Commentary: Is the Rehnquist Court A. A Friend of the States? B. A Friend of the People? C. A Friend of the Court? D. None of the Above?

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Harry L. Witte*

INTRODUCTION

If the Rehnquist Court is curtailing the power of Congress to regulate under the Commerce Clause,¹ rewriting the grant of congressional authority to regulate the states under Section 5 of the Fourteenth Amendment,² and all but eliminating suits by citizens

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* I am grateful for the thoughtful and generous assistance of Widener law student Nancy L. Datres and the editors of the Widener Law Journal for their invaluable contributions to the morphosis of the spoken edition of this commentary to the written.


The dramatic disparity in the deference accorded by Chief Justice Rehnquist to the legislative findings of Congress in the VAWA (Morrison) and the FMLA (Hibbs), and his very different views of the national import of the
against their state governments for violation of federal law,\(^3\) then surely this must be a Court that is friendly to the interests of states. If we view the states simply as corporate entities, independent of the people who empower them, we might well be inclined to agree that reducing congressional power to regulate tends to increase the authority of the states, a good thing, and that reducing state liability for wrongful acts also is good. If, on the other hand, we view the states as vital political communities where "We the People" decide what power to delegate to our governmental agents and what power to withhold, as well as what superior power to delegate to our other governmental agents at the national level, then our answer may be very different.

In the debate over "state sovereignty," we risk losing sight of the real issue: Who is the sovereign? According to the text of the U.S. Constitution, "We the People" are the makers of our supreme civil law, not some conglomerate of "we the states." It is the same "We the People" who have been making state constitutions well before attention was focused on the new national model in 1789. "We the People" continue making and amending state constitutions today. The states are the principal theaters of American democracy. They are laboratories\(^5\) where political, social, and two issues are not immediately easy to reconcile. It is noteworthy, however, that the Chief Justice in his capacity as head of the Judicial Conference of the United States lobbied in Congress against the civil remedy provisions of the VAWA, and criticized it repeatedly, both before and after it became law. See Judith Resnick, Constructing Remedies: The Rehnquist Judiciary, Congress, and Federal Power, 78 IND. L.J. 223, 292-96 (2003); Charles Gardner Geyh, Paradise Lost, Paradigm Found: Redefining the Judiciary's Imperiled Role in Congress, 71 N.Y.U. L. REV. 1165, 1208 (1996). The Chief Justice lost the battle as a lobbyist, but won the war as adjudicator.


\(^4\) U.S. CONST. pmbl.

\(^5\) As the Court once stated, "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the
economic innovation are forged. They are seed-beds, where American conceptions of individual rights see their first ray of light, are nurtured, and evolve. This, I suggest, is the context in which we should consider the impact of the Rehnquist Court’s New Federalism on the states.

The principal authors and other commentators have focused admirably on the content and character of the New Federalism jurisprudence. I want to focus on two specific examples of how the Court’s mischaracterization of the structure of federalism has diminished the role of the states as important political entities and participants in vital national discourse. The first example involved the role of the states, as political entities, in resolving problems of great national import. The second involves the structural role of federalism in protecting rights.


7 In selecting these two examples, I relegate to this single footnote the 2000 presidential election cases in which some members of the Court express open (though not candid) hostility to the place of state constitutions and state courts in our American constitutional jurisprudence. See Bush v. Gore, 531 U.S. 98, 111-22 (2000) (Rehnquist, C.J., concurring) (rejecting views of Florida Supreme Court on Florida law); Bush v. Palm Beach Canvassing Bd., 531 U.S. 70, 76-78 (2001) and Transcript of Oral Argument, 2000 W.L. 1763666 (2000) (per curium) (suggesting impropriety of Florida Supreme Court’s reference to the Florida Constitution’s right-to-vote provision). Together, these cases and the transcripts of oral arguments seem at times to suggest that, for Article II purposes, state legislatures spring “off the rack” from Article II itself, untethered to state constitutions. Additionally, the dissent in Bush v. Gore notes the disrespect expressed toward states in that the decision exacerbates public perception and mistrust of state judiciaries. See Bush, 531 U.S. at 128 (Stevens, J., dissenting) (“What must underlie petitioners' entire federal assault on the Florida election procedures is an unstated lack of confidence in the impartiality and capacity of the state judges who would make the critical decisions if the vote count were to proceed. . . . The endorsement of that position by the majority of this Court can only lend credence to the most cynical appraisal of the work of [state] judges throughout the land.”).
I. THE STATES AS PROBLEM-SOLVERS: NEW YORK V. UNITED STATES

New York v. United States was a challenge by New York and two of its counties to provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 (the Act). The Act provided a set of incentives to states to deal with the problem of low-level radioactive waste through regional or single-state disposal sites. The incentives became increasingly expensive where states failed to provide proper siting. The ultimate incentive, at the end of a very long process was the "take title" provision. This provision required non-complying states to take possession of, and liability for, the subject wastes generated within that state upon the request of an owner or generator of the waste. The Court held this last provision unconstitutional.

Writing for the Court, Justice O'Connor described the issue as one that could be examined in two different ways. On the one hand, was the act of Congress authorized by the Constitution's Article I powers? On the other, had Congress invaded an area of state authority that the Tenth Amendment reserved to the states? She stated:

In a case like [this], involving the division of authority between federal and state governments, the two inquiries are mirror images of each other. If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress.

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10 New York, 505 U.S. at 152-54.
11 Id. at 153-54.
12 Id. at 152-54.
13 Id. at 174-77.
14 Id. at 155.
15 Id. at 156. Elsewhere, Justice O'Connor substituted the term "retained by the States" for "reserved." Id. at 155. Without wishing to be excessively technical, I would submit there is a significant distinction between an active assertion that powers are "retained by the states" and the passive language of the Tenth Amendment regarding powers that are "reserved to the States".
Justice O'Connor conceded that the Tenth Amendment "states but a truism that all is retained which has not been surrendered." She continued, however, to find significant force in that truism: "The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power.

Neither the text of Article I nor the text of the Tenth Amendment answers this question. To find a limitation on the Article I power of Congress to regulate commerce, Justice O'Connor examined the history of the Constitutional Convention. In brief, the regulatory powers under the Articles of Confederation had been ineffective because they had been required to reach individuals only through the states. This was remedied at the Convention of 1789 by providing for direct regulation of individuals by the Congress of the United States. Although the text of the Constitution does not say as much, Justice O'Connor argued that the history shows the Convention intended not only to add the new congressional power to regulate individuals, but also to withdraw the former power to compel the states to regulate on behalf of the national government. The "take title" provision ran afoul of this historical analysis. It offered New York one of two choices: regulate to insure the proper disposal of low-level radioactive wastes, or take title to, and liability for, those wastes produced in its territory.

The Court stated that "[a] choice between two unconstitutionally coercive regulatory techniques is no choice at all. Either way, 'the Act commandeers the legislative processes of

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16 New York, 505 U.S. at 156 (quoting United States v. Darby, 312 U.S. 100, 124 (1941)).
17 Id. at 157.
18 Id. at 163-66.
19 Id. at 163.
20 Id. at 167.
21 Id.
22 Id. at 174-75.
the States by directly compelling them to enact and enforce a federal regulatory program."

Justice White, joined by Justices Blackmun and Stevens, dissented from those portions of the Court's opinion and judgment holding the "take title" provision unconstitutional. The majority's essential neglect of the lengthy political and legislative history of the Low-Level Radioactive Waste Policy Act of 1980 and its 1985 amendments particularly concerned Justice White. He described in detail the nature of the problem confronting the nation and the deep concern of the governors of the states to devise a solution.

Both the 1980 Act and the 1985 Amendatory Act were developed by the National Governors' Association. Justice White stated that "in sum, the 1985 Act was very much the product of cooperative federalism, in which the States bargained among themselves to achieve compromises for Congress to sanction."

The Act was not only an exercise of Congressional power under the Commerce Clause, but it was also an extraordinarily impressive example of the power of cooperative federalism made possible by the Compact Clause. Article I, Section 10, Clause 3

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23 Id. at 176 (quoting Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).
24 Id. at 188-89 (White, J., dissenting).
25 Id. at 189 (White, J., dissenting).
26 Id. at 190-92 (White, J., dissenting).
27 Id. at 193-94 (White, J., dissenting).
28 Id. at 194 (White, J., dissenting).
29 The Court acknowledged the Compact Clause but argued that the Act itself is not a compact. It stated, "The fact that the Act, like [so] much federal legislation, embodies a compromise among the States does not elevate the Act (or the antecedent discussions among representatives of the States) to the status of an interstate agreement requiring Congress' approval under the Compact Clause." Id. at 183. This statement is literally true but misses the point of the Compact Clause. While the Act is not, itself, a ''Compact'' under the clause, it expressly authorizes states to enter into regional compacts, which is precisely what the states, through their governors, had proposed. The Court thought its distinction important because New York was one of eight states that did not enter into regional compacts. Had the Act itself been a compact of the fifty states, New York arguably would have been bound to it. Id. (citing W. Va. ex rel. Dyer v. Sims, 341 U.S. 22, 35-36 (1951) (Jackson, J., concurring)). The Court's distinction is unavailing. The Compact Clause allows Congress to authorize exactly what the clause itself otherwise prohibits, compacts between
of the U.S. Constitution provides that "[n]o State shall, without the Consen\ of Congress . . . enter into any Agreement or Compact with another State [.]."30

Most uses of the Compact Clause are regional addressing issues of significant import to two or to a handful of states. In this instance, the issue was very much a national issue, and all of the states were participants in the planning process through the National Governors’ Association.31 The Act both encouraged and permitted states to enter into regional compacts for the purpose of developing adequate sites for the disposal of the low-level radioactive wastes.32 Forty-two states entered into one of nine regional compacts under the Act.33 New York, one of the largest generators of low-level radioactive waste, elected to "go it alone," as permitted by the Act.34

Although New York failed to develop its own disposal site, it reaped substantial benefit from the Act by continuing to use the sites available in other states.35 Then, apparently unable to address the problem of "not in my backyard," New York sought to bring the whole, carefully-evolved compromise to a halt by eliminating the final incentive. The Court allowed New York to succeed, using its atextual understanding of the history of the Constitution to trump the text of the Commerce and Compact Clauses. New York could not consent to what the Court viewed as an unconstitutional attempt by Congress to regulate through the states.36 In the end, however, the Court saved New York from the consequences of its political indecision by denying New York and the other forty-nine states the power jointly to make decisions on national issues.

or among states. It does not allow Congress to authorize compacts compelling the states to act in ways prohibited by other provisions of the Constitution.

30 U.S. Const. art. I, § 10, cl. 3.
31 See New York, 505 U.S. at 196 (White, J., dissenting).
32 Id. at 191-92 (White, J., dissenting).
33 Id. at 198 (White, J., dissenting).
34 Id. at 196 (White, J., dissenting).
35 Id. at 198 (White, J., dissenting). Justice White was "unmoved by the Court’s vehemence in taking away Congress’ authority to sanction a recalcitrant unsited State now that New York has reaped the benefits of the sited States’ concessions." Id. at 196 (White, J., dissenting).
36 Id. at 183.
II. THE RITES OF FEDERALISM: MICHIGAN V. LONG

If my choice of New York v. United States to illustrate the Rehnquist Court's disdain for the structural benefits of federalism focused on a classic of the genre, my choice of Michigan v. Long to illustrate the Court's disdain for federalism's advancement of rights may strike some as a tad odd. Yes, I understand that Michigan v. Long predates my classic, but early, example of the Court's New Federalism by almost a decade; and yes, I acknowledge that a case decided when Warren Burger was Chief Justice is not a product, properly speaking, of the Rehnquist Court. Nonetheless, Michigan v. Long is a precursor of the rights jurisprudence of the Rehnquist era, and its progeny continue to expand.

