UNITED STATES SENATE

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON THE CONSTITUTION

HEARINGS ON

THE REHNQUIST COURT'S FEDERALISM: CONSERVATIVE JUDICIAL ACTIVISM

TESTIMONY

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1. Introduction

Mr. Chairman, distinguished members, thank you for the opportunity to submit my remarks on the Rehnquist Court's federalism for your consideration.

My name is Michael Greve. For the past two years, I have directed the American Enterprise Institute's Federalism Project, where I conduct and supervise research and writing on American federalism. Prior to joining the American Enterprise Institute, I directed the Center for Individual Rights, a non-profit constitutional litigation firm. During my tenure, the Center served as defense counsel in *United States v. Morrison*,[1] one of the modern U.S. Supreme Court's landmark federalism decisions.

I received my Ph.D. in Government from Cornell University in 1987. I have written widely on federalism issues for both scholarly and journalistic publications. A list of my writings on the subject is attached, along with my Curriculum Vitae. Several of the listed articles expand upon topics covered only briefly in my testimony. The views expressed in those writings and today's testimony are my own; the American Enterprise Institute as an institution holds no views on the subject.

As a political scientist (rather than an attorney), my interest lies not only in the Supreme Court's doctrines but also in its role as a co-equal branch of government, and my testimony reflects that perspective. To state my conclusion up front: I believe that a sustained public debate about judicial activism serves a compelling public need and purpose. As my occupational pursuits suggest, I am still more firmly persuaded that a public debate about federalism would be a highly instructive and productive exercise. Conjoