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A Return to States' Rights? The Rehnquist Court Revives Federalism

Melanie K. St. Clair

A Return to States' Rights? The Rehnquist Court Revives Federalism

INTRODUCTION

The Supreme Court ended the 1997 Term with the declaration that Congress exceeded its power when it enacted three recent laws.[1] The Court stated that Congress cannot "commandeer" a local sheriff to execute a federal law,[2] that Congress cannot pass a law that effectively overturns a prior Supreme Court decision[3] and that Congress cannot regulate the transmission of obscene or indecent material on the Internet.[4] The question arises of whether these decisions signal a fundamental shift by the Court toward a new era of federalism.[5] Perhaps to answer this question and to underscore the point, Justice Antonin Scalia wrote in *Printz v. United States*, the case that invalidated part of the Brady Gun Law, that liberty was best protected and the "risk of tyranny" best avoided by preserving "a healthy balance of power between the states and the federal government."[6]

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1. In the term that ended in July, 1997, the Supreme Court overturned three federal laws: the Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141, 107 Stat. 1488 (1993); the Communications Decency Act, Pub. L. No. 104-104, Title V, 110 Stat. 133 (1996); and the Brady Handgun Violence Protection Act, Pub. L. No. 103-159, Title I, 107 Stat. 1536 (1993).

2. Printz v. United States, 117 S. Ct. 2365 (1997). The Court invalidated the portion of the Brady Handgun Violence Prevention Act which commanded state and local law enforcement officers to conduct background checks on prospective handgun purchasers for an interim period until a national instant background check system becomes operative. *See* Brady Handgun Violence Prevention Act, Pub. L. 103-159, Title I, 107 Stat. 1536.

3. The Supreme Court ruled in Employment Div., Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest. Many members of Congress criticized this ruling and passed the Religious Freedom Restoration Act to essentially overrule the *Smith* decision. *See* City of Boerne v. Flores, 117 S. Ct. 2157, 2161 (1997).

4. The Communications Decency Act prohibits the knowing transmission of obscene or indecent messages over the Internet to anyone under the age of 18. Communications Decency Act, Pub. L. No. 104-104, Title V, 110 Stat. 133 (1996); *See* Reno v. ACLU, 117 S. Ct. 2329 (1997) (finding Act invalid).

5. *See* Ralph A. Rossum, *Power to the States. The Supreme Court's Defense of Federalism*, SAN DIEGO UNION & TRIB., July 23, 1997, at B5 ("In its recent decisions, the court has accelerated the shift of power to the states and away from the national government.").

6. 117 S. Ct. at 2378.

Is it the case then that these decisions solidify a recent trend toward increased states' rights? Or is it that these decisions are examples of an activist Court's reaction to its frustration with the expansion of congressional power?[7] This Comment examines the three decisions in which the Court invalidated an act of Congress: *Printz v. United States*,[8] *City of Boerne v. Flores*[9] and *Reno v. ACLU*.[10] In two of the cases, *Printz*[11] and *City of Boerne*[12], the Court indicated that Congress exceeded its powers and infringed on the autonomy of the states. In *Reno v. ACLU*,[13] the Court stated that Congress is barred by the First Amendment from regulating speech on the Internet.[14] Part I examines judicial activism and the period in history when the Court last placed significant restrictions on Congress' power to legislate, the New Deal era of the early 1930s.[15] The subsequent move by the Court after 1937 toward increased deference to Congress will also be examined.[16] Part II examines cases that have been decided since the New Deal. The cases from the 1970s and the 1980s represent the Court's fluctuating interpretation of the Tenth Amendment.[17] The most recent cases, however, illustrate the Court's shift toward a new dynamic, one which reins in the power of Congress and affords increased deference to the

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7. *See* Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1087 (1995) (arguing that the Court's antagonism toward congressional commandeering of state officers is "driven by attitude, not analysis").

8. 117 S. Ct. 2365 (1997).

9. 117 S. Ct. 2157 (1997).

10. 117 S. Ct. 2329 (1997).

11. 117 S. Ct. 2365 (1997).

12. 117 S. Ct. 2157 (1997).

13. 117 S. Ct. 2329 (1997).

14. The Internet is an international network of interconnected computers. *See Reno*, 117 S. Ct. at 2334.

15. When Franklin D. Roosevelt was elected, the country was faced with serious economic problems. Congress attempted to solve the nation's woes with broad, sweeping legislation that was constitutionally questionable. *See* Richard A. Maidment, The Judicial Response to the New Deal 56 (Manchester Univ. Press, 1991) ("In those early days of the New Deal, both President Roosevelt and his advisors were preoccupied with recovery and were not concerned with what they saw were constitutional niceties.").

16. *See, e.g.*, NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). This was the first major case to test the National Labor Relations Act of 1935. The Supreme Court upheld the power of Congress to regulate intrastate activities that had an effect on interstate commerce.

17. *See, e.g.*, Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528 (1985); *See also* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976) (reviving the states' rights doctrine by holding that there are essential attributes of state sovereignty that cannot be infringed upon by the Federal government). *Garcia* essentially overturned *Usery* ten years later.

autonomy of the states.[18] Part III examines in detail the cases decided during the 1997 term and concludes that although the Court may not be standing on solid constitutional ground with its recent decisions, its activist majority does envision a new federalism.[19]

I. THE NEW DEAL

A. EARLY "NEW DEAL" CASES

The Tenth Amendment to the United States Constitution states that, "[t]he 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."[20] The Framers, by drafting this amendment, sought to assure that the power of the federal government was limited and the sovereignty of the states was protected.[21] However, at various points in history, Supreme Court decisions have often curtailed or enlarged the power of the federal government. Often these limitations or expansions correspond more with the prevailing economic or philosophical theories entertained by the Justices than by strict constitutional doctrine.[22] With this process, the Tenth Amendment has been reduced to almost nothing[23] only to be revived in later cases when economic or philosophical opinions change.[24]

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18. *See, e.g.*, United States v. Lopez, 514 U.S. 549 (1995); *See also* New York v. United States, 505 U.S. 144 (1992). In both these cases, the Supreme Court limits the Federal government's power to regulate in what the Court believes are traditional state areas.

19. David Strauss, Law Professor at the University of Chicago and editor of the Supreme Court Review stated, "what we saw this term in the Supreme Court was the court striking down recently enacted, popular, major pieces of legislation, sometimes in two instances admitting that there was nothing explicit in the Constitution that required them to do it." *Morning Edition* (National Public Radio broadcast, July 2, 1997).

20. U.S. CONST. amend. X.

21. *See* 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 (1995).

22. *See* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213-14 (1996).

23. *See* United States v. Darby, 312 U.S. 100 (1941). The Court stated, in regard to the Tenth Amendment, "there is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments." *Id.* at 124.

24. *See* Nat'l League of Cities v. Usery, 426 U.S. 833 (1976). The Court stated that "the Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

Congress has historically utilized the Commerce Clause[25] to expand Tenth Amendment power. The Supreme Court allows the use of the Commerce Clause when the Court determines that Congress is within its constitutional bounds and outlaws the use of the Commerce Clause when Congress treads into what the Justices feel are traditional state functions.[26] When President Roosevelt issued a call for action in order to deal with the economic crisis in the early 1930s,[27] it was the Commerce Clause that Congress looked to when enacting sweeping legislation.[28] However, when the challenges to this New Deal legislation reached the Court, the Court swiftly rebuffed Congress for exceeding its powers and invalidated one law after another.[29]

One of the first decisions in which the Court crippled the New Deal was its decision in *Railroad Retirement Board v. Alton Railroad Co.*[30] This case dealt with a challenge to the Railroad Retirement Act of 1934,[31] an act which established a compulsory retirement and pension system for railroad carriers.[32] Although Congress had in the past regulated the railroad industry,[33] the Court ruled that Congress exceeded its Commerce Clause powers when passing this Act. The Court stated that, "though we should think the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare."[34] Critics,

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25. Congress shall have the power "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST. art. I, §8.

26. *See, e.g.,* Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled by* United States v. Darby, 312 U.S. 100 (1941). The Court stated that the Tenth Amendment barred Congress from usurping traditional state powers. *Id.* at 274.

27. *See* GERALD GUNTHER, CONSTITUTIONAL LAW 115 (Foundation Press, 12th ed. 1991) ("President Roosevelt took office in 1933 in the midst of a grave economic crisis and with a call for 'action, and action now.'").

28. *Id.*

29. *Id.* at 116.

30. 295 U.S. 330 (1935).

31. The Railroad Retirement Act was not a product of the Roosevelt administration, but he nevertheless signed it because it was "in line with the social policy of the Administration." Maidment, *supra* note 15, at 71 (quoting R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 104 (1941)).

32. Congress felt that the Act was needed to boost morale in the railroad industry. Morale was low because of the financial insecurity of the railroad carriers and the inadequacy of their pension plans. *Id.* at 72.

33. *See, e.g.,* Southern R.R. Co. v. United States, 222 U.S. 20 (1911).

