, and Balance Wheel of the Federal System. The role selected has important

implications for the operation of American federalism, and the range of possibilities sheds light on the judiciary's role in any federal system.

Neutral Arbiter

Traditionally, the Supreme Court has been viewed as the neutral arbiter of the Constitution. Any federal system based upon divided powers has need of a referee to decide and rule on conflicts that can arise between the institutional parties. As Philip Kurland once put it: "one of the prime functions of the Supreme Court has been to act as 'umpire of the federal system,' to allocate or justify the assumption of power as between the nation and the States."[95] In his magisterial work on American government, Lord Bryce said much the same thing at the turn of the last century:

> By placing the Constitution above both the National and the State governments, it has referred the arbitrament of disputes between them to an independent body, charged with the interpretation of the Constitution, a body which is to be deemed not so much a third authority in the government as the living voice of the Constitution.[96]

Bryce's idealized vision of the Court as an independent arbiter, "the living voice of the Constitution," is rejected by most contemporary political scientists. They would argue that the Court is an inherently political institution, composed of real life justices with their own individual values, beliefs, and experiences, and constrained by history and contemporary political pressures. The Supreme Court is often the "storm center" of important policy disputes, which subjects it to the winds of public opinion and to the influences and constraints of the President and Congress.[97] Moreover, the Court has its own institutional prerogatives to protect, as seen in cases from *Marbury v. Madison* to *City of Boerne v. Flores*. Thus, conceptualizing the Court as a neutral arbiter may serve as a useful ideal for lawyers and judges, but most political observers doubt that it serves to adequately describe the Court's actual behavior on matters of federalism or anything else.[98]

Agent of Nationalism

Some observers go further in questioning whether the Supreme Court can act – or has acted – as a neutral party in the contest for power between the federal government and the States. Writing critically about the Court's role under Earl Warren, Kurland rejected this "arbiter" model on grounds that the Court is systematically biased in favor of the national government:

> The Court has no more achieved neutrality between the interests of State power and national power than would any umpire paid by one of the two contestants. The Court is and always has been an integral part of the central government.[99]

As an arm of the national government, Kurland argued, the Supreme Court inevitably acts over the long term as an agent of centralization:

> Of all the important functions [the Supreme Court] purports to perform, its essential role has been to act as a centripetal force, to modify the Constitution in order to sustain the enhancement of national authority and the despoliation of State power.[100]

William Riker made a similar argument, declaring that the Court is "by construction (...) a wholly centralized institution" which "has significance for federalism only when it is the handmaiden of the political branches, especially the Presidential branch."[101] From a comparative perspective, K.C. Wheare, who favored the concept of a neutral body arbitrating federal-State disputes, agreed that supreme courts that are appointed by the general government run the risk of "undue partiality to the general government... If the Supreme Court is dependent upon the general or regional governments, then the system of government is to that extent not federal."[102]

Advocate for the Powerless

One problem with what might be called the "agent theory" of the Court is that one can readily point to long periods where the Supreme Court has either actively resisted or failed to promote such centralization, the present era included. Except under Marshall, the Court has never adopted this as a self conscious role for itself. But a third role that was self-consciously adopted by the Court during the twentieth century also tends to lead it toward centralization in the federal system.[103] In his famous footnote in *United States v. Carolene Products Co*., Justice Stone suggested that the Supreme Court has a special duty to protect minority rights that may be at risk in a majoritarian democracy:

> There may be a narrower scope for (...) the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the 14th... It is unncessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the 14th Amendment... Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious (...) or national (...) or racial minorities; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon.[104]

Many have argued that the Court adopted precisely such a role for itself in many of its interventionist decisions of the Warren Court. It is certainly true, as Martin Shapiro has noted, that the Court's agenda at that time was at odds with the majoritarian instincts of most elected officials at the time: "Few American politicians (...) would care to run on a platform of desegregation, pornography, abortion, and the 'coddling' of criminals"– all

areas where the Court was the initiator of major policy innovations during the Warren era.[105] How well this role describes the present Court is unclear, however. It is probably safe to say that the Rehnquist Court has shown a willingness to trim back earlier rulings on behalf of vulnerable groups and criminal defendants, but it has not abandoned this role altogether, as the recent decision to uphold the *Miranda* decision demonstrates.

Intergovernmental Laissez-Faire

A fourth role for the Court in issues of federalism is akin to the economic concept of “laissez-faire.” In this view, the Court should keep its "hands off" disputes between the national government and the States, treating such controversies as "political questions" to be worked out by the elected branches of government at all levels. In academic circles, this interpretation holds great currency. It has been argued straightforwardly by Jesse Choper, among others, who has written that:

> The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the States; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates "States’ rights " should be treated as non justiciable, final resolution being relegated to the political branches.[106]

This approach is also favored by the four member minority in most federalism cases on the present Court [Justices Stevens, Breyer, Ginsburg, and Souter]. Justice Blackmun enunciated it expressly in Garcia v. San Antonio, when the Court declared: “States’ sovereign interests [are] more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” It is probably safe to conclude that this role would be restored as official Court doctrine if a future president appointed even one additional, like-minded judge to replace one member of the Rehnquist majority.

Balancing Intergovernmental Power

The first of the roles discussed above is intended to be neutral. The remaining three are, in practical effect if not deductively, biased toward centralization. A final role, and the one that best characterizes the Rehnquist majority's own conception of its new federalism rulings, focuses on policing and maintaining the balance of power in the federal system. Conceivably, the Court could lean in either direction under this role, but after two generations of political and governmental centralization, the current Court has weighted its decisions in favor of the States.

There is little doubt that that the current majority on the Court views its role as a stabilizer of the federal-State balance of power. As Justice Scalia has said, the Supreme Court has a duty to maintain a "healthy balance of power between the States and the federal government."[107] Likewise, Justice Kennedy defined the Court's role in similar terms in his concurrence in the *Lopez* decision: "While the intrusion on State sovereignty may not be as severe in this instance as in some of out recent Tenth Amendment cases, (...) [it] contradicts the federal balance the Framers designed and that this Court is obliged to enforce."[108] Finally, Justice O'Connor has endorsed this role as well, while justifying the court's leaning in the direction of the States:

> [The] Court has been increasingly generous in its interpretation of the commerce power of Congress, primarily to assure that the National Government would be able to deal with national economic problems... The Court [should] enforce affirmative limits on federal regulation of the States to complement the judicially crafted expansion of the interstate commerce power.[109]

Conclusion

Given the structure of the American Constitution, maintaining the intergovernmental balance of power is a natural, and perhaps necessary, role for the Supreme Court to play. In a system where "ambition must be made to counteract ambition," as James Madison put it in *Federalist* 51, the Court's role might well include ensuring that no level of government becomes so powerful as to keep this cybernetic mechanism from operating. Balance, however, is a subjective judgment. It is not unfair as one description of what the Court has accomplished thus far, but the concept of balance implies a large degree of subtlety and self restraint. If one proceeds too far in an opposite direction, the sense of balance can easily be lost once again.

This, in the end, is one dilemma facing the new federalists on the Rehnquist Court. To date, the Court has been operating to restore balance within the framework of what Bruce Ackerman has called the post-New Deal constitutional regime.[110] There are those, on and off the Court, who would like to do far more. To be effective and secure, this would require a new constitutional revolution - a new regime in Ackerman's framework - legitimated by a period of public deliberation and decision. The closeness of the 2000 elections suggests that the period of public deliberation over the size and role of contemporary government has not concluded. Even if the next President has an opportunity to appoint three to four new justices to the Supreme Court, he would be well advised to avoid trying to shift the Court's present direction too markedly in either direction.

There is a deeper philosophical dilemma facing the new federalists on the U.S. Supreme Court. Like the choice of alternative roles that courts can play within a federal system, this dilemma has implications for thinking about the concept of federalism outside the United States as well. The Rehnquist Court's conceptual model of federalism as a system of divided sovereignty rests on a logical paradox. It has proven utility as a device for policy making purposes, but it cannot be pushed too far without yielding absurd conclusions and collapsing down upon itself. The Court's new federalists will

need a stronger intellectual foundation if they hope to build a new constitutional regime for the future.

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[1]Quoted in Timothy J. Conlan, *From New Federalism to Devolution* (Brookings Institution Press, 1998), p. 1.

[2]Donald Kettl, "Governor Rehnquist," *Governing*, August 1999, p. 10.

[3]The term comes from James Sterling Young, *The Washington Community, 1800-1828.*

[4]For a richly detailed analysis of this constitutional debate in the early Republic, see Michael J. Lacey, "Federalism and National Planning: The Nineteenth Century Legacy," in *The American Planning Tradition: Culture and Policy*, Robert Fishman, ed. (Johns Hopkins University Press, forthcoming).

[5] Article I, Section 8 of the U.S. Constitution reads in part that "The Congress shall have Power . . . To regulate Commerce . . . among the several States."

[6] Article I, Section 8 concludes with that provision that "The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States."

[7] Article I, Section 8 begins with the statement that "The Congress shall have Power To lay and collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." Until the 1930s, much debate centered on whether the provision to "provide for the common Defence and general Welfare" constituted separate grants of power or whether they were limited to the specific enumerated powers outlined in the remainder of Section.8.

[8] The Tenth Amendment to the Constitution states that "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

[9]Clearly there are important exceptions to this rule. There have been twenty seven amendments to the U.S. Constitution, including fifteen since the founding era. Many have dealt with expansion of suffrage or changes in the structure of government that could not be accomplished through interpretation. Nevertheless, the federal Constitution, at 7,800 words, remains much shorter than the median state constitution at 22,500 words -- even after decades of state constitutional reform and simplification. See Virginia Gray and Herbert Jacob, *Politics in the American States, sixth ed.* (CQ Press, 1996), p. 257.

[10]*Wickard v Filburn*, 317 U.S. 111 (1942).

[11]*Helvering v. Davis*, 301 U.S. 619 (1937).

[12]*United States v. Darby*, 312 U.S. 100 (1941).

[13]Martin Shapiro, "The Supreme Court from Early Burger to Early Rehnquist," in *The New American Political System*, second version, Anthony King, ed. (AEI Press, 1990), p. 66.

[14]21 Howard 506 (1859).

[15]Philip Kurland, *Politics, the Constitution, and the Warren Court* (Chicago, 1970), p. 59; and Ibid.

[16]U.S. Advisory commission on Intergovernmental Relations, *A Crisis* of *Confidence and Competence*, A-77 (Government Printing Office, 1980), pp. 78,79, 112.

[17]C. Peter Magrath, "The Supreme Court and a National Constitution," in *Modernizing American Government*, Murray Stedman, ed. (Prentice Hall, 1968), p. 64. See also Theodore J. Lowi, "Europeanization of America? From United States to United State," in *Nationalizing Government: Public Policies in America*, Theodore J. Lowi and Alan Stone, eds (Sage, 1978).

[18]Quoted in Joan Biskupic, "Justice Shifts Federal-State Power Balance: Rehnquist led Majority Determined to Restrict Washington's Authority," *The Washington Post* (March 29, 1996), p. A-16.

[19]*National League of Cities, et. al. v. Usery*, 426 U.S. 833, 1976. U.S. Lexis 158 (1976), p. *152.

[20]*Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264; *FERC v. Mississippi*, 456 U.S. 742; and *EEOC v. Wyoming*, 460 U.S. 742.

[21]*Garcia v. San Antonio Metropolitan Transit Authority, et. al*., 469 U.S. 528, 1985. U.S. Lexis 48 (1985), pp. *546-*547.

[22]See Herbert Wechsler, "The Political Safeguards of Federalism, " 54 *Colum. L. Rev*. (1954); and Jesse Choper, *Judicial Review and the National Political Process* (Chicago, IL. University of Chicago Press, 1980).

[23]*Garcia v. San Antonio Metropolitan Transit Authority*, et. al., pp. *550-*554.

[24]See, for example, Timothy J. Conlan, "Politics and Governance: Conflicting Intergovernmental Trends in the 1990s?" *The Annals of the American Academy of Political and Social Science* 509 (May 1990): 128-136.,

[25]*Garcia v. San Antonio Metropolitan Transit Authority*, p. *580 (J. Rehnquist, dissenting).