Its substantive holding aside, Michigan v. Long addressed a critical question of U.S. Supreme Court jurisdiction. Consistent with the cases producing the New Federalism, the Court resolved that jurisdictional question by expanding its own power. The jurisdictional issue was simple: When a state court's judgment rests upon "independent and adequate state grounds," the United States Supreme Court does not have authority to review that judgment if it is otherwise harmonious with federal law. Of course, if a state court judgment decided as a matter of state law nonetheless violates federal law, the Supreme Court has jurisdiction to review it. However, when that state court decision is both adequately and independently based on state law, that is does not contravene or rely upon federal law, it presents no federal question to invoke the Supreme Court jurisdiction.

The Michigan v. Long problem arises when there is a question as to whether the state court judgment truly rests on independent state law grounds. This typically occurs when a state court refers to federal as well as state authority in its opinion.

38 Id. at 1048 (holding that a search of a passenger compartment of an automobile during a lawful stop is reasonable).
39 JENNIFER FRIESSEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 1-7 (3d ed. 2000).
40 See id.
41 Id.
Prior to the 1983 *Michigan v. Long* decision, the Court was deferential when determining whether it had jurisdiction. If the state court opinion considered federal and state grounds to support the decision, the Court used clarifying procedures when reviewing it. Often, the Court remanded the case to the state court to clarify whether there were sufficient independent state grounds.\(^42\) This practice created a presumption that the Supreme Court did not have jurisdiction unless it was clear on the opinion's face.\(^43\) *Michigan v. Long* essentially reversed this presumption:

> [... a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.\(^44\)](Long, 463 U.S. at 1040-41)

Justice Stevens dissented:

> In this case the State of Michigan has arrested one of its citizens and the Michigan Supreme Court has decided to turn him loose. The respondent is a United States citizen as well as a Michigan citizen, but since there is no claim that he has been mistreated by the State of Michigan, the final outcome of the state processes offended no federal interest whatever. Michigan simply provided greater protection to one of its citizens than some other State might provide or, indeed, than this Court might require throughout the country.

\(^{42}\) *Id.*  
\(^{43}\) *Id.*  
\(^{44}\) *Long*, 463 U.S. at 1040-41. The Court announced a new "plain statement" rule that would permit state appellate courts to avoid Article III jurisdiction:

> If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

*Id.* at 1041.
I believe that in reviewing the decisions of state courts, the primary role of this Court is to make sure that persons who seek to vindicate federal rights have been fairly heard.\textsuperscript{45}

He further stated:

Until recently, we had virtually no interest in cases of this type. . . . Some time during the past decade . . . our priorities shifted. The result is a docket swollen with requests by states to reverse judgments that their courts have rendered in favor of their citizens. I am confident that a future Court will recognize the error of this allocation of resources. When that day comes, I think it likely that the Court will also reconsider the propriety of today’s expansion of our jurisdiction.\textsuperscript{46}

Justice Stevens’ optimism has not been vindicated.\textsuperscript{47}

\textit{Michigan v. Long}’s presumption of federal jurisdiction undermines the Founders’ concept of dual protection of rights. As James Madison stated in the Federalist Papers:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, subdivided among the distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other; at the same time that each will be controlled by itself.\textsuperscript{48}

The presumption of jurisdiction demonstrates the Rehnquist Court’s antipathy both to state court analysis of federal constitutional rights and to state court analysis of \textit{state} constitutional rights that produce greater protection than the Court itself deems appropriate.