34. *Alton,* 295 U.S. at 346.

however, charged that this was the act of an activist Court majority that was hostile to reform.[35]

Another blow to the New Deal came only a few weeks after the *Alton* decision when the Court announced its decision in *A.L.A Schechter Poultry Corp. v. United States.*[36] The *Schechter* case concerned the National Industrial Recovery Act of 1933 which authorized industry codes that covered such things as unfair trade practices, wages, maximum hours and collective bargaining. The Court found this Act to be beyond Congress' Commerce Clause power.[37] Again the Court was unwilling to consider the economic crisis gripping the country. Echoing the sentiment from *Alton* that valuable social plans are not a justification for enlarging the sphere of constitutional authority, the Court stated that, "[e]xtraordinary conditions do not create or enlarge constitutional power."[38]

The Court appeared to solidify its opposition to New Deal legislation when, following *Schechter*, it ruled against the Bituminous Coal Act of 1935 in the case of *Carter v. Carter Coal Co.*[39] Despite the fact that the government had a strong argument that this legislation dealt with interstate commerce, the Court invalidated the Act.[40] Further, the Court asserted itself as the ultimate interpreter of the Constitution by stating:

> [A] judicial tribunal, clothed by that instrument with complete judicial power, and, therefore, by the very nature of the power, required to ascertain and apply the law to the facts in every case or proceeding properly brought for

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35. *See* Gunther, *supra* note 27, at 116. *See also* Daniel Novak, *Economic Activism and Restraint, in* SUPREME COURT ACTIVISM AND RESTRAINT, 77, 91 (Stephen C. Halpern and Charles M. Lamb, eds., 1982) ("The Court's attack was, therefore, widely seen as judicial arrogance of the first water, and a direct challenge to the democratic process.").

36. 295 U.S. 495 (1935).

37. The Schechter case resulted from convictions for violating wage and hour provisions of the "Code of Fair Competition for the Live Poultry Industry of the Metropolitan [New York City] Area." *See* Gunther, *supra* note 27, at 117. Schechter's market bought and sold chicken locally. For this reason, the government had difficulty arguing to the Court that this was interstate commerce. *Id.* at 117.

38. *Schechter*, 295 U.S. at 528. The Court stated that, "such assertions of extraconstitutional authority were anticipated and precluded by the explicit terms of the Tenth Amendment." *Id.* at 529.

39. 298 U.S. 238 (1936). Following the defeat of the NIRA in *Schechter*, Roosevelt urged the passage of a regulatory act for the coal industry. *See* Gunther, *supra* note 27, at 119.

40. *See* Novak, *supra* note 35, at 92.

> adjudication, must apply the supreme law and reject the inferior statute whenever the two conflict.[41]

The New Deal Court was considered activist because it put its belief in dual federalism and states' rights over the social or economic effects of its decisions.[42] The Court had its own anti-regulatory agenda and wanted to limit federal interference into local economic areas.[43] The Court was concerned with the sovereignty of the states and chose to hold its ideal of this sovereignty above the possible serious economic ramifications of its decisions.[44] The opinion in *Carter Coal* has been described as striking a blow to "American nationalism" such that "it has seldom, if ever, received."[45] The opinion, it has been said, denied that the Constitution "contained within its grants any authority for meeting the most serious of the problems facing the nation in 1936."[46]

B. THE MOVE AWAY FROM STATES' RIGHTS

On March 9, 1937, President Franklin D. Roosevelt addressed the American public on a plan to reorganize the federal judiciary. President Roosevelt talked about the refusal of the Supreme Court to support his plans for economic reform.[47] He also spoke of the Court as a "super-legislature" that read into the Constitution "words and implications which were not there and which were never intended to be there."[48] Roosevelt's plan was to pack the Court by nominating a new Justice for each Justice over seventy years of age who had not yet retired.[49] Although this plan was rejected by Congress, the change in the attitude of the Supreme Court was swift.[50] The Court, in subsequent decisions, abandoned its ideal of dual federalism

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41. *Carter*, 298 U.S. at 296.

42. *See* Novak, *supra* note 35, at 92 ("The bulk of the Court's activism had been exhausted upon the national government's regulatory legislation, and often the rationale for those decisions had been a professed solicitude for the sovereignty of the states.").

43. *See* Hovenkamp, *supra* note 22, at 2214.

44. *See* Maidment, *supra* note 15, at 123.

45. *Id.* (quoting J. Paschal, MR. JUSTICE SUTHERLAND: A MAN AGAINST THE STATE 198 (1951)).

46. *Id.*

47. President Roosevelt stated, "the courts, however, have cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions." Franklin Delano Roosevelt, Fireside Chat on Reorganization of the Judiciary (March 9, 1937).

48. *Id.*

49. *See* Gunther, *supra* note 27, at 122.

50. *See* Novak, *supra* note 35, at 93.

and economic due process and began awarding more deference to Congress.[51]

The move by the Court from judicial activism to judicial restraint[52] is apparent in its decision in *NLRB v. Jones & Laughlin Steel Corp.*[53] In that decision, the Court upheld the constitutionality of the National Labor Relations Act of 1935[54] which guaranteed the rights of employees to organize labor unions and bargain collectively with employers.[55] By upholding this Act the Court afforded great deference to Congress' power of regulation under the Commerce Clause by stating that legislation is constitutional if Congress can merely establish a reasonable basis for it.[56]

This deference to the legislature continued in *United States v. Darby*[57] when the Court stated that the power of Congress over interstate commerce "extends to those activities intrastate which so affect interstate commerce."[58] Further, the Court dealt a crippling blow to its ideal of state sovereignty by stating that the Tenth Amendment did not serve as a restraint on Congressional power and was nothing more than "declaratory of the relationship between the national and state governments. . . ."[59] Finally, the Court appeared to come full circle when it ruled in *Wickard v. Filburn*[60] that Congress could regulate the home production and consumption of wheat.[61] At this point, the early New Deal philosophy of state

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51. *Id.* at 93. "[T]he Court reversed its pattern of economic activism, and did so without any change in membership. The whole panoply of doctrinal instruments economic due process, liberty of contract, dual federalism, the local nature of manufacturing, direct or indirect effects on interstate commerce, all were abandoned in an orgy of reversal." *Id.*

52. Judicial restraint is characterized by the courts respecting the enactments of the political branches of the government and being cautious about holding legislation unconstitutional. *See* Maidment, *supra* note 15, at 118-119.

53. 301 U.S. 1 (1937).

54. *Id.* at 22.

55. *Id.*

56. *See* Thomas D. Dillard, *United States v. Lopez: The Commerce Clause vs. State Sovereignty, Once Again*, 22 J. CONTEMP. L. 158 (1996).

57. 312 U.S. 100 (1941).

58. *Id.* at 118.

59. *Id.* at 124.

60. 317 U.S. 111 (1942).

61. The Court developed the "aggregate effects" theory which stated that if an activity taken in the aggregate had an effect on interstate commerce, it could be regulated. Thus, a lone farmer could be regulated because when his actions were taken in the aggregate with other farmers there could be an effect on interstate commerce. *See* Rachel Elizabeth Smith, *United States v. Lopez: Reaffirming the Federal Commerce Power and Remembering Federalism*, 45 CATH. U. L. REV. 1459, 1476-77 (1996).

sovereignty and dual federalism was abandoned and nearly total deference was afforded to Congress.[62]

II. MODERN CASES

A. THE FLUCTUATING DEFINITION OF THE TENTH AMENDMENT

It was nearly forty years before any substance was given to the Tenth Amendment again. Its re-emergence, however, came in 1975 with the decision in *National League of Cities v. Usery*.[63] In *Usery* the Court invalidated amendments to the Fair Labor Standards Act which extended minimum wage and maximum hour provisions to state employees. Referring to the Tenth Amendment, the Court stated that it "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity."[64] Further, the Court stated that, "[t]here are attributes of sovereignty attaching to every state government which may not be impaired by Congress."[65] With this revival of the states' rights doctrine, the Tenth Amendment once again served as a prohibition on Congress' ability to assert power over the states.[66]

The *Usery* doctrine of essential attributes of state sovereignty did not endure the test of time. The doctrine began to erode a few years later[67] and was subsequently overturned in 1985 with *Garcia v. San Antonio*

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62. *See* Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 484 (1997) ("The consequence [of this change by the Court] was that the states became constitutionally dependant on the will of Congress through the latter's power of preemption and the operation of the Supremacy Clause. Arguably, this not only radically changed the nature and balance of the federal system, but abolished federalism as a matter of constitutional law.").

63. 426 U.S. 833 (1975).

64. *Id.* at 843 (quoting Fry v. United States, 421 U.S. 542, 547 n.7 (1975)).

65. *Id.* at 845. The Court also stated that "One undoubted attribute of state sovereignty is the States' power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions. . . ." *Id.*

66. *See* Ching, *supra* note 21, at 111.

67. *See, e.g.*, EEOC v. Wyo., 460 U.S. 226 (1983) (upholding an extension of the Age Discrimination in Employment Act to cover state and local governments and ruling that this was a valid exercise of Congress' power); FERC v. Miss., 456 U.S. 742 (1982) (upholding Federal Energy Regulation Commission standards and procedural requirements on state utility commissions); Hodel v. Va. Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981) (upholding the Surface Mining Control and Reclamation Act which mandated performance standards for surface mining operations).

Metropolitan Transit Authority.[68] In *Garcia*, the Court showed frustration over the difficulty of defining those attributes of state sovereignty deemed to be essential.[69] The Court abandoned the effort and reasoned that these determinations need not be made by the courts because the states' interests were already protected through the political process.[70] The Court rationalized that because the states send representatives to Congress, their interests are being protected.[71] This theory was reinforced three years later when the Court stated that, "[s]tates must find their protection from congressional regulation through the national political process, not through judicially defined spheres of unregulable state activity."[72]

B. SHIFT BACK TO STATES' RIGHTS

But for the temporary doctrine of *Usery*, the Court had not shown any of the activism that was present in the early New Deal cases. Deference to Congress essentially remained strong for nearly fifty years. In 1992, however, with the Court's decision in *New York v. United States,*[73] a new era of states' rights may have begun. An examination of *New York* and the later decided *United States v. Lopez*[74] may reveal some clues as to whether the 1997 decisions cement a new vision of federalism.

The issue in the *New York* case revolved around the Low Level Radioactive Waste Policy Amendments Act of 1985.[75] The Act provides that states, either alone or in regional compacts, must provide for the disposal of waste generated within their borders.[76] The Act offers three incentives to the states for complying with this obligation.[77] The Court held the third incentive to be beyond Congress' power to regulate.[78] This

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68. 469 U.S. 528 (1985). The issue in *Garcia* was again the Fair Labor Standards Act. The San Antonio Metropolitan Transit Authority wanted immunity from the Act's minimum wage and overtime pay provisions.

69. The Court stated that "the opinion [in *Usery*] did not explain what aspects of such decisions made them [wages and hours of state employees] such an 'undoubted attribute' and the Court since has remarked about the uncertain scope of the concept." *Id.* at 548.

70. "The political process ensures that laws that unduly burden the States will not be promulgated." *Id.* at 556.

71. *See* Ching, *supra* note 21, at 114.

72. South Carolina v. Baker, 485 U.S. 505, 512 (1988).

73. 505 U.S. 144 (1992).

74. 514 U.S. 549 (1995).

75. *See* 42 U.S.C.A. § 2021c (West 1985). Congress passed this Act in response to a looming shortage of disposal sites for low level radioactive waste in thirty-one states. *New York*, 505 U.S. at 150-51.

76. *New York*, 505 U.S. at 150-51.

77. *Id.* at 152.

78. *Id.*

incentive was referred to as the "take title" provision because it specified that a state or regional compact that does not provide for the disposal of waste by a particular date must take title to and possession of the waste.[79] The state would become liable for damages suffered by the generator of the waste as a result of the state's failure to promptly take possession.[80]

The arguments against the Act stated that Congress, rather than directly regulating the waste generators, had unconstitutionally directed the states what to regulate and how to regulate.[81] In response, the Court stated that although Congress has the authority to pass laws requiring or prohibiting certain acts, Congress may not compel the states to require or prohibit those acts.[82] Congress "may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program."[83]

The Court focused on accountability and refused to allow Congress to skirt public disapproval of their actions by forcing state officials to implement their directives.[84] The Court reasoned that with the "take title" provision of the Act,[85] Congress essentially forced the states to regulate pursuant to its direction and crossed "the line distinguishing encouragement from coercion."[86] With this decision, the Court outlined a new definition of state sovereignty, one in which the states cannot be compelled to implement federal policy and one in which accountability is not allowed to be clouded.[87] This notion of accountability as an element of states' rights

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79. *Id.* at 153.

80. *Id.*

81. *Id.* at 161.

82. *Id.* at 166.

83. *Id.* at 161 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n., Inc., 452 U.S. 264 (1981)).

84. "But where the Federal Government directs States to regulate, it may be state officials who bear the brunt of public disapproval, while federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." *Id.* at 169.

85. The Court held the first two provisions to be constitutional because they provided incentives not directives. 505 U.S. at 171, 173.

86. *Id.* at 175-76.

87. *See* Jennifer A. Wiengleb, *Strong-Arming the States to Conduct Background Checks for Handgun Purchasers: An Analysis of State Autonomy, Political Accountability, and the Brady Handgun Violence Prevention Act*, 48 WASH. U. J. URB. & CONTEMP. L. 373, 380-81 (1995) ("Federalism creates a zone of autonomy, which the federal government should respect in certain areas . . . 'Political accountability, a necessary feature of democratic federalism, is the 'answerability' of representatives to the represented.'" (quoting D. Bruce

and federalism would reemerge in *Printz v. United States*,[88] the 1997 decision invalidating portions of the Brady Handgun Act.

In 1995, when the Court announced its decision in *United States v. Lopez*,[89] it again curtailed Congress' regulatory power. In *Lopez*, the Court invalidated the Gun Free School Zones Act[90] by stating that Congress did not establish the requisite nexus between guns in schools and interstate commerce.[91] With this decision, the Court ruled for the first time since the New Deal that Congress had exceeded its Commerce Clause powers.

The *Lopez* Court refused to adopt the *Wickard v. Filburn*-type aggregate effects philosophy[92] and stated that to uphold the act, "we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States."[93] The Act had tried to regulate the two traditionally state areas of crime and education. With this decision, the Court reaffirmed its new found commitment to state autonomy and its commitment to maintaining a federal-state balance.[94] The *Garcia* notion of states finding protection solely within the federal political process appeared to be a thing of the past.[95]

Arguably, the Court is returning to the activism of the early 1930s.[96] As the Court did then, the current Court appears to be looking beyond the social and economic effects of its decisions and is concerning itself with principles of state sovereignty. The *New York* and *Lopez* cases concerned Congressional attempts to regulate matters that greatly affect society in the 1990s: radioactive waste and handgun violence. The Court rebuffed these efforts at solving these problems and instead focused on notions of states' rights and federalism. It has been suggested, however, that these concerns with state sovereignty are a mask for the Court's frustration at the size and

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La Pierre, *Political Accountability in the National Political Process—The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. Rev. 577, 640 (1985)).

88. 117 S. Ct. at 2382.

89. 514 U.S. 549 (1995).

90. The Gun Free School Zones Act made it a federal offense for any individual knowingly to possess a firearm at a place that the individual knows or has reasonable cause to believe is a school zone. *See Id.* at 551.

91. *Id.* at 562-63.

92. In *Wickard v. Filburn*, the Court upheld regulation of a local farmer's homegrown wheat. *See supra* note 61 and accompanying text.

93. 514 U.S. at 567.

94. *See* Smith, *supra* note 61, at 1497.

95. *Garcia*, 469 U.S. 528 (1995).

96. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936). The Court seemed to solidify its opposition to the New Deal when it ruled in *Carter* that the Bituminous Coal Act of 1935 was an unconstitutional attempt at regulation by Congress.

scope of Congressional power.[97] This frustration, real or not, seems to reappear in the 1997 decisions. Again, Congress has attempted to address problems that face the country[98] and the Court has again turned to notions of federalism. Whether the Court has legitimate concerns about Congress over-reaching its constitutional bounds or whether the Court is simply erecting philosophical barriers to the proposed solutions to today's problems may be determined by examining the decisions from the 1997 Term.

III. DECISIONS IN 1997

In the history of our country, the Supreme Court has struck down only 141 laws.[99] In one week, however, during the 1997 Term, the Supreme Court struck down three federal laws.[100] What follows is an examination of those three decisions: *United States v. Printz*,[101] *City of Boerne v. Flores*,[102] and *Reno v. ACLU*.[103] At first glance, it appears that these decisions outline a new federalism.[104] Indeed, when the Court invalidated portions of the Brady Handgun Violence Prevention Act[105] in *Printz* and when it invalidated the Religious Freedom Restoration Act[106] in *City of Boerne*, the Court clearly asserted its belief in increased state power. However, the Court also invalidated the Communications Decency Act[107] in *Reno v. ACLU* by stating that Congress crossed the First Amendment line

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97. *See* Caminker, *supra* note 7, at 1088 ("Beneath the surface of the Court's opinions in *New York* and . . . other recent federalism cases, lurks a discernable and genuine lament about the tremendous expansion of congressional power since the Constitution's Founding, coupled with an apparent frustration over what to do about it.").

98. *Printz v. United States*, 117 S. Ct. 2365 (1997), concerned the regulation of handguns through the Brady Handgun Violence Prevention Act. *Reno v. ACLU*, 117 S. Ct. 2329 (1997), concerned Congress' attempt to regulate pornography on the Internet.

99. *See Morning Edition* (National Public Radio broadcast, July 2, 1997) (Nina Totenberg, NPR Reporter, interviewing David Strauss, editor of the Supreme Court Review and Law Professor at the University of Chicago).

100. *Id.*

101. 117 S. Ct. 2365 (1997). *See supra* note 2.

102. 117 S. Ct. 2157 (1997). *See supra* note 3.

103. 117 S. Ct. 2329 (1997). *See supra* note 4.

104. Laurence Tribe, Harvard Law professor, stated that "[t]he most consistent commitment of the current court is probably a vision of federalism that gives states considerably more autonomy and protection from the national legislature than any court in decades has done," *in* John A. Farrell, *In Session, A Streak of Pragmatism*, BOSTON GLOBE, June 28, 1997, at A1.

105. Pub. L. No. 103-159, Title I, 107 Stat. 1536 (1993).

106. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

107. Pub. L. No. 104-104, Title V, 110 Stat. 133 (1996).

by abridging free speech on the Internet.[108] Because the *Reno* decision does not involve the states' rights question, the Court's rationale for striking these three federal laws is not perfectly clear and concise. There is no single, unified and easy answer for the Court's actions. Taken together, these three decisions signal more than an increased recognition of state autonomy. These decisions reveal a Court that is concerned with the enlarged scope of federal power and is prepared to narrow that scope.[109]

A. *PRINTZ V. UNITED STATES*

The Gun Control Act of 1968[110] (hereinafter GCA) sets forth the federal scheme that governs the distribution of firearms.[111] The Brady Handgun Violence Prevention Act of 1993 amended the GCA.[112] The Brady Act requires the Attorney General of the United States to establish a national instant background check system for purchasers of handguns. It is mandated that this system be in place by November 30, 1998.[113] In the interim, the Act provides that local chief law enforcement officers (hereinafter CLEOs) must make efforts to perform background checks on potential handgun purchasers within five days of being notified by firearm dealers of potential sales.[114]

Jay Printz and Richard Mack are both CLEOs; Printz is the chief law enforcement officer in Ravali County, Montana and Mack is the chief law enforcement officer in Graham County, Arizona.[115] Both Printz and Mack objected to this interim provision of the Brady Act and filed separate actions challenging its constitutionality.[116] The argument put forth by Mack and Printz against the Act's constitutionality focuses on the authority of Congress to compel state officers to execute federal laws.[117] In both cases, the district courts found the provision of the Act to be unconstitution-

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108. *See* Reno v. ACLU, 117 S. Ct. at 2345 ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

109. *See* David Wagner, *The Rehnquist High Court?*, INSIGHT MAG., July 28, 1997, at 8 ("If there is a dominant theme in the court's recent cases, it is reining in the powers of Congress.").

110. Pub. L. No. 90-618, 82 Stat. 1213 (1968).

111. 117 S. Ct. at 2368. The Court outlines the scope of the Gun Control Act of 1968.

112. *Id.*

113. *Id.*

114. *Id.* at 2369.

115. *Id.*

116. 117 S. Ct. at 2369.

117. *Id.*

al.[118] The Ninth Circuit Court of Appeals, however, combining the cases, reversed the district courts and upheld the constitutionality of the Brady Act's provisions.[119] The Supreme Court granted certiorari.

In an opinion written by Justice Scalia, a 5-4 majority of the Supreme Court ruled that this interim provision of the Brady Act is an unconstitutional mandate by Congress.[120] Seeming to echo the *Schechter* Court that, "[e]xtraordinary conditions do not create or enlarge constitutional power,"[121] the Court stated that, "[t]he Constitution protects us from our own best intentions: It divides power among sovereigns . . . so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[122] In reaching its decision, the Court admitted that there was no constitutional text that addressed the question at hand.[123] In an opinion that hinged on somewhat subjective conceptions of constitutional policy,[124] the Court looked to support its decision with an examination of historical understanding, the structure of the Constitution

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118. *Id.* Both Courts found that the provision that outlined this interim system was severable from the rest of the Act. This allows a voluntary background check system to operate until the National system is in place. *Id. See* Mack v. United States, 856 F. Supp. 1372 (D. Ariz. 1994), *aff'd*, 117 S. Ct. 2365 (1997); Printz v. United States, 854 F. Supp. 1503 (D. Mont. 1994), *aff'd*, 117 S. Ct. 2365 (1997).

119. *Printz*, 117 S. Ct. at 2369. *See* Mack v. United States, 66 F.3d 1025 (9th Cir. 1995). The court referred to earlier decisions of the Supreme Court which allowed federal regulation and intervention in state affairs and business. *Id.* The court stated that in *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), the Supreme Court stated that the federal government could offer to preempt regulation in a given area and permit the states to avoid preemption if they regulate in a manner acceptable to Congress. Further, the court stated that in *FERC v. Miss.*, 456 U.S. 742 (1982), the Supreme Court permitted the federal government to require state utility regulators to consider prescribed federal standards in determining regulatory policies. The court stated that, "[a]gainst this background, there would appear to be nothing unusually jarring to our system of federalism in the Brady Act's requirement." *Mack*, 66 F.3d at 1029.

120. *Printz*, 117 S. Ct. at 2383.

121. *Schechter*, 295 U.S. at 528. *See supra* note 38 and accompanying text.

122. *Printz*, 117 S. Ct. at 2383 ("It matters not whether policymaking is involved . . . such commands are fundamentally incompatible with our constitutional system of dual sovereignty.").

123. *Id.* at 2370. The Court stated that, "there is no constitutional text speaking to this precise question." *Id.*

124. David Strauss, Law Professor at the University of Chicago and the editor of the Supreme Court Review, stated, "[i]t was really the Supreme Court saying, we think this legislation is ill-considered; we think it goes too far; we don't think there's a very good rationale for it, and we're gonna strike it down . . . [T]here was no single provision of the Constitution that they could point to. And there was also no well established body of judicial doctrine that they could point to." *Morning Edition* (National Public Radio broadcast, July 2, 1997).

and past jurisprudence.[125] However, much of the majority's opinion was written in defense to the dissent. For each historical example and structural interpretation, the dissent countered with an opposing interpretation. As a result, *Printz* is an opinion that does not rest on solid constitutional ground. It is an opinion based on a deep philosophical belief in state sovereignty that is written to reach a predetermined end consistent with that belief.

To support its position, the majority first examined instances early in our nation's history when state officials were asked to enforce federal prescriptions.[126] The Court presented a long list of statutes passed by an early Congress in which state judges were asked to perform federal functions.[127] These functions included such varied tasks as recording applications for citizenship, transmitting abstracts of citizenship, registering aliens seeking naturalization, issuing certificates of registry, resolving controversies between a captain and a crew of his ship concerning the seaworthiness of the vessel and hearing the claims of slave owners who had apprehended fugitive slaves.[128] In order to separate these early statutes from the mandate of the Brady Act, the majority argued that the enlistment of judges is distinct from the enlistment of state executives.[129] The argument of the majority is that while it may have been constitutional to enlist judges to perform federal duties, it is not constitutional to mandate state executives to do so.

The dissent objected to the majority drawing this fine distinction between adjudicative functions and executive functions with what it characterized as "empty formalistic reasoning."[130] The dissent further attacked the majority's distinction of Congress being able to request state

125. *Printz*, 117 S. Ct. at 2370.

126. *Id.*

127. *Id.* *See* Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155 (Act mandating that state courts maintain a registry of aliens seeking naturalization). *See also* Act of Mar. 26, 1790, ch. 3, § 1. 1 Stat. 103 (Act mandating state judges and clerks perform various duties with respect to applications for citizenship).

128. *See* Caminker, *supra* note 7, at 1045, n.176 ("[T]wo centuries ago, state and local judges and associated judicial personnel performed many of the functions today performed by executive officers, including such varied tasks as laying city streets and ensuring the seaworthiness of vessels. Thus, these early commandeering statutes clearly represent executive rather than judicial commandeering.").

129. *Printz*, 117 S. Ct. at 2371. ("These early laws establish, at most, that the Constitution was originally understood to permit imposition of an obligation on state judges to enforce federal prescriptions, insofar as those prescriptions related to matters appropriate for the judicial power.").

130. *Id.* at 2392.

assistance but not being able to command it.[131] In support of its argument, the dissent pointed to the example of President Wilson utilizing the services of state officers to implement the World War II draft.[132] The dissent argued that the fact that Wilson requested the help of the states rather than commanded it reveals that he was an effective statesman but does not mean that he could not have made the assistance mandatory had he felt it necessary in that national emergency.[133]

In its discussion of the historical uses of state judges and state executive officials, the majority of the Court relied heavily on fine distinctions such as the distinction between judges and state executives. Further, the majority simply relied on the lack of precedent of commandeering of state officials into federal service to deny its constitutionality in this case.[134] The dissent attacked the majority's reasoning and said the majority's arguments lacked affirmative support and were against the substantial weight of the evidence in opposition.[135] The dissent stated that, "[a]bsent even a modicum of textual foundation for its judicially crafted constitutional rule, there should be a presumption that if the Framers had actually intended such a rule, at least one of them would have mentioned it."[136]

Undaunted by the dissent's completely opposite interpretation of historical commandeering statutes, however, the majority of the Court next built on its evidence by examining the structure of the Constitution and its history.[137] The majority stated with certainty that the Constitution established a system of dual sovereignty.[138] In the majority's view, that system of dual sovereignty does not allow the federal government to issue mandates

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131. *Id.* at 2393. The majority referenced passages from The Federalist Papers which seem to say that the Federal government may enlist the states to execute federal laws, but stated that, "none of these statements necessarily implies what is the critical point here that Congress could impose these responsibilities without the consent of the States. They appear to rest on the natural assumption that the States would consent to allowing their officials to assist the Federal Government." *Id.* at 2372.

132. *Id.* at 2393.

133. *Id.*

134. *Printz*, 117 S. Ct. at 2372. The Court outlines instances where state judges and clerks were asked to perform federal functions. Although the dissent analogizes these early statutes with the present situation, the majority refuses to concede that commandeering state court officials into federal service is precedent for commandeering other state officials. The majority states, "we do not think the early statutes imposing obligations on state courts imply a power of Congress to impress the state executive into its service." *Id.*

135. *Id.* at 2394.

136. *Id.*

137. *Id.* at 2376.

138. *Id.* ("It is incontestible that the Constitution established a system of dual sovereignty.").

to state officials. To add weight to this interpretation, the majority looked to the Founding Fathers by examining the writings of Hamilton, Madison and Jay in The Federalist Papers.[139]

The majority, using The Federalist No. 15 as support, stated that, "the Framers' experience under the Articles of Confederation had persuaded them that using the States as the instruments of federal governance was both ineffectual and provocative of federal-state conflict."[140] The Court referred to Madison who stated that local and municipal authorities form "distinct and independent portions of the supremacy" and are not subject "within their respective spheres, to the general authority."[141] This language, according to the majority, supports the proposition that the Framers explicitly chose a Constitution that did not give Congress the power to regulate the states.[142]

The dissent, however, also turned to The Federalist Papers to rebut the majority's interpretation of the Framers' intent. The dissent quoted Alexander Hamilton in The Federalist No. 27 that the Constitution, "by extending authority of the federal head to the individual citizens of the several States, will enable the government to employ the ordinary magistrate of each, in the execution of its laws."[143] According to the dissent, this unambiguous language stands for the proposition that the federal government has the power to demand that local officials implement national policy programs.[144]

To explain the difference in interpretation of the Framers' intentions, the dissent pointed out that the majority looked for evidence that the national government actually exercised such power in the early years of our

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139. *See* ALEXANDER HAMILTON ET AL., THE FEDERALIST PAPERS, (Clinton Rossiter ed., NAL Penguin Inc. 1961). The editor states in his introduction to this edition that, "*The Federalist* stands third only to the Declaration of Independence and the Constitution itself among all the sacred writings of American political history." *Id.* at vii. The Federalist Papers were a series of essays written by "Publius" in reality Alexander Hamilton, James Madison and John Jay and published in New York newspapers in an effort to gain support for the proposed Constitution. *See Id.* at ix.

