

Eleventh Amendment Sovereignty: Much Ado about Nothing?

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The Supreme Court's decision in *Nevada v. Hibbs*¹ is the latest skirmish in the current Supreme Court's bitter internecine battle over the constitutional scope of a state's sovereign immunity. That battle is but the most recent phase in a two-hundred-year war over the appropriate, respective roles of the state and national governments in America's compound republic. That war dominated the debate over the ratification of the Constitution, fueled the Civil War, pitted the Reconstruction radicals against the defiant apologists for the Old South, underlay the seventy-five-year political struggle between increasingly conservative Republicans and ever more progressive Democrats that ended in the triumph of the New Deal; and it continues to divide those who prize individual liberty and advocate limited government from those who favor group rights and demand the regulatory state. One might plausibly argue that the history of America is largely the history of this war between these partisans over whether the national government or the states should dominate the making of public policy.²

The battle over the constitutional scope of a state's sovereign immunity began quietly enough thirty years ago. Only three years after his confirmation as an associate justice, Rehnquist, in a lonely dissent, articulated the theoretical basis for the Court's current sovereign immunity doctrine, which seeks to preserve the constitutional prerogatives of the states. Objecting to his brethren's acquiescence in the federal government's imposition of wage and price controls on the states, Rehnquist acknowledged that the Union was indestructible but questioned whether the states were any longer indestructible; and he asserted that the states had an "affirmative defense

¹*Nevada v. Hibbs*, 123 S. Ct. 1972 (2003).

²JAMES BRYCE, *THE AMERICAN COMMONWEALTH* (1896).

against a congressional act that infringed their retained sovereignty."³ He also explained a practical reality that would be repeatedly emphasized in subsequent cases: "[W]here the Federal Government seeks not merely to collect revenue as such, but to require the State to pay out its moneys to individuals at particular rates, not merely state revenues but also state policy choices suffer."⁴ An important prerogative of state sovereignty is deciding how to spend its tax revenues, and interference with the exercise of that prerogative necessarily circumscribes the state's power to implement its public policies.

Four years later in *Nevada v. Hall*⁵ Rehnquist again unfurled the banner of sovereign immunity, arguing that "unconsenting states are not subject to the jurisdiction of the Courts of other states."⁶ This time he was not alone. Chief Justice Burger joined his dissent, and the "Sovereign Immunity Cavalry" was born.

Not until 1996, however, did Chief Justice Rehnquist rally a majority to his crusade to protect the states' sovereign immunity from an intrusive, overbearing national government. From 1996 through 2002, the Court decided a series of 5-to-4 cases in which the majority protected and arguably expanded the states' sovereignty immunity.⁷ Each case involved plaintiffs who sued under a congressional act that authorized them to sue in state court for remedial damages caused by the state's violation of the act's guarantees. In each case, the five-person majority uttered the same battle cry: "Not without the State's consent." The Chief Justice forcefully and succinctly articulated the point in *Seminole Tribe of Florida v. Florida*,⁸ declaring that "the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."⁹

³Fry v. United States, 421 U.S. 542, 544 (1975).

⁴*Id.* at 545.

⁵*Nevada v. Hall*, 440 U.S. 410 (1979).

⁶*Id.* at 437 (Rehnquist, J., dissenting).

⁷*Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, 527 U.S. 627 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666 (1999); *Alden v. Maine*, 527 U.S. 706 (1999); *Kimmel v. Florida Board of Regents*, 528 U.S. 62 (2000); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001).

⁸*Seminole Tribe*, 517 U.S. 44 (1996).

⁹*Id.* at 53 (1996).

In *Nevada v. Hibbs*, however, the Chief deserted his troops. Leaving Justices Kennedy, Scalia, and Thomas to warm their hands around the perhaps flickering federalism campfire, Rehnquist and his law school classmate Justice O'Connor joined the "Anti-Sovereign Immunity Four" to hold that Congress could in some circumstances authorize damage suits against state governments even though the state had expressly refused to waive its sovereign immunity.

Does the Court's Opinion Clarify the Scope of a State's Sovereign Immunity?

Before *Nevada v. Hibbs*, the black letter law of sovereign immunity seemed clear, if controversial. Basically, the "Sovereign Immunity Cavalry" argued that the Eleventh Amendment was intended by those who framed and ratified it to guarantee each state sovereign immunity, including immunity from suit by its citizens unless it waived that immunity. As Justice Kennedy observed in *Alden v. Maine*, "[States] are not relegated to the role of mere provinces or political corporations. . . ." ¹⁰ That pronouncement is consistent with James Madison's broader description of the states' retained sovereignty in Federalist No. 45: "[The] powers reserved to the several States will extend to all objects, which, in the ordinary course of affairs concern the lives, liberties and properties of the people; and the internal order, improvement and prosperity of the State." ¹¹ Moreover, the specific constraints on state sovereignty contained in Section 10 of Article I of the Constitution impliedly presuppose the existence of state sovereignty at least as broad as Madison acknowledges in No. 45.

Notwithstanding Chief Justice Stone's cavalier dismissal of the Tenth Amendment as a mere "truism," ¹² that amendment would also seem to confirm Madison's original understanding of a state's sovereign immunity. Madison was, after all, the author of the Bill of Rights, which was intended in part to assuage anti-federalist concerns that the new Constitution would strip the states of their sovereignty. During the ratification debates Madison had emphasized that the powers of the national government were few and

¹⁰ *Alden v. Maine*, 527 U.S. 706, 715 (1999).

¹¹ THE FEDERALIST NO. 45 (MADISON) 241.

¹² *United States v. Darby* 312 U.S. 100, 124 (1941).

defined, while state governments enjoyed many and often undefined powers.¹³ So, too, did his ardent nationalist collaborator Alexander Hamilton, who denied that the federal courts would have any power to breach the sovereign immunity of a state, which he described as a preexisting right of state governments.¹⁴ More particularly, Hamilton insisted that “[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent.”¹⁵

Consequently, the “Sovereign Immunity Cavalry” have insisted over the last seven years that Congress can abrogate the states’ retained sovereign immunity only if it is validly exercising its Fourteenth Amendment enforcement power, and then only if it expressly states that it intends to abrogate the states’ immunity. The Court enunciated the governing test for evaluating the validity of a congressional attempt to abrogate a state’s sovereign immunity in the exercise of its power to enforce the guarantees of the Fourteenth Amendment in *City of Boerne v. Flores*.¹⁶ *Boerne* involved a challenge to the 1993 Religious Freedom Restoration Act, which prohibited the states from “substantially burden[ing]” the free exercise of religion unless the states could demonstrate that the burden furthered a “compelling state interest” by the “least restrictive means.”¹⁷ Relying on the Act, a San Antonio church challenged a historic preservation regulation that prohibited it from enlarging its chapel. One might have predicted that the conservative majority, which has been generally more sympathetic to the claims of the religious than was the Warren Court, would have blessed Congress’s deferential acquiescence to the interests of the religious. One would have been wrong.

While conceding that Congress had broad enforcement powers under Section 5 of the Fourteenth Amendment, the Court majority, per Justice Kennedy, worried that acquiescence in its exercise here would permit Congress to define the substantive scope of the Fourteenth Amendment. If Congress could define the substantive scope of the rights guaranteed in Section 2, “it is difficult to conceive of a principle that would limit congressional power.”¹⁸

¹³THE FEDERALIST NO. 81 (HAMILTON) 423.

¹⁴*Id.*

¹⁵*Id.*

¹⁶*Boerne*, 521 U.S. 507 (1997).

¹⁷*Id.* at 515–6.

¹⁸*Id.* at 529.

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Although ostensibly interested in policing Congress's power, the Court majority was also determined to protect its own power. The Religious Freedom Restoration Act (RFRA), which was passed unanimously in the House and 93 to 7 in the Senate, intended to overrule the Court's prior decision in *Employment Division Department of Human Resources v. Smith*.¹⁹ Congress could not do that. Perhaps a constitutional amendment could. But absent that, the Court alone determined the scope of constitutional rights: "[t]he power to interpret the constitution . . . remains in the judiciary."²⁰ Moreover, the Court insisted that the scope of any remedy had to be "congruent and proportional" to the nature of the violation, a standard that is a gloss on Congress's Article I, Section 8 "necessary and proper" authority to implement its Article I powers.

John Marshall would have been proud. The *Boerne* rule echoed the proclamation of *Marbury v. Madison* that "[i]t is emphatically the province and duty of the judicial department to say what the law is"²¹ and his oft-repeated declaration in *McCulloch v. Maryland* that so long as "the end be legitimate . . . [and] within the scope of the constitution . . . all means which are appropriate and plainly adopted to, which are not prohibited, but consist with the letter and the spirit of the constitution, are constitutional."²²

Nevada v. Hibbs may nevertheless confuse the clarity of the Court's prior sovereign immunity doctrine because the "Sovereign Immunity Cavalry" (the Chief Justice and Justices Kennedy, O'Connor, Scalia, and Thomas) split. To the surprise of some Court-watchers, the Chief and Justice O'Connor joined the "Anti-Sovereign Immunity Four" in finding no sovereign immunity bar to a citizen suing his state in federal court, at least where certain constitutional rights are at stake. This potential confusion is compounded by the fact that Rehnquist's opinion for the Court appears to reflect only Justice O'Connor's and his judgment, and the rule of the case is thus difficult to discern.

The "Anti-Immunity Four" clearly repudiate the Court's opinion even as they concur in its result. Justice Souter emphasized, for

¹⁹*Employment Division* 494 U.S. 872 (1990).

²⁰*Id.*

²¹*Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²²*McCulloch v. Maryland*, 17 U.S. 316, 420 (1819).

example, that the same result would follow from the reasoning of the dissenting positions of Justices Breyer, Stevens, and himself in prior sovereign immunity cases. He stated, "I join the Court's opinion here without conceding the [principles of those] dissenting opinions."²³ Justice Stevens, concurring separately, scornfully asserted that "the plain language of the Eleventh Amendment poses no barrier" to Congress's abrogation of Nevada's sovereign immunity because the state's defense was "based on what I regard as the second [judge made] Eleventh Amendment."²⁴ In other words, the Amendment—by its own terms—simply does not apply to suits involving a state and its own citizens. The "Anti-Sovereign Immunity Four" thus adhere in *Hibbs* to their consistent position that the Eleventh Amendment embodies a concept of sovereign immunity no broader than that a state may not be dragged into federal court by a citizen of another state or a foreign state.

It is consequently the disagreement among the "Sovereign Immunity Cavalry" that is critical to deciding whether *Nevada v. Hibbs* clarifies or confuses the preexisting law. The scope and nature of their disagreement can only be understood in light of the facts of the case. The critical facts are undisputed. In 1993 Congress passed the Family and Medical Leave Act (FMLA),²⁵ granting eligible employees up to 12 weeks of unpaid leave annually for, among other reasons, a "serious health condition" suffered by an employee's parent, spouse, or child. FMLA grants aggrieved employees a private right of action "against any employer (including a public agency) in any Federal or State court of competent jurisdiction."²⁶ Congress adopted FMLA to eliminate gender discrimination in the workplace.

Nevada, however, had enacted a gender-neutral family leave policy. Indeed, Mr. Hibbs had received 500 days leave under the state act. Insisting that FMLA gave him yet more leave time, he refused to return to work after he was warned, following a state hearing on his claim, that he would lose his job if he did not. Following his

²³ *Hibbs*, 123 S. Ct. at 1984 (Souter, J., concurring).

²⁴ *Id.* at 1985 (Stevens, J., concurring in the judgment).

²⁵ 29 U.S.C. § 2601.

²⁶ 29 U.S.C. § 2617(a)(2).

termination, Mr. Hibbs sued to vindicate his rights in Nevada's Federal District Court.

While all the justices who wrote opinions appeared to agree that Congress had the authority to pass FMLA under its power to regulate interstate commerce, the Court's controlling precedents made it clear that Congress's Commerce Clause powers did not include the authority to abrogate a state's sovereign immunity. Consequently, Congress rested its authority to impose FMLA upon the states on its power under Section 5 of the Fourteenth Amendment to enforce the substantive provisions of Section 1, which prohibit the states from (1) abridging the privileges or immunities of citizens and (2) denying persons the equal protection of the laws and due process of law. Thus, the issue before the Court was the scope of Congress's enforcement powers under Section 5 of the Fourteenth Amendment. More particularly, the question was whether Congress's abrogation of Nevada's sovereign immunity was a "proportional and congruent remedy" for a persistent pattern of gender discrimination in the workplace.

This phrasing of the issue highlights the two determinative questions in *Hibbs*. First, what factual predicate must Congress establish to justify abolition of a state's sovereign immunity in the exercise of its Section 5 enforcement powers? Chief Justice Rehnquist dwelled at length on the evidence Congress weighed in reaching its conclusion that the states had engaged in a persistent pattern of gender discrimination in the workplace. He concluded that "the States' record of unconstitutional participation in, and fostering of, gender-based discrimination in the administration of leave benefits is weighty enough to justify the enactment of prophylactic § 5 legislation."²⁷

The Chief Justice explained that his rejection of analogous congressional justifications in *Board of Trustees v. Garrett*²⁸ and *Kimmel v. Board of Florida Regents*²⁹ reflected the different nature of the interest Congress sought to protect in *Hibbs*. In *Garrett* and *Kimmel* Congress had sought to protect the aged and the disabled, neither of whom belongs to a "protected" class. In *Hibbs* it sought to protect women

²⁷*Hibbs*, 123 S. Ct. at 1981.

²⁸*Garrett*, 531 U.S. 356 (2001).

²⁹*Kimmel*, 528 U.S. 62 (2000).

and men from discrimination based on their gender, which the Court recognized in *United States v. Virginia*³⁰ as a “semi-suspect” and thus “protected” class.

Normally, the significance of the distinction between the general run of legislative classifications and semi-suspect and suspect classifications is that the Court scrutinizes more carefully the government’s regulation of the latter two classes to ensure, in the case of semi-suspect classifications, that the classification serves “important governmental objectives” in a manner “substantially related to the achievement of those objectives.”

Here, however, the significance of the nature of the class subject to regulation appears to be that the Court will give greater deference to Congress’s judgment that it must abrogate a state’s sovereign immunity to protect a semi-suspect (or, one presumes, a suspect) class from discriminatory state legislation. In any case, Chief Justice Rehnquist was satisfied that Congress had met its evidentiary burden:

Congress responded to this history of discrimination by abrogating States’ sovereign immunity in Title VII of the Civil Rights Act of 1964, 78 Stat. 255, U.S.C. § 2000e-2(a), and we sustained this abrogation. . . . But state gender discrimination did not cease. It can hardly be doubted that . . . women still face pervasive, although at times more subtle, discrimination . . . in the job market. According to evidence that was before Congress when it enacted the FMLA, States continue to rely on invalid gender stereotypes in the employment context, specifically in the administration of leave benefits. Reliance on such stereotypes cannot justify the States gender discrimination in this area. The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here . . . the persistence of such unconstitutional discrimination by the States justifies Congress’ passage of prophylactic § 5 legislation.³¹

The majority’s apparent deference to congressional fact-finding may mitigate Judge Noonan’s fear that the “proportional and congruent” test invites the justices to usurp the role of Congress and substitute

³⁰*United States v. Virginia*, 518 U.S. 515 (1996).

³¹*Hibbs* at 1978–9.

their value judgments for those of the House and Senate, at least where Congress is exercising its Fourteenth Amendment enforcement powers.³²

The dissenting members of the “Sovereign Immunity Cavalry” clearly rejected such deference, however; and they reviewed the congressional record almost as if it were a trial transcript. They first challenged the factual nexus that Congress asserted between the alleged pattern of gender discrimination in the states and the Equal Protection Clause. Even the Court of Appeals had conceded that much of the evidence upon which Congress relied did “not document a widespread pattern of precisely the kind of discrimination prohibited by § 2612 (a)(1)(c) of FMLA.”³³ Justice Scalia framed the factual predicate which would justify abrogation of a state’s sovereign immunity in such circumstances very narrowly and clearly articulated its relationship to the range of remedies that Congress might employ:³⁴

The constitutional violation that is a prerequisite to “prophylactic” congressional action to “enforce” the Fourteenth Amendment is a violation by the State against which the enforcement action is taken. There is no guilt by association, enabling the sovereignty of one State to be abridged under §5 of the Fourteenth Amendment because of violations by another State, or by most other States, or even by 49 other States.

Under that standard, the generosity of Nevada’s gender-neutral family leave policy would seem to preclude any justification for Congress’s subjecting it to FMLA. In other words, the factual record did not show that Nevada had violated the substantive guarantees of Section 1 of the Fourteenth Amendment.

The second determinative question was thus whether Congress’s remedy was proportional and congruent to the violation revealed by the facts. Justice Scalia sarcastically emphasized the cut of this rule in *Hibbs* by citing *City of Rome v. United States*³⁵ as evidence that

³²JOHN NOONAN, *NARROWING THE NATIONS POWERS: THE SUPREME COURT SIDES WITH THE STATES* 145–8 (2002).

³³273 F.3d 844, 859 (9th Cir. 2001).

³⁴*Hibbs* at 1985 (Scalia, J., dissenting).

³⁵446 U.S. 156 (1980).

“Congress has sometimes displayed evidence of this self-evident limitation” because there it restricted “the most sweeping provisions of the [1965] Voting Rights Act” to “seventeen states” with a demonstrable history of intentional racial discrimination in voting.³⁶ Because there was no evidence that all states had discriminated against women in family leave policies, Congress’s remedy was not proportional.

Justice Kennedy shared Scalia’s concern, asserting that the majority had failed to show “that States have engaged in a pattern of unlawful conduct which warrants the remedy of opening state treasuries to private suits.”³⁷ But Kennedy added another, more nuanced objection. Characterizing FMLA as “a welfare benefit” rather than “a remedy for discrimination,” he insisted that that categorical distinction “demonstrate[s] the lack between any problem Congress had identified and the program it mandated.”³⁸ If Kennedy’s characterization is correct, the congressional remedy is plainly not congruent; and he pointed out that FMLA was thus not structured “as a remedy to gender-based discrimination in family leave.” Rather, it was a “Congressional attempt to define the scope of the Fourteenth Amendment.” Here Justice Kennedy cited, not *City of Boerne*, but Justice Harlan’s dissent in *Katzenbach v. Morgan*³⁹ where he would have invalidated the federal ban on literacy tests in New York because there was no evidence that the state had used them for discriminatory purposes. Thus, the ban was not, in his view, an “appropriate remedial measur[e] to redress and prevent the wrongs” but an impermissible attempt to define the *substantive* scope of the Amendment.⁴⁰

It would appear then that this much can be said about the clarity of the Court’s sovereign immunity doctrine, post *Nevada v. Hibbs*. While the generally applicable “rule” remains the same, the factual nexus that Congress must establish to justify enacting remedial legislation to address violations of Section 1 of the Fourteenth Amendment is now uncertain. Arguably, on the one hand, the opinion of the

³⁶ *Hibbs* at 1981 (Scalia, J., dissenting).

³⁷ *Hibbs* at 1987 (Kennedy, J., dissenting).

³⁸ *Id.* at 1991.

³⁹ 384 U.S. 641 (1966).

⁴⁰ *Id.* at 666 (Harlan, J., dissenting).

Court signals a willingness on the part of the otherwise mismatched majority to defer to congressional findings of fact in this area, much as Chief Justice Burger once suggested was appropriate in *Fullilove v. Klutznick*.⁴¹ On the other hand, such deference might seem more appropriate under a “rational basis test” than a “narrowly tailored” test. Indeed, a week later Chief Justice Rehnquist himself seemed less disposed to defer to legislative findings in *Grutter v. Bollinger*,⁴² though there it was a state university, not the Congress, that was making the judgment; and the impacted class was a suspect rather than a semi-suspect one.

The first distinction made all the difference to Chief Justice Burger in *Fullilove*. Why it should make such a difference to Chief Justice Rehnquist, the patron saint of state sovereignty, is less clear. Perhaps the explanation is that Rehnquist was simply engaged in damage control. Once Justice O'Connor deserted, the Chief Justice may have felt that he faced a Hobson's choice: dissent, where he could only cry foul, or join the majority, where he could assign himself the opinion and at least seize the opportunity to cite the VMI case without repeating Justice Ginsburg's “exceedingly persuasive” language, which had caused some analysts to speculate that gender classifications might soon be subject to strict rather than intermediate scrutiny. More important, he could make the result in *Hibbs* appear to turn on a particularized assessment of the factual record before Congress rather than on some broader principle of constitutional law enunciated by the “Anti-Sovereign Immunity Four” and thus maintain doctrinal fluidity while awaiting the appointment of new recruits to his “Sovereign Immunity Cavalry.”

The dissenters' insistence that Congress cannot cloak its redefinition of a constitutional guarantee as a remedy for an assumed violation of that guarantee suggests a much less deferential view toward congressional findings of fact. The rigorous application of that dissenters' rule would presumably require, not deference to Congress's stated factual conclusions, but a searching inquiry to determine their accuracy and perhaps even to assess Congress's “real” intent. Generally, the Court has refrained from such inquiries. Whether such an inquiry would be consistent with the respect one branch of the

⁴¹448 U.S. 448 (1980).

⁴²123 S. Ct. 2325 (2003).

national government ought to practice toward a coordinate branch is a fair and complex question. Whether such an inquiry is necessary if the sovereign immunity of the states is to be protected is an equally fair and complex question, as Professor Richard Epstein, a confessed “Doubting Thomas” on the wisdom of the Court’s current sovereign immunity doctrine, conceded in a recent review of Noonan’s book. Epstein nevertheless concludes that Judge Noonan “does not come anywhere near proving that the Court’s invocation of sovereign immunity usurp[s] Congress’ legislative powers.”⁴³

Is the Doctrine of State Sovereignty a Substantial Contribution to Our Enduring Understanding of Federalism?

From the political left, the answer is a resounding no. Their view, reflected within the Court most clearly in the dissents of Justice Breyer, is that modern America is a post-federal polity whose institutions have superceded the quaint antebellum political structures within which states enjoyed substantial discretion to regulate the health, welfare, and morals of their citizens. Consequently, the national government should have the authority to impose its public policy choices on the states, despite the Tenth Amendment’s clear reservation of traditional police powers to the states. In *United States v. Lopez*,⁴⁴ Justice Breyer argued, on the one hand, that Congress might reasonably have concluded that many school children were traumatized by their knowledge that persons carried guns near schools. Accordingly, those children dropped out of school and deprived America of their latent skills. As a result, America would be unable to compete in the global economy. He then concluded:⁴⁵

In sum, a holding that a particular statute before us falls within the commerce power would not expand the scope of that Clause. . . . It would recognize that, in today’s economic world, gun-related violence near the classroom makes a significant difference to our economic, as well as our social well-being.

⁴³Richard Epstein, *A Federal Case*, NATIONAL REVIEW 50, 52 (October 28, 2002).

⁴⁴*United States v. Lopez*, 514 U.S. 549, 616 (1995) (Breyer, J., dissenting).

⁴⁵*Id.* at 624–5.

Chief Justice Rehnquist, on the other hand, recognized the impact of such reasoning in *United States v. Morrison*,⁴⁶ where he pointed out:

The reasoning that petitioners advance seeks to follow the but-for causal chain from the initial occurrence of violent crime (the suppression of which has always been the prime object of the States' police power) to every attenuated effect upon interstate commerce. If accepted, petitioners' reasoning would allow Congress to regulate any crime as long as the nationwide, aggregated impact of that crime has substantial effects on employment, production, transit, or consumption. Indeed, if Congress may regulate gender-motivated violence, it would be able to regulate murder or any other type of violence since gender-motivated violence, as a subset of all violent crime, is certain to have lesser economic impacts than the larger class of which it is a part.

The Chief Justice's reasoning in *Morrison* is difficult to reconcile with his *Hibbs* opinion. In *Morrison*, Rehnquist rested his conclusion on the national government's constitutional obligation to respect the reserved powers of the states. One of those powers, implicit in Rehnquist's pre-*Hibbs* view of the Eleventh Amendment, is a state's authority to prevent citizens from suing it without its consent.

Perhaps Rehnquist's arguable inconsistency merely reflects the ambivalence of the political right, which is curiously divided over whether the Court's sovereign immunity doctrine is a substantial contribution to our enduring understanding of federalism. Conservatives and libertarians alike generally embrace traditional notions of federalism because it is one of the institutional structures that they believe both permit diverse communities to flourish and, equally important, protect the liberties of the people from overweening governmental power. As Judge Alex Kozinski and Professor Steven Engel point out, "dividing sovereignty fundamentally changed the business of government by introducing competition into that oldest of monopolies."⁴⁷

And yet some on the right dismiss the Court's sovereign immunity doctrine as "federalism lite" at best and pernicious at worst. Robert

⁴⁶*United States v. Morrison*, 529 U.S. 598, 615 (2000).

⁴⁷Alex Kozinski and Steven A. Engel, *Recapturing Madison's Constitutionalism Without the Blank Check*, in JAMES MADISON AND THE FUTURE OF CONSTITUTIONAL GOVERNMENT 13 (John Samples, ed. 2002).

Levy, a senior fellow in constitutional studies at the Cato Institute, insists that “[w]hen sovereign immunity is used, supposedly to reinforce federalism, it constricts rather than enlarges personal liberty.”⁴⁸ The doctrine of sovereign immunity is rooted in the assumption that “the king can do no wrong.” All history demonstrates that kings not only can do wrong but, if given an opportunity, will do wrong. The founders understood that history. They had lived it, as the Declaration’s searing indictment of King George so clearly demonstrates. Mr. Levy is thus correct when he points out that the founding generation knew that governments could and would do wrong. And state governments are no exception to that rule, as Clint Bolick has so chillingly described in the aptly named *Grassroots Tyranny*.⁴⁹

Mr. Levy may be mistaken, however, when he argues that the Founders’ concept of sovereign immunity must be construed narrowly—bounded by the express text of the Eleventh Amendment.⁵⁰ While the Declaration makes clear that ultimate sovereignty rests in the people, that fact scarcely supports the conclusion that the Framers rejected a broader concept of sovereign immunity, including the perceived need for governmental immunity. They were not all libertarians. Thomas Paine’s *Common Sense* may have fueled the revolutionaries’ fervor that ignited their revolt, but its libertarian, anti-government bias did not dominate discussions in the constitutional convention or in the subsequent ratification debates. Rather, those debates focused, first, on which level of government—state or national—would enjoy predominant governmental power and its implied handmaiden, sovereign immunity, and, second, on what allocation of power between the two would best protect the liberties of the people.

There is also good reason to question the prudence of Mr. Levy’s rejection of state sovereign immunity. Adherence to the original understanding is essential to the preservation of the rule of law, the interpretive lodestar of the political right; and while there may be

⁴⁸Robert Levy, *People v. State*, LEGAL TIMES 74 (June 16, 2003).

⁴⁹CLINK BOLICK, GRASSROOTS TYRANNY: THE LIMITS OF FEDERALISM (1993).

⁵⁰*But see* CLYDE E. JACOBS, THE ELEVENTH AMENDMENT AND SOVEREIGN IMMUNITY (1972) (state sovereign immunity is inconsistent with both the original understanding and the nature of the government established in the Constitution).

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room for different assessments of the original understanding of the scope of the Eleventh Amendment, there is much less reason to doubt the accuracy of Justice Thomas's understanding of the founding generation's concept of state power and the scope of sovereign immunity, which that power included.

Dissenting in *U.S. Term Limits, Inc. v. Thornton*, Justice Thomas succinctly described the original understanding of the peoples' ultimate sovereignty and the constitutional division of powers between the national and state governments.

In each State, the remainder of the people's powers—"t[he] powers not delegated to the United States by the Constitution, nor prohibited by it to the States," Amdt. 10—are either delegated to the state government or retained by the people. The Federal Constitution does not specify which of these two possibilities obtains; it is up to the various state constitutions to declare which powers the people of each State have delegated to their state government. As far as the Federal Constitution is concerned, then, the States can exercise all powers that the Constitution does not withhold from them. The Federal Government and the States thus face different default rules: Where the Constitution is silent about the exercise of a particular power—that is, where the constitution does not speak either expressly or by necessary implication—the Federal Government lacks that power and the States enjoy it.⁵¹

In other words, if the states retained the traditional authority to deny citizen suits against themselves, the federal government could not abridge that dimension of a state's sovereign immunity.

In contrast to Mr. Levy, some observers on the political right bubble with optimism about the future foreshadowed by the Court's statutory federalism decisions. Michael Greve, director of the American Enterprise Institute's Federalism Project, wrote:

The Rehnquist Court's statutory federalism decisions have had a real effect. They have measurably increased the autonomy of state and local governments, diminished the role of special-interest advocacy groups, and increased the accountability of Congress. That shift spells neither the end of the welfare state nor an "activist" judicial arrogation of power.

⁵¹*U.S. Term Limits v. Thornton*, 514 U.S. 779, 847–8 (1995) (Thomas, J., dissenting).

The central theme of the Rehnquist Court's statutory federalism is democratic responsibility and accountability. Congress remains free to create private entitlements and to impose corresponding mandates on the states—so long as it clearly informs the states of their obligations. If Congress lacks the will or the votes to expose states to private enforcement, it can provide for enhanced federal agency oversight over the states or else administer welfare statutes with the federal government's own money and bureaucrats.⁵²

While Mr. Greve is doubtless correct that the Court's statutory federalism decisions have protected the states' fiscal autonomy, no one can contemplate with equanimity the "Big Brother" alternative means of enforcement that he acknowledges the federal government might employ.

We may take heart from the anti-federalists, who rightly insisted that the people are the best guardians of their liberty. The fact that states enjoy sovereign immunity does not preclude their citizens, in whom ultimate sovereignty does rest, from defining the scope of governmental immunity narrowly under state law. Acting through the political processes established in their state constitutions and statutes, they can secure legislation or amendments that redefine the scope of their state's sovereign immunity.

In addition, state court judges may appropriately construe their respective state constitutions in ways that curtail a state's powers. Indeed, one distinguished state court jurist has recently made that very point emphatically and persuasively:

To the extent a state government exercises its power to undertake activities beyond those necessary to protect and maintain individual rights, courts must look for specific manifestations of the people's consent that evidence constitutional grants of that authority. But, where a legislature acts without express or necessarily implied authorization of the constitution, it exceeds its authority—even if there is no constitutional provision barring such actions.⁵³

Justice Sanders then draws the obvious conclusion:

⁵²MICHAEL S. GREVE, *Federalism, Yes. Activism, No*, AEI PUBLIC POLICY RESEARCH, No. 7 at 5 (July 2001).

⁵³RICHARD SANDERS AND BARBARA MAHONEY, *Restoration of Limited Government: A Dissenters' View*, 59 NEW YORK UNIVERSITY ANNUAL SURVEY OF LAW 269, 270 (2003).

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The practice of interpreting state constitutions as granting the state legislature plenary power except where such power has been expressly limited by the constitution presumes that state governments have inherent powers that sovereignty resides with the servant rather than the popular masters. However, this presumption contradicts the basic premise of American government that all power resides in the people except as it has been delegated to the government. Because courts have uniformly and uncritically adopted this presumption, they have interpreted state constitutions contrary to the clear meaning of the text and allowed an unwarranted expansion of state power that threatens individual rights. Once this presumption is debunked, a defensible theory of constitutional interpretation emerges that embodies that principle of limited government expressed by the people who ratified their state constitutions.⁵⁴

Simultaneously, one can hope that the Supreme Court will follow Justice Sanders' advice in its own construction of Congress's enumerated powers. The truth is that the Rehnquist Court has demonstrated an instinct for the capillaries rather than the jugular when it comes to federalism questions and the preservation of the states' police powers. The jugular is the forgotten or ignored concept of enumerated powers. The national government continues to expand in lock-step with the Court's ever more expansive readings of Congress's enumerated powers, most especially its power to regulate interstate commerce. Unfortunately, the Court has not succeeded in reining in those powers, notwithstanding *United States v. Lopez*⁵⁵ and *United States v. Morrison*.⁵⁶ Until the Court retreats from its general latitudinal "anything Congress wants to do, it can" approach to interpreting Congress's Article I powers, federal power will continue to expand.

In a recent article on enumerated powers, Roger Pilon made this very point, demanding that courts man the batteries against such political assaults on the principle of enumerated powers.⁵⁷ Madison had also stressed the power and obligation of the courts to enforce

⁵⁴*Id.*

⁵⁵*Lopez*, 514 U.S. at 549 (1995).

⁵⁶*Morrison*, 529 U.S. at 598 (2000).

⁵⁷ROGER PILON, *Madison's Constitutional Vision: The Legacy of Enumerated Powers*, in JAMES MADISON AND THE FUTURE OF LIMITED GOVERNMENT 25 (John Samples, ed. 2002).

the principle of enumerated powers in his veto of an act to promote internal improvement:⁵⁸

Such a view of the Constitution [as the bill contemplated] would have the effect of excluding the judicial authority of the United States from its participation in guarding the boundary between the legislative powers of the General and the State Governments, inasmuch as questions relating to the general welfare, being questions of policy and expediency, are unsusceptible of judicial cognizance and decisions.

Madison's emphasis on the inappropriateness of the courts policing legislative judgments on questions of "policy and expediency" arguably reinforces the importance of confining the national government to its enumerated powers rather than attempting to preserve state police powers by employing the general doctrine of sovereign immunity to curtail federal power. Only Justices Thomas and Scalia, however, appear ready to take the doctrine of limited enumerated powers seriously by overruling prior precedents. Justice Thomas made his position clear in his concurring opinion in *Lopez*:

Although we have supposedly applied the substantial effects test for the past 60 years, we always have rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power. . . . In an appropriate case, I believe that we must further reconsider our "substantial effects" test with an eye toward constructing a standard that reflects the text and history of the Commerce Clause without totally rejecting our more recent Commerce Clause jurisprudence.⁵⁹

Thomas's colleagues have also been conspicuously unresponsive to his plea to reexamine and rationalize the "dormant commerce clause" doctrine, which has generally inhibited the states from exercising their traditional police powers.⁶⁰ In a withering assessment of the Court's federalism cases, Professor Earl Maltz ties the Court's

⁵⁸JAMES MADISON, *Veto Message*, March 3, 1817, MIND OF THE FOUNDER 308 (MARVIN MEYERS, ed. 1981).

⁵⁹*Lopez*, 514 U.S. at 584 (Thomas, J., concurring).

⁶⁰*See Camps Newfound Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 609–20 (1997) (Thomas, J., dissenting).

sovereign immunity cases to those dormant commerce clause cases. While conceding that “Justice Kennedy’s opinions in *City of Boerne* . . . and *Lopez* . . . demonstrated that he had at least some concern for the preservation of state decision-making authority,”⁶¹ Professor Maltz points out that in *U.S. Term Limits, Inc. v. Thornton*⁶² Kennedy refused to recognize state sovereignty over the number of terms its U.S. senators and representatives could serve. Even more disturbing, according to Maltz, Justice Kennedy has routinely invoked the dormant commerce clause as a justification for invalidating “even-handed state regulations” where the magnitude of the state interests does not, in the Court’s judgment, justify the burden on interstate commerce. Maltz concludes:⁶³

The preservation of state autonomy in the federal system requires more than judicial protection of the structure of state governments or even the enforcement of constitutional limitations on the power of Congress; it also requires that the Supreme Court itself adopt a restrained posture in reviewing the enactments of state governments. Justice Kennedy quite obviously has failed to grasp this fundamental truth; thus, his strong endorsement of the concept of state sovereignty in *Alden* has a hollow ring.