\textsuperscript{45} Id. at 1068 (Stevens, J., dissenting).
\textsuperscript{46} Id. at 1069-70 (Stevens, J., dissenting) (citations omitted).
\textsuperscript{48} The Federalist No. 51, at 351 (James Madison) (Jacob E. Cook ed., 1961).
A contrary presumption, favored by Justices Stevens and Ginsburg, would have the salutary effect of fostering a state and federal dialogue over the meaning of rights. Under this approach, if state "A" reads its own state constitution and the federal constitution to accord a somewhat higher recognition of a particular right than the current reading of the U.S. Supreme Court, there would be no cause for the latter to assume jurisdiction. If state "B" follows state "A," we have the same result. Only when state "C," reading its own and the federal constitution, denies a claimant the same right, does the U.S. Supreme Court have jurisdiction to intervene. At that point, informed by the intervening decisions of state courts "A" and "B," as well as the contrary opinion of state court "C," the U.S. Supreme Court may reevaluate its own earlier decision of the subject. If it does not, the federal constitutional rule is reaffirmed, and states "A" and "B" are free to continue to accord their citizens the greater protection of their respective state constitutions. On the other hand, if the U.S. Supreme Court chooses to adopt the analysis of state courts "A" and "B," that becomes the national rule binding on state "C" and all others.

CONCLUSION

The New Federalism espoused by the Rehnquist Court is fundamentally at odds with the old federalism that saw the states as vibrant political communities competing, as it were, to uncover the best means and ends of self-government. The old federalism was a guarantor of effective and dynamic protection of rights; the New Federalism prefers a race to the bottom.

Federal judicial review is inherently anti-democratic. We can best justify it when majoritarian political processes seek to exclude the interests of a minority. There was a time when a rule of judicial restraint mediated the anti-democratic power of federal judicial review. More than fifty years elapsed between the Court’s first use of judicial review to strike a federal statute in *Marbury v. Madison*.

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49 Long, 463 U.S. at 1071 (Stevens, J., dissenting); Arizona, 514 U.S. at 24 (Ginsburg, J., dissenting).


51 5 U.S. 137 (1803).
and the second such use. The second instance, *Dred Scott v. Sanford*,\(^{52}\) in 1856, is itself a brutal\(^{53}\) reminder of the value of restraint.\(^{54}\)

For all its faults, one thing that surely can be said about the New Federalism is that, happily, it too shall pass. There will again be a day when cooperative federalism allows the Congress to encourage the states to exercise their creativity in finding solutions to national problems and to require the participants to keep to their agreements. There may even be a day when the Ninth Amendment, which, unlike the Tenth, is not a tautology or truism, will receive the attention that the Tenth does today. The Ninth Amendment provides that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."\(^{55}\)

The notion of unenumerated rights retained by the people is a powerful idea, but one that has seen relatively little practical application.\(^{56}\) Professor Massey proposes that the best evidence of the rights retained by the people are those written by them into their state constitutions.\(^{57}\) Under his theory, fundamental rights that are binding limitations not only on state government but on the national government as well would vary somewhat from state to state in accordance with the traditions and values of the different political communities. This is a robust application of the vision of Federalist 51\(^{58}\) and the primacy of "We the People."\(^{59}\) Perhaps its day, too, will come.

\(^{52}\) 60 U.S. 393 (1856).
\(^{53}\) In the eyes of the Constitution, according to the Court, African Americans were a "subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them." *Id.* at 404-05.
\(^{54}\) For a contemporary statement of the importance of judicial restraint, see Bush v. Gore, 531 U.S. 1046, 1047-48 (2000) (Stevens, J., dissenting from grant of writ of certiorari and grant of stay).
\(^{55}\) U.S. CONST. amend. IX.
\(^{58}\) THE FEDERALIST No. 51 (James Madison).
\(^{59}\) U.S. CONST. pmbl.