140. *Printz*, 117 S. Ct. at 2377. The Court only references The Federalist No. 15 when making this statement. The Court stated that "[w]e have set forth the historical record in more detail elsewhere, see New York v. United States, 505 U.S., at 161-166." *Id.*

141. *Id.* (quoting The Federalist No. 39. *See* Hamilton *supra* note 139, at 245).

142. *Id.* The Court stated that, "the Framers explicitly chose a Constitution that confers upon the Congress the power to regulate individuals, not States." *Id.*

143. *Id.* at 2389.

144. *Id.* To bolster this point, the dissent again quoted Hamilton: "[T]he legislatures, courts, and magistrates, of the respective members, will be incorporated into the operations of the national government as far as its just and constitutional authority extends; and will be rendered auxiliary to the enforcement of its laws." *Id.*

country.[145] Because our history is bereft of such evidence, the majority concluded that the Framers did not intend the federal government to have such power.[146] In response to that logic, the dissent stated that following such a position would undermine most of the post-New Deal Commerce Clause jurisprudence.[147] The dissent then quoted Justice O'Connor from her *New York v. United States* opinion stating that, "[t]he [F]ederal [G]overnment undertakes activities today that would have been unimaginable to the Framers."[148]

The dissent found the answer to the constitutionality of the Brady Act interim provision in the Necessary and Proper clause of Article I, Section 8 of the Constitution.[149] The clause states that Congress has the power, "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers."[150] The dissent argued that the grant of authority in the Necessary and Proper clause is adequate to support the temporary enlistment of local police officers to run background checks.[151] The dissent did not find that the Tenth Amendment[152] restricts this grant of authority. The Tenth Amendment, according to the dissent, refers to powers "not" delegated to Congress but it does not profess to limit the exercise of powers which are delegated to Congress.[153]

The majority addressed the dissent's argument and, at the same time, reaffirmed its commitment to states' rights. The Court stated that, notwithstanding the Necessary and Proper clause, when a law violates the principle of state sovereignty, it is not a law that is proper for executing the Commerce Clause.[154] The Court found support in its *New York* deci-

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145. *Printz*, 117 S. Ct. at 2389.

146. *Id.* at 2370.

147. *Id.* at 2391. The dissent stated that, "we have never suggested that the failure of the early Congresses to address the scope of federal power in a particular area or to exercise a particular authority was an argument against its existence."

148. *Id.* (quoting New York v. United States, 505 U.S. at 157).

149. *Id.*

150. U.S. CONST., art. I, §8; *See Printz*, 117 S. Ct. at 2387.

151. *Printz*, 117 S. Ct. at 2387. The dissent argued that "[t]he additional grant of authority in that section of the Constitution . . . is surely adequate to support the temporary enlistment of local police officers in the process of identifying persons who should not be entrusted with the possession of handguns." *Id.*

152. U.S. CONST. amend. X. ("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.").

153. *Printz*, 117 S. Ct. at 2387.

154. *Id.* at 2378.

sion[155] in which it stated that Congress does not have the power to directly compel the states to require or prohibit certain acts. [156]

Having outlined its support for its decision with the examination of historical precedent and of The Federalist Papers, the majority stated the underlining rationale for its decision. That rationale is a belief that the states have definite and separate powers that cannot be usurped by the federal government.[157] It is this fundamental belief in state sovereignty that defines this opinion. The majority stated that, "[i]t is the very principle of separate state sovereignty that such a law offends, and no comparative assessment of the various interests can overcome that fundamental defect."[158] The Court echoed the rationale that was prevalent among the early New Deal Court that crisis is not enough to enlarge the power of Congress.[159] The majority stated that power should not be concentrated in any one branch of government as a quick solution to the "crisis of the day."[160] The Court declared that the Brady Act's interim provision is "fundamentally incompatible with our constitutional system of dual sovereignty."[161]

In examining this opinion, the majority's commitment to states' rights is apparent. The notion of federalism that first emerged in Chief Justice Rehnquist's opinion in *Usery*[162] is gaining strength.[163] However, there is something more in this opinion. There is no doubt that the Court is cementing its vision of dual sovereignty. What is also happening here, however, is the Court venting its frustration with the largess of the federal government.[164] Throughout this opinion, the Court often relied on the principles that were outlined in *New York*,[165] including the notion of the need for Congress to have accountability for its actions. The Court stated

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155. New York v. United States, 505 U.S. 144 (1992).

156. *Printz*, 117 S. Ct. at 2378. ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts.").

157. *Id.* at 2381. ("It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority.").

158. *Id.* at 2383.

159. *See, e.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

160. *Printz*, 117 S. Ct. at 2383.

161. *Id.* at 2384.

162. Rehnquist wrote in *Usery* that the Tenth Amendment, "expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States' integrity." 426 U.S. 833, 843 (1975).

163. *See* Herman Schwartz, *The Nation Supreme Court Going Right by Using States Rights*, L.A. Times, October 5, 1997 at M2.

164. *See* Caminker, *supra* note 7 and accompanying text.

165. *New York*, 505 U.S. 144 (1992).

that, "[b]y forcing state governments to absorb the financial burden of implementing a federal regulatory program, Members of Congress can take credit for solving problems without having to ask their constituents to pay for the solutions with higher taxes. And even when the states are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects."[166] This language indicates an underlying antagonism toward the actions of Congress. This antagonism appears repeatedly throughout the 1997 decisions.

B. *CITY OF BOERNE V. FLORES*

In *City of Boerne v. Flores*,[167] the Court again illustrates antagonism toward the actions of Congress. Also, the Court reaffirms its commitment to states' rights. The case addresses the constitutionality of the federal Religious Freedom Restoration Act[168] (hereinafter RFRA) and concerns the St. Peter Catholic Church in the City of Boerne, Texas. St. Peter was built in 1923 and replicates the mission style of architecture.[169] The church, which seats 230 people, is too small for its congregation. In order to accommodate everyone, the church made plans for renovation and expansion.[170] A few months after plans were underway to enlarge the church, the City of Boerne passed an ordinance that mandated the Historic Landmark Commission to preapprove construction affecting historic landmarks or buildings in an historic district.[171] Because St. Peter was in an historic district, the Commission chose to deny the church's application for a building permit.[172] The Archbishop of San Antonio brought suit under RFRA[173] which prohibits government from burdening the free exercise of religion with a law of general applicability.[174] The City of Boerne questioned the constitutionality of RFRA and the district court concluded that Congress had exceeded its Fourteenth Amendment[175] power

166. *Printz*, 117 S. Ct. at 2382.

167. *City of Boerne*, 117 S. Ct. at 2160.

168. Pub. L. 103-141, 107 Stat. 1488 (1993).

169. *City of Boerne*, 117 S. Ct. at 2160.

170. *Id.* Approximately forty to sixty parishioners cannot be accommodated at Sunday mass.

171. *Id.*

172. *Id.*

173. Religious Freedom Restoration Act, Pub. L. 103-141, 107 Stat. 1488 (1993).

174. *City of Boerne*, 117 S. Ct. at 2160.

175. U.S. CONST. amend. XIV § 1 states 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

in enacting the law. The Fifth Circuit Court of Appeals disagreed and found the Act to be constitutional.[176] The Supreme Court granted certiorari.

Congress passed RFRA in direct response to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith.*[177] In the *Smith* case, the Court considered a challenge to an Oregon statute of general applicability that made use of the drug peyote a criminal offense.[178] Members of a Native American church objected to the law because they claimed it interfered with their free exercise of religion guaranteed by the Constitution.[179] The practice of the church members was to ingest peyote for sacramental purposes.[180] The Court did not find the state law unconstitutional and ruled that neutral, generally applicable laws may be applied to religious practices even without a compelling state interest.[181]

Many members of Congress criticized the *Smith* decision and this disagreement resulted in passage of RFRA. Congress stated that laws that are neutral toward religion can nevertheless interfere with the exercise of religious freedom.[182] Further, Congress stated that, "in [*Smith*], the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion."[183] The stated purpose for RFRA was then, "to provide a claim or defense to persons whose religious exercise is substantially burdened by government."[184] To enact RFRA, Congress relied on its Fourteenth Amendment enforcement power.[185]

The Supreme Court ruled that RFRA was unconstitutional. Following a traditional federalist approach, the Court determined that Congress

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deny to any person within its jurisdiction the equal protection of the laws." Section 5 states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

176. *City of Boerne,* 117 S. Ct. at 2160. The Fifth Circuit court stated that the Fourteenth Amendment does empower Congress to enact RFRA and that RFRA does not usurp the judiciary's power to interpret the Constitution. *See* Flores v. City of Boerne, 73 F.3d 1352 (1996), *aff'd* 117 S. Ct. 2157 (1997).

177. 494 U.S. 872 (1990).

178. *Id.*

179. *Id. See* U.S. CONST. amend. I. ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.").

180. *City of Boerne,* 117 S. Ct. at 2160.

181. *Id.* at 2161.

182. *Id.* at 2161 (quoting Congressional hearings and floor debates).

183. *Id.* (quoting Congressional hearings and floor debates).

184. *Id.* (quoting RFRA, 42 U.S.C. §2000bb(b)).

