
THE DECLINE OF FEDERAL COMMON LAW

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INTRODUCTION

“This case is about power”¹ This incisive comment began Justice Stevens’ dissenting opinion in the recent *Seminole Tribe* case, but it would describe accurately any number of Supreme Court decisions of the last few years. The first half of this decade has seen several major rulings that affect the balance of power between the federal government and the states.² The Court has significantly shifted the power balance, protecting state sovereignty by limiting federal law making power.³

In 1992, in *New York v. United States*,⁴ the Court for the first time in-

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¹ *Seminole Tribe v. Florida*, 116 S. Ct. 1114, 1133 (1996) (Stevens, J., dissenting).

² *Seminole Tribe* is the most recent example. See also *United States v. Lopez*, 115 S. Ct. 1624 (1995); *New York v. United States*, 505 U.S. 144 (1992).

³ See, e.g., Linda Greenhouse, *Taking States Seriously*, N.Y. TIMES, Apr. 14, 1996, at E3 (discussing *New York*, *Lopez*, and *Seminole Tribe*, and opining that “a reshaping of the Federal-state balance may prove [the Rehnquist Court’s] most enduring legacy”); Editorial, *Lurching Towards States’ Rights*, N.Y. TIMES, Mar. 29, 1996, at A20 (“A headstrong five-justice majority is driving the Supreme Court toward a revolutionary, indeed reactionary, interpretation of federalism, tilting the balance dangerously toward states’ rights at the expense of federal power.”).

⁴ 505 U.S. at 187-88 (holding that although Congress may possess constitutional authority to pre-empt state regulation contrary to federal interests, or to encourage states to adopt suggested regulation through use of incentives, Congress does not have the power to force states to enact a federally mandated regulatory scheme); see also Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001 (1995) (arguing that because the Court’s “anti-commandeering doctrine,” as announced in *New York*, relies upon a flawed originalist interpretation of constitutional design unsupported by the Framers’ writings or the text itself, the doctrine is not constitutionally justified); Anthony B. Ching, *Traveling Down the Unsteady Path: United States v. Lopez, New York v. United States, and the Tenth Amendment*, 29 LOY. L.A. L. REV. 99, 114-21 (1995) (examining the impact of *New York* on a resurrected Tenth Amendment jurisprudence, and discussing the troubling suggestion that, in the wake of *New York*, Congress may encourage states to burden commerce by discriminating against foreign states); Candice Hoke, *Constitutional Impediments to National Health Reform:*