[26]South Carolina v. Baker, 485 US 505 (1988). For an analysis, see Margaret T. Wrightson, "The Road to South Carolina: Intergovernmental Tax Immunity and the Constitutional Status of Federalism," *Publius* 19 (Summer 1989): 39-55.

[27] The Fourteenth Amendment states in part that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

[28]112 S.Ct. 2408; 1992 U.S. Lexis 3693.

[29]Ibid, p. *188.

[30]Ibid., p. *161-162.

[31]*Printz v. United States*, 521 U.S. 98 1997. U.S. Lexis 4044 (1997), p. *935.

[32]*Seminole Tribe of Florida v. Florida, et. al*., 517 U.S. 44, 1996. U.S. Lexis 2165 (1996), pp. *72, *76.

[33]*Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989).

[34]The Amendment reads: "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or

subjects of any foreign state."

[35]*Alden, et. al., v. Maine*, 119 S.Ct. 2240, 1999. U.S. Lexis 4374 (1999), p. *2246

[36]Ibid., p. *2464.

[37]*United States v. Lopez*, 514 U.S. 549, 1995. U.S. Lexis 3039 (1995), p. *551.

[38]Ibid.

[39]Ibid., p. *565.

[40] 42 U.S.C. §13981.

[41] *United States v. Morrison*, 529 U.S. 17, 18 (2000).

[42] *City of Boerne v. Flores*, 521 U.S. 507, 1997. U.S. Lexis 4035 (1997).

[43] Ibid, p. ***14.

[44] Ibid., pp. ***20-21.

[45] Ibid., p. ***29.

[46] Ibid., pp. ***46, 47, 50.

[47] *Kimel et. al. v. Florida Board of Regents et. al*., 528 U.S. (2000).

[48] *EEOC v. Wyoming*, 460 U.S. 226.

[49] *Kimel et. al. v. Florida Board of Regents et. al*., 528 U.S. 19 (2000).

[50] See *United States v. Morrison*, supra, at 19-27.

[51]Quoted in Linda Greenhouse, "States are Given New Legal Shield by Supreme Court," *New York Times* (web edition), June 24, 1999, p. 2.

[52]Anthony Lewis, "The Supreme Power," *New York Times* (web edition), June 29, 1999, p. 1.

[53] Quoted in Stuart Taylor Jr., "The Tipping Point," *National Journal*, June 10, 2000, p. 1816.

[54]For more discussion of this, see Taylor, "The Tipping Point."

[55]See Lloyd A. Free and Hadley Cantril, *The Political Beliefs of Americans: A Study of Public Opinion* (Rutgers University Press, 1967).

[56]See, for example, Tom W. Smith, "Public Support for Spending, 1983-1994," *The Public Perspective* 6(April/May 1995).

[57]Gerald Gunther and Kathleen M. Sullivan, *Constitutional Law*, 13th ed. (Foundation Press, 1997), p. 113.

[58]*Lopez*, p. *560.

[59]Ibid.

[60]Ibid., p. *585 (J. Thomas, concurring).

[61]Ibid., p. *567.

[62] Quoted in Stuart Taylor, Jr. "A Bridge Too Far on States' Rights," *National Journal* (July 24, 1999): 2137.

[63] *United States v. Morrison*, p. 9.

[64] *United States v. Morrison*, p. 9.

[65] See Taylor, "A Bridge Too Far on States' Rights," p. 2137.

[66]*Alden v. Maine*, p. *2266.

[67]*New York v. United States*, p. *162. Emphasis added.

[68]*South Dakota v. Dole*, 483 U.S. 203, 1987. U.S. Lexis 2871 (1987), p. *210.

[69]*New York v. United States*, p. *166-167.

[70]For more discussion of this, see Taylor, "The Tipping Point." Of course, should George W. Bush be elected president, and should he follow through on his implicit promises to nominate future justices like Thomas and Scalia, then the implications for future Court rulings in this and many other areas may be momentous.

[71]See Lloyd A. Free and Hadley Cantril, *The Political Beliefs of Americans: A Study of Public Opinion* (Rutgers University Press, 1967).

[72]See, for example, Tom W. Smith, "Public Support for Spending, 1983-1994," *The Public Perspective* 6(April/May 1995).