185. *See supra* note 175.

exceeded its power and intruded into traditional state areas.[186] The Court looked at the scope of Congress' power under Section 5 of the Fourteenth Amendment.[187] According to the majority, Section 5 gives Congress the power only to enforce the provisions of the Fourteenth Amendment.[188] The Court has described this power as remedial.[189] According to the Court, RFRA was not remedial.[190]

While admitting that "the line between measures that remedy or prevent unconstitutional actions and measures that make a substantive change in the governing law is not easy to discern," the Court nevertheless ruled that Congress crossed that line when passing RFRA.[191] Congress' stated objective for RFRA was to prevent and remedy laws that are enacted with the unconstitutional object of targeting religious beliefs.[192] RFRA serves to invalidate any law which imposes a substantial burden on religious practice unless that law is justified by a compelling interest and is the least restrictive means of accomplishing that interest.[193] The Court argued that this type of preventive rule can sometimes be remedial. To be remedial, however, there needs to be a congruence between the means used and the ends to be achieved.[194]

The Court stated that, "RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning."[195] The problem with the legislation, according to the Court, was that Congress did not provide enough evidence of instances where general applicability laws were passed for discriminatory reasons.[196] This lack of evidence of discrimination puts RFRA out of proportion to the proposed remedial ends.[197] The Court compared RFRA with the Voting Rights Act of 1965.[198] When

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186. *City of Boerne*, 117 S. Ct. at 2171. Declaring that RFRA is overbroad, the Court stated that "[t]his is a considerable congressional intrusion into the States' traditional prerogatives and general authority to regulate the health and welfare of their citizens." *Id.*

187. *Id.* at 2163. ("As broad as the congressional enforcement power is, it is not unlimited.").

188. *Id.*

189. *Id.* The Court quoted South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) to illustrate that this power has previously been interpreted as "remedial."

190. *Id.*

191. *City of Boerne*, 117 S. Ct. at 2164.

192. *Id.* at 2168.

193. *Id.* at 2169.

194. *Id.*

195. *Id.* at 2170.

196. *City of Boerne*, 117 S. Ct. at 2169.

197. *Id.* at 2170.

198. *Id.* at 2169. The Court stated that, "[t]he constitutional propriety of [legislation under the Enforcement Clause] must be judged with reference to the historical experience . . .

passing the Voting Rights Act, Congress had evidence of "subsisting and pervasive discriminatory and therefore unconstitutional use of literacy tests"[199] as voting requirements. In the case of RFRA, though, Congress did not have any such evidence of pervasive discriminatory practices.[200]

According to the Court, not only was RFRA passed despite little evidence of the problem it is proposed to remedy but also is unconstitutionally overbroad.[201] RFRA applies to all levels of government federal, state and local. The Court stated that under RFRA, "[a]ny law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion."[202] Laws that are challenged would have to pass a "compelling state interest" test.[203] The Court feared that many laws would not be able to pass such strict scrutiny.[204]

When discussing the overbroad scope of RFRA, the Court put forth its states' rights argument.[205] The Court stated that, "[t]he statute . . . would require searching judicial scrutiny of state law with the attendant likelihood of invalidation. This is a considerable congressional intrusion upon the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."[206] RFRA curtails the "traditional general regulatory power" of the states.[207] Additionally, the Court pointed to the substantial cost of litigation that the states face defending challenges to their laws under RFRA.[208] The Court noted that there are countless state laws which impose a substantial burden on a large class of individu-

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it reflects." (quoting South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). *Id.* at 2166, 2167.

199. *Id.* at 2167.

200. *Id.* at 2169. The Court stated, "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry." *Id.* Further, the Court stated that "[t]he history of persecution in this country detailed in the hearings mentions no episodes occurring in the past 40 years." *Id.*

201. *City of Boerne*, 117 S. Ct. at 2170.

202. *Id.*

203. *Id.* at 2171. ("If an objector can show a substantial burden on his free exercise, the State must demonstrate a compelling governmental interest and show that the law is the least restrictive means of furthering its interest. Claims that a law substantially burdens someone's exercise of religion will often be difficult to contest.").

204. *Id.*

205. *Id.*

206. *City of Boerne*, 117 S. Ct. at 2171.

207. *Id.*

208. *Id.* RFRA has received a lot of press because of the cost to the states in defending frivolous lawsuits brought by prison inmates claiming that their religious freedom had been abridged. *See* Rossum, *supra* note 5.

als.[209] The Court does not believe that persons whose religious beliefs were incidentally burdened due to a law of general applicability were burdened any more than other citizens.[210] According to the Court, this is the "reality of the modern regulatory state."[211]

This opinion is another clear reiteration of the majority's commitment to federalism. The majority again has drawn a clear line between federal and state power. According to this Court, congressional power is limited and enumerated.[212] After making the argument that Congress had exceeded its power and had trampled on traditional state authority, the Court made one last argument against RFRA. In the last argument, the majority's antagonism toward the actions of Congress is seen.

The antagonism is evident when the Court essentially rebuffs Congress for its attempt to overturn its decision in *Smith*.[213] The Court stated, "[w]hen the political branches . . . act against the background of a judicial interpretation of the Constitution already issued, it must be understood that . . . the Court will treat its precedents with the respect due them."[214] In this case, Congress went beyond its authority. The precedent of the *Smith* decision, according to the Court, "must control."[215] The Court believes that Congress, by passing RFRA, essentially interpreted the Constitution.[216] This, according to the majority, is not the proper role for Congress.[217] The Court ruled that it is the province of the judicial branch to

209. *Id.* The Court makes reference to the particular zoning regulation at issue here.

210. *Id.* ("When the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens . . . .").

211. *Id.*

212. *See* Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997 at A14.

213. *City of Boerne*, 117 S. Ct. at 2171. The Court stated that, "[o]ur national experience teaches that the Constitution is preserved best when each part of the government respects both the Constitution and the proper actions and determinations of the other branches." *Id.* at 2172.

214. *Id.* at 2172.

215. *Id.*

216. *Id.* ("RFRA was designed to control cases and controversies, such as the one before us . . . .").

217. *See Restoring the First Freedom*, DES MOINES REG., July 7, 1997 at 6 ("'Take that, Supreme Court!' the lawmakers seemed to say. And the court replied by striking down the Religious Freedom Restoration Act. It is the job of the court, not the Congress, to say what the Constitution means, the justices said.").

say what the law is.[218] Arguably, the majority's view of its new federalism embraces a separation of powers that assigns the role of ultimate constitutional interpretation to the Court.[219] This, according to some scholars, is a view of judicial supremacy that "would have embarrassed even John Marshall."[220]

C. *RENO V. AMERICAN CIVIL LIBERTIES UNION*

Reno v. American Civil Liberties Union[221] is not a case that is concerned with states' rights. In *Reno*, the Court addresses Congress' ability to pass the Communications Decency Act ("CDA")[222] as an effort to protect minors from harmful material on the Internet.[223] The CDA comprises Title V of the Telecommunications Act of 1996.[224] The stated purpose of the Telecommunications Act was to reduce regulation and encourage development of new telecommunications technologies.[225] Title V was the only title of the Act to be challenged.[226] The two provisions of the CDA that were challenged were commonly known as the "indecent transmission" provision and the "patently offensive display" provision.[227]

Immediately after the President signed the Act, twenty plaintiffs filed suit claiming that the two provisions of the CDA were unconstitutional.[228]

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218. *City of Boerne*, 117 S. Ct. at 2172. This notion was originally articulated in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). *Id.* at 177.

219. The Court as ultimate interpreter of the Constitution was also articulated in the early New Deal case of *Carter v. Carter Coal*, 298 U.S. at 296.

220. Wagner, *supra* note 109, quoting Robert George, professor of political science at Princeton University and a former scholar-in-residence to Chief Justice William Rehnquist. According to George, the *Boerne* decision goes beyond the precedent of Marbury which states that it is the role of the judiciary to say what the law is.

221. Reno v. ACLU, 117 S. Ct. 2329 (1997).

222. Pub. L. No. 104-104, Title V, 110 Stat. 133 (1996).

223. The Internet is an international network of interconnected computers which allows people to communicate with one another in "cyberspace." *See* Reno v. ACLU, 117 S. Ct. 2329, 2334 (1997). The Court gives a detailed explanation of the beginning and the growth of the Internet. *Id.*

224. Pub. L. No. 104-104, 110 Stat. 56 (1996).

225. *See Reno*, 117 S. Ct. at 2337, 2338. The major portions of the Telecommunications Act were designed to promote competition in the local telephone service market, the multi-channel video market, and the market for over-the-air broadcasting. *Id.* at 2338.

226. *Id.*

227. 47 U.S.C.A. § 223(a) (Supp. 1997) prohibits the knowing transmission of obscene or indecent messages to any recipient under 18 years of age. 47 U.S.C.A. § 223(d) (Supp. 1997) prohibits the knowing sending or displaying of patently offensive messages in a manner that is available to a person under 18 years of age.

228. The plaintiffs ranged from the American Civil Liberties Union to the Queer

A week later, a District Court judge issued a temporary restraining order against enforcement of the provisions.[229] Shortly thereafter, a three judge panel on the District Court enjoined the government from enforcing the provisions.[230] The Government appealed to the Supreme Court under the Act's special review provisions.[231]

Calling the breadth of the CDA's coverage "wholly unprecedented,"[232] the Court affirmed the judgment of the district court.[233] The problem with the Act, according to the Court, was its vague and over-broad language.[234] The Court stated the words that Congress chose to use in the act, such as "indecent" and "patently offensive," are general, undefined terms which can cover large amounts of non-pornographic material.[235] Material which has serious educational or other value would be banned.[236] Further, the statute undeniably silences speakers whose messages should be afforded First Amendment protection.[237] The Court stated that this burden on adult speech is unacceptable and an unconstitutional violation of free speech.[238]

The vagueness of the CDA concerned the Court for two reasons. First, because the CDA was a content-based regulation of speech it raised First Amendment concerns.[239] If a statute such as this has overly vague language, it is difficult to know which speech is banned and which speech is not banned. It is for this reason that a vague statute will have a chilling effect on free speech.[240] People, uncertain as to what is illegal, will opt for no speech at all. Second, the CDA is a criminal statute. This increased

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Resources Directory. A second suit was filed after the temporary restraining order was issued. The two suits were consolidated. For a complete list of the plaintiffs, *see Reno,* 117 S. Ct. at 2339, nn. 27-28.

229. *Id.* at 2339.

230. *Id.*

231. *Id.* at 2340.

232. *Id.* at 2347.

233. *Reno*, 117 S. Ct. at 2351.

234. *Id.* at 2344.

235. *Id.* at 2347.

236. *Id.* at 2344. The Court questions whether, "a speaker could confidently assume that a serious discussion about birth control practices, homosexuality, the First Amendment . . . or the consequences of prison rape would not violate the CDA?" *Id.*

237. *Id.* at 2344. U.S. CONST. amend. I states that "congress shall make no law . . . abridging the freedom of speech . . . ."

238. *Reno,* 117 S. Ct. at 2346. ("In order to deny minors access to potentially harmful speech, the CDA effectively suppresses a large amount of speech that adults have a constitutional right to receive and to address to one another.").

239. *Id.* at 2344.

240. *Id.*

deterrent effect, according to the Court, also has a chilling effect on free speech. The severity of the possible criminal punishment, up to two years in prison, could cause people to refrain from speech that may not be prohibited by the CDA.[241]

Because these free speech concerns are so strong in this case, the Court placed the heavy burden on the Government to explain why a less restrictive provision would not have been as effective as the CDA.[242] The Court stated that Congress could not sustain that burden. The CDA was not narrowly tailored enough to survive the Court's scrutiny and was therefore violative of the First Amendment's guarantee of freedom of speech.[243]

This case differs from *Printz* and *City of Boerne* in that it does not have a states' rights theme. The Court here is concerned primarily with the scope of Congress' power and what the Court perceives as Congress' propensity to pass over-broad, poorly thought-out legislation.[244] The Court pointed out that the two provisions in question were added in executive committee after the hearings on the Telecommunications Act were completed and that no hearings were held prior to the passing of the CDA.[245] The Court quoted Senator Leahy, speaking at the one-day hearing that was held after the adoption of the CDA by the Senate: "The Senate went in willy-nilly, passed legislation, and never once had a hearing, never once had a discussion other than an hour or so on the floor."[246] The Court referred to this lack of Congressional inquiry when it concluded that the CDA was not drafted in sufficiently narrow terms.[247]

Much like it did in *Printz*,[248] the Court again echoed the view of the early New Deal Court that valuable social plans are not to be afforded

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241. *Id.* at 2345. ("The severity of criminal sanctions may well cause speakers to remain silent rather than communicate even arguably unlawful words, ideas, and images.").

242. *Id.* at 2348.

243. *Id.* ("Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.").

244. *Id.* at 2344. The Court argued that the vagueness of the CDA, "undermines the likelihood that the CDA has been carefully tailored to the congressional goal of protecting minors from potentially harmful materials." *Id.*

245. *Id.* at 2338.

246. *Id.* at 2338, n. 24. After the Senate adopted the two statutory provisions challenged in this case, the Senate Judiciary Committee did conduct a one-day hearing on "Cyberporn and Children." Hearing on S. 892 before the Senate Committee on the Judiciary, 104th Cong., 1st Sess., 7-8 (1995) (statement of Patrick J. Leahy, U.S. Senator from the state of Vermont).

247. *Reno*, 117 S. Ct. at 2348.

248. *Printz*, 117 S. Ct 2365 (1997).

increased deference.[249] The Court made reference to the important purpose of the act, to protect children from exposure to sexually explicit material, but stated that the importance of the purpose "does not foreclose inquiry into its validity."[250] The Court reaffirmed its commitment to making sure Congress has designed its statute in a way so that the purpose is accomplished without imposing an unnecessarily great restriction on speech.[251] In this case, as it did with its examination of the statutes at question in *Printz* and *City of Boerne*, the Court refused to defer to the judgment of Congress. According to the Court, Congress has a duty to afford ample legislative attention to an Act and must not use language that is vague and over-broad.[252] The Court invalidated the law because Congress failed its duty in this case.

IV. ANALYSIS

While it is unprecedented for the Supreme Court to invalidate three federal laws in one week, it is even more so if these decisions signal a fundamental shift in Supreme Court jurisprudence.[253] If this is a new federalism it is not a federalism that is concerned solely with state autonomy and clear, delineated lines of state and federal power. There is more reasoning to these decisions. Led by Chief Justice Rehnquist,[254] these

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249. The Court stated in *Railroad Retirement Board v. Alton R.R. Co.*, that, "though we should think that the measure embodies a valuable social plan and be in entire sympathy with its purpose and intended results, if the provisions go beyond the boundaries of constitutional power we must so declare." 295 U.S. 330, 346 (1935).

250. *Reno*, 117 S. Ct. at 2346.

251. *Id.* at 2347.

252. *Id.* at 2347, n.41. The Court makes reference to an earlier case, Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989). That case, like this case, involved a statute which Congress gave little legislative attention to prior to passage. Quoting Sable, the Court stated, "aside from conclusory statements during the debates by proponents of the bill, as well as similar assertions in hearings on a substantially identical bill the year before . . . the congressional record presented to us contains no evidence as to how effective or ineffective the FCC's most recent regulations were or might prove to be . . . . No Congressman or Senator purported to present a considered judgment with respect to how often or to what extent minors could or would circumvent the rules and have access to dial-a-porn messages." *Id.*

253. *See* Marcia Coyle, *Was This Term Historic?*, NAT'L L. J., Aug. 11, 1997, at B5. The author states that, "[i]n the term that just ended, remarkable for the number of pathbreaking issues confronting the justices, some court scholars are reluctant to attach the "historic" label, but almost all agree that this term produced decisions with profound significance for the structure of American government." *Id.*

254. Chief Justice Rehnquist was in the majority for these three decisions. *See* David G. Savage, *Supreme Court Grants States a Power Surge*, L.A. TIMES, June 29, 1997, at A1.

decisions illustrate a move by the conservative members of the Court to curtail the regulatory power of the national government.[255] This effort is based on a strong belief in states' rights but, as these cases illustrate, it is often driven by an antagonism toward the actions and the largess of Congress.

The origins of this move by the Court to rein in the powers of Congress can be found in the *Usery* decision in 1975.[256] That decision, written by Justice Rehnquist, overturned amendments to the Fair Labor Standards Act which would have extended the Act's minimum wage and maximum hour provisions to employees of state governments.[257] In reaching its decision, the Court discussed essential attributes of state sovereignty that were beyond the reach of Congress[258] and the Court warned of the national government "devour[ing] the essentials of state sovereignty."[259] Much as it did in the *Printz* case in 1997, the majority's decision in *Usery* in 1975 rested largely on a philosophical belief in state sovereignty and the dangers of a large and powerful Congress and not on a specific provision of the Constitution.[260] The concerns of the dissent in *Usery* are strikingly similar to those echoed by the dissent in the *Printz* case.[261] In *Printz*, the dissent was concerned about what it called a "judicially crafted constitutional rule."[262] Likewise, over twenty years ago, the dissent in *Usery* stated, "[m]y Brethren thus have today manufactured an abstraction without substance, founded neither in the words of the Constitution nor on precedent."[263] Perhaps because the majority's essential attributes theory was not founded on a strong constitutional basis, it did not survive scrutiny. *Usery* was overturned by *Garcia v. San Antonio Metropolitan Transit Authority*.[264]

Discussing Chief Justice Rehnquist, Savage states that, "[i]n his view, the [Constitution] leaves most government decisions to state legislatures, city councils and local boards, not to Congress, federal agencies or judges." *Id.*

255. *See* Schwartz *supra* note 163 and accompanying text.

256. *See Usery*, 426 U.S. 833 (1975).

257. 426 U.S. at 845. The Court stated that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." *Id.*

258. *Id.*

259. *Id.* at 855.

260. *See Usery*, 426 U.S. 833 (1975).

261. *See id.* at 856 (Brennan, J., dissenting).

262. *See Printz*, 117 S. Ct. at 2364.

263. *Usery*, 426 U.S. at 860.

264. *See Garcia*, 469 U.S. 528 (1985).

Twenty-one years after Rehnquist voiced his concerns about the national government devouring state sovereignty the Court is again revisiting the question of the scope of federal power over the states. This concern with limits and lines of authority noticeably began with the *New York* decision in 1992,[265] continued with *Lopez*[266] and has been rooted firmly into Constitutional jurisprudence with these 1997 decisions. In *New York*, the Court limited Congress' power to regulate nuclear waste.[267] In *Lopez*, the Court did the same with gun control.[268] Likewise the Court in *Printz*, *City of Boerne*, and *Reno* limited Congress' power to regulate gun control, religious freedom and the Internet.

The majority's concerns with the scope of federal power manifests itself in a number of ways in these decisions. First, the commitment to states' rights is apparent.[269] These concerns are clearly articulated in both *Printz* and *City of Boerne*. Referring to the Brady Act's provision for handgun background checks, the Court states that it is "fundamentally incompatible" with our system of dual sovereignty.[270] Similarly, in response to RFRA, the Court calls it a "considerable intrusion into the States' traditional prerogatives."[271] The Court appears to be resurrecting the notion that there are essential attributes of state sovereignty that cannot be usurped by Congress. Indeed, other decisions in the 1997 Term, although not invalidating acts of Congress, did reinforce state power.[272]

In addition to its concerns about state sovereignty, the majority also expressed uneasiness with Congress enlarging the scope of its power in response to a perceived crisis or national problem. Echoing the early New Deal Court, this Court does not see any reason why the powers of the

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265. *See New York*, 505 U.S. 144 (1992).