Whatever the legal, historical, and policy merits of this two-century-long war, two underlying facts are clear. One, the “Sovereign Immunity Calvary’s” earlier attempts to cut back the ever expanding power of the national government proved short-lived⁶⁴ and may suggest that hydraulic pressures to expand government are built into a postmodern technological society. That is the implicit thesis of Professor Rossum’s lament over the adoption of the Seventeenth Amendment, which abolished the system under which state legislatures elected Senators:

⁶¹EARL MALTZ, *Justice Kennedy’s Vision of Federalism*, 31 RUTGERS L.J. 761, 762 (2000). See also LINO GRAGLIA, *United States v. Lopez: Judicial Review Under the Commerce Law*, 74 TEXAS L. REV. 719, 740 (1996).

⁶²U.S. 514 U.S. 779, 838 (Kennedy, J., concurring).

⁶³Maltz *supra* note 61, at 770.

⁶⁴Compare Nat’l League of Cities v. Usury, 426 U.S. 833 (1976) (federal government cannot interfere with the integral governmental functions of the states) with *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985) (overruling Nat’l League of Cities v. Usury).

Most political leaders during this lengthy campaign to secure the adoption and ratification of the Seventeenth Amendment clearly did not appreciate the framers' understanding that the principal means of protecting federalism and preventing the transfer of the "residuary and inviolable sovereignty of the states" to the national government was the mode of electing the Senate. They did not worry about altering constitutional structure, because they embraced the Progressive dogma that the Constitution is a living organism that must constantly adapt to an ever changing environment. They did not worry that their alterations would break a Newtonian, clock-like mechanism; rather, they celebrated the Darwinian adaptability of the Constitution and the evolution of its principles.⁶⁵

Professor Rossum thus sees the Court's sovereign immunity doctrine as an ill-advised and ineffective effort to plug a hole in a dike that has already been washed away. And even if that is not true, the narrow and continuing split within the Court underscores the insight of Bishop Hoadly that "he who has the power to declare the law is truly the lawgiver."⁶⁶ In a nine-person court, the majority is thus the lawgiver—as the late Justice Brennan's famous "Rule of Five" so bluntly reveals. Judge Noonan makes the same point: "If five members of the Supreme Court are in agreement on an agenda, they are mightier than five hundred members of Congress."⁶⁷ Consequently, the immediate future of state sovereignty depends more on the pattern of impending retirements and replacements than on the merits of the opposing positions.

That's the political reality. In any case, the longer term future of sovereign immunity will turn on broader political developments. Justice Frankfurter understood that these political trends ultimately transformed judicial doctrine.⁶⁸

⁶⁵Rossum at 220.

⁶⁶In a recent article in the *American Bar Association Journal*, Rehnquist is characterized as an "impresario" rather than an "intellectual leader" who "is like the guy who deals the cards. He's skilled at seeing where he has five votes." RICHARD BURST, *Supreme Court Analysis*, AMERICAN BAR ASSOCIATION 43, 46 (May 2003).

⁶⁷Noonan *supra* note 32 at 139.

⁶⁸*Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 709 (1949) (Frankfurter, J., dissenting).

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The course of decisions concerning sovereign immunity is a good illustration of the conflicting considerations that often struggle for mastery in the judicial process, at least implicitly. In varying degrees, at different times, the momentum of the historic doctrine is arrested or deflected by an unexpressed feeling that governmental immunity runs counter to prevailing notions of reason and justice. Legal concepts are then found available to give effect to this feeling, and one of the results is the multitude of decisions in which this Court has refused to permit an agent of the government to claim that he is *pro tanto* the government and therefore sheltered by its immunity.

The Court's current state sovereign immunity doctrine may thus prove to be one of Frankfurter's isolated "derelict[s] on the waters of the law,"⁶⁹ and *Nevada v. Hibbs* may be the beginning of its demise. To the extent that the American people, whether conservative or liberal, increasingly look to the national government rather than to their local and state governments to solve problems, federalism may in fact be withering away.

As two astute scholars—one a political liberal and the other a political conservative—have pointed out in recent books,⁷⁰ there are decisive moments in American history when the people coalesce around some new understanding of their constitutional principles and enforce that understanding through their political institutions. No Supreme Court majority, however determined to be the last rather than the first to acquiesce in the jettisoning of federalism, can long prevent the demise of America's compound republic if the "sleeping sovereign" arises from its usual slumber and demands that the federal government assume all policymaking for the nation. When a conservative president insists on national standards to ensure that "no child is left behind" and a liberal senator wins her seat on a pledge to eliminate trailer classrooms across Washington State, we may be perilously close to that moment. If it materializes, the Justice Breyers of the world may well prove to have been the oracles of a post-federal and liberty-lite America.

⁶⁹Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting).

⁷⁰BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991); KEITH WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION* (1999).

To prevent that unhappy event, the American people must act on their common sense and, like those who rallied to Paine's, demand that their state and national governments respect both the peoples' rights and the limits the people have imposed on governmental powers. In the specific context of the issue in *Hibbs v. Nevada*, they might well demand that they have the right to sue in state courts for the state's denial of rights guaranteed them by the national government. It ought never to be thought that a state's dignity is compromised when its citizen sovereigns ask it to appear in court and answer to the charge that it has violated their rights.