[73]For more on this, see Patrick Riley, "The Origins of Federal Theory in International Relations Ideas," *Polity* 6 (Fall 1973): 87-121.

[74] 4 Wheat 316.

[75]21 Howard 506 (1859).

[76]Daniel Elazar, *The American Partnership* (University of Chicago Press, 1962).

[77]*The Federalist*, No. 46, Modern Library edition, pp. 304-305.

[78]Samuel H. Beer, *To Make a Nation: The Rediscovery of American Federalism* (Harvard Belknap, 1993) p. 20.

[79] Insert note here from Francois about early disputes over the legitimacy of judicial review; now a matter of settled law.

[80]*New York v. United States*, p. *155.

[81]*Printz v. United States*, p. *935.

[82]*Alden v. Maine*, p. *2247.

[83]1995 Lexis 3487, p. *69.

[84]p. 111-112.

[85]Kurland, *Politics and the Constitution*, p. 56.

[86]Quoted in ibid.

[87]Ibid., p. 57.

[88]Ibid., p. 58.

[89]*United States v. Carolene Products Co*., 304 U.S. 144 (1938); reprinted in Gunther and Sullivan, *Constitutional Law*, p. 484.

[90]Martin Shapiro, "The Supreme Court: From Warren to Burger," in *The New American Political System*, Anthony King, ed. (AEI Press, 1978), p. 181.

[91] Choper, Jesse H., Judicial Review and the National Political Process, Chicago, Chicago UP, 1980, p. 175. See also Kramer Larry, « Dazed and confused : Federalism in the United States Supreme Court», unpublished paper, conference on *« Le fédéralisme américain et ses implications pour l'Europe »*, CERI (Centre d'Etude des Relations Internationales), Paris, 10-11 décembre 1998.

[92]Quoted in David Savage, "High Court Bolsters States Rights," *State Legislatures* 23 (September 1997): 11.

[93]*United States v. Lopez*, (Justice Kennedy concurring), p. *1642.

[94]Quoted in Peter A. Lauricella, "Comment on the Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause," 60 Alb L. Rev. 1394.

[95]Kurland, *Politics and the Constitution*, p. 56.

[96]Quoted in ibid.

[97] David O'Brien, *Storm Center: The Supreme Court in American Politics, 3rd ed.* (New York: WW Norton, 1993).

[98] For a dissenting view, however, see Steven Kelman, *Making Public Policy: A Hopeful View of American Government* (Basic Books, 1987), chapter 6.

[99]Ibid., p. 57.

[100]Ibid., p. 58.

[101] William H. Riker, *Federalism: Origin, Operation, Significance* (Boston: Little Brown & Co., 1964), pp. 102-103.

[102] K.C. Wheare, *Federal Government* (Oxford University Press, 1951), pp. 62, 64.

[103] Cf Henry J. Abraham and Barbara A. Perry, *Freedom and the Court: Civil Rights and Liberties in the United States, 7th ed.*, (New York: Oxford University Press, 1998).

[104]*United States v. Carolene Products Co*., 304 U.S. 144 (1938); reprinted in Gunther and Sullivan, *Constitutional Law*, p. 484.

[105]Martin Shapiro, "The Supreme Court: From Warren to Burger," in *The New American Political System*, Anthony King, ed. (AEI Press, 1978), p. 181.

[106] Choper, Jesse H., Judicial Review and the National Political Process, Chicago, Chicago UP, 1980, p. 175. See also Kramer Larry, « Dazed and confused : Federalism in the United States Supreme Court», unpublished paper, conference on *« Le fédéralisme américain et ses implications pour l'Europe »*, CERI (Centre d'Etude des Relations Internationales), Paris, 10-11 décembre 1998.

[107]Quoted in David Savage, "High Court Bolsters States Rights," *State Legislatures* 23 (September 1997): 11.

[108]*United States v. Lopez*, (Justice Kennedy concurring), p. *1642.

[109]Quoted in Peter A. Lauricella, "Comment on the Real "Contract with America": The Original Intent of the Tenth Amendment and the Commerce Clause," 60 Alb L. Rev. 1394.

[110] Bruce A. Ackerman, *We the People: Foundations* (Cambridge, MA: Harvard University Press, 1991).