266. *See Lopez*, 514 U.S. 549 (1995).

267. *New York*, 505 U.S. 144 (1992).

268. *Lopez*, 514 U.S. 549 (1995).

269. *See* John Aloysius Farrell, *Pragmatism, High-profile Cases Constitutional 'Common Sense' is Applauded*, RICHMOND TIMES-DISPATCH, June 29, 1997, at A12. (quoting Laurence Tribe, Harvard Law Professor, "The court has clearly reaffirmed and underscored the depth of its constitutional commitment to states' rights. The most consistent commitment of the current court is probably to a vision of federalism that gives states considerably more autonomy and protection from the national legislature than any court in decades has done.").

270. *Printz*, 117 S. Ct. at 2383.

271. *City of Boerne*, 117 S. Ct. at 2171.

272. *See* Kansas v. Hendricks, 117 S. Ct. 2072 (1997). The Court upheld a state "sexual predator" law which served to indefinitely confine prisoners who were convicted of sexual crimes if they are believed to be "mentally abnormal." *See also* Washington v. Glucksberg, 117 S. Ct. 2258 (1997). The Court ruled that states could pass legislation that would criminalize doctor-assisted suicide.

federal government should be enlarged to remedy a crisis or address a unique problem.[273] The early New Deal Court was considered activist because it put its belief in dual federalism and states' rights over the social or economic effects of its decisions.[274] The same can be argued for this majority. In the *Reno* decision, the Court admitted that protecting children from pornography on the Internet was important. However, the Court was unequivocal in stating that this important purpose does warrant blanket deference to Congress.[275] Similarly, in *Printz*, while admitting that gun control is an important objective, the Court stated that it must "resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day."[276]

The Court is concerned also with Congress not being accountable for its actions. In *Printz*, the Court stressed this need for accountability.[277] The Court did not like the fact that Congress could insulate itself from criticism by essentially delegating the dirty work to the state governments.[278] The cost of performing background checks was borne by local law enforcement as was the blame for problems and defects of the system.[279] This concern was first voiced in *New York* when the Court stated that Congress should not be allowed to avoid public disapproval by forcing state governments to implement its directives.[280]

The Court, beginning with *New York* and continuing with these decisions, is attempting to rein in the power of Congress. The concerns of the majority, which include state autonomy, quick legislative fixes for problems, and the need for accountability, combine to form a movement by the Court to curtail the regulatory power of Congress. Although the concern for states' rights is a dominant theme, it is certainly not the sole reason for the Court's decisions. This is a majority that is frustrated with the

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273. *See, e.g., Schechter Poultry*, 295 U.S. at 528.

274. *See* Novak, *supra* note 35, at 92 ("The bulk of the Court's activism had been exhausted upon the national government's regulatory legislation, and often the rationale for those decisions had been a professed solicitude for the sovereignty of the states.").

275. *See Reno*, 117 S. Ct. at 2346.

276. *Printz*, 117 S. Ct. at 2383. ("Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear 'formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity.").

277. *See id.* at 2382. The Court criticized Congress for taking credit for solving problems without having to ask their constituents to pay for the solutions with higher taxes.

278. *Id.*

279. *Id.*

280. *See New York*, 505 U.S. 149 (1992).

expanding scope of congressional power.[281] Its decisions are fueled less by strict readings of the Constitution than by philosophical beliefs and frustration. Indeed in *Printz*, for example, the Court admitted that the text of the Constitution did not address the issue. Nevertheless, the Court found reasons to declare the interim provision of the Brady Act unconstitutional.

The Court has legitimate concerns about Congress passing legislation without giving serious thought about the implications or without serious thought about states' rights.[282] Americans clamor for solutions to today's problems and politicians fear losing elections if those solutions do not come quickly enough. Often quick-fix legislation is poorly thought-out.[283] With these decisions, the Court has gone beyond the role of acting as a check on Congressional impulsiveness. To an extent, the Court has placed itself at a level above that of the elected representatives in Congress. This situation can only bring problems to our system of checks and balances and separation of powers.[284]

Walter Dellinger, the Acting Solicitor General of the United States, stated that with these decisions the Court shifted away from deferring to the judgment of "the elected representatives of the people in Congress" and "has made its own judgment as its best reading of the Constitution."[285] This situation is likely to create problems.[286] Congress' ability to govern will be undermined by the Court declaring itself the ultimate interpreter of the Constitution and the ultimate decider of regulatory policy. The Court has erected barriers that will impede Congress' ability to regulate. For instance, can Congress mandate that a registry of missing children be compiled with input from the states? Following the *Printz* rationale, the answer is probably

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281. *See* Caminker *supra* note 7, at 1088, stating that, "[j]ust beneath the surface of the Court's opinions in *New York* . . . and other recent federalism cases, lurks a discernible and genuine lament about the tremendous expansion of congressional power since the Constitution's Founding, coupled with an apparent frustration over what to do about it."

282. *See supra* note 246 and accompanying text. Senator Leahy referred to Congress passing the CDA as going in "willy-nilly" and never once having a hearing.

283. *See supra* note 252.

284. Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, stated that the *City of Boerne* case "has serious implications for the balance of power between the court and the Congress." *See* Morning Edition, *supra* note 99 (interview with Orrin Hatch).

285. *Weekend Edition - Saturday* (National Public Radio Broadcast, June 28, 1997) (interview by Nina Totenberg, NPR Reporter, with Walter Dellinger).

286. Bruce Ackerman of Yale Law School stated that "[t]his very thin majority is, on its volition and under its own steam, trying to challenge the bedrock elements of everybody's idea of American government. A very rare event in American history." *Morning Edition, supra* note 99 (interview with Bruce Akerman).

no.[287] Congress' ability to address national problems will be hampered as a result of these decisions. The ramifications of the 1997 Term may not be readily apparent but will certainly shape future Congressional action.

V. CONCLUSION

The new federalism envisioned by the majority is a commitment to states' rights coupled with close scrutiny of Congressional regulations. This change in jurisprudence will undoubtedly affect the everyday lives of Americans. Relying on the *New York* decision, lower courts have already struck down laws that concern lead contamination and excessive timber exports.[288] Further, challenges to the "Motor Voter" law, the Clean Air Act, and the Child Support Recovery Act are being litigated.[289] And following its states' rights commitment, in the 1997 Term, the Supreme Court upheld a state's restrictive sexual predator law and paved the way for the states to outlaw assisted suicide.[290]

Issues such as the fate of affirmative action are already being affected by the Court's increased deference to the states.[291] The 1998 Term was to include an affirmative action case, *Piscataway Township Board of Education v. Taxman*.[292] Civil rights groups contributed to a settlement that ended the case before it reached the Court fearing that the Court would rule in a way that would essentially destroy affirmative action.[293] That these groups would take the unprecedented step of settling such a high profile case out of fear of how the Supreme Court might rule underscores the profound impact of the 1997 Term.

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287. *See Weekend Edition - Saturday* (National Public Radio Broadcast, June 28, 1997) (Scott Simon, NPR Reporter and Daniel Schorr, NPR Senior News Analyst).

288. *See* Schwartz *supra* note 163 and accompanying text.

289. *Id.*

290. *See supra* note 272 and accompanying text.

291. *See* Schwartz *supra* note 162 and accompanying text. (discussing the case of *Taxman v. Board of Educ.*, 91 F.3d 1547 (1996)).

292. *Piscataway, cert. dismissed*, 118 S. Ct. 595 (U.S. Dec. 2, 1997) (No. 96-679). This case concerns a white school teacher being fired over a black school teacher in order to preserve the school's diversity. *See* Nat Hentoff, *Escaping From The Supreme Court*, VILLAGE VOICE, December 30, 1997 at 22.

293. *See id.* The civil rights groups included the National Association for the Advancement of Colored People (NAACP), the National Urban League and the Legal Defense and Education Fund. A total of $433,500 was paid to Sharon Taxman for back pay, damages and lawyers' fees.

The Court has positioned itself to make sweeping decisions that affect the lives of all Americans. After Roosevelt's "Court Packing Plan,"[294] this country experienced fifty years of largely uncontested regulation by the federal government over innumerable aspects of daily life. Just as the United States was changed by that shift in Supreme Court jurisprudence, the country will be changed by this new federalism. The line between state and federal regulatory power is now more clearly drawn. Congress no longer can pass regulations and rely on deference to its judgment by the Court. This new federalism essentially ties the hands of the Congress. As the American public looks for federal solutions to problems that face large segments of the society, Congress will not be able to respond with sweeping legislation. The new federalism is built on the political ideology of the conservative majority of the Court rather than being founded on strong constitutional policy. Because the majority of the Court did not rely on strong constitutional precedent when it invalidated the laws at issue in *Printz*, *Reno* and *City of Boerne*, acceptable areas of Congressional regulation are no longer clearly defined. There are likely to be more attempts by Congress to pass sweeping regulation — for example, a national sexual predator registry or a national system designed to track persons who are delinquent in child support payments. Following the 1997 decisions, the success of these types of programs is unlikely. By sticking to an unbendable notion of federalism, the Court is sure to hinder many worthwhile efforts to improve American society.

MELANIE K. ST. CLAIR

294. *See supra* note 47 and accompanying text. The Court abandoned its "activist" stance and began deferring to the judgment of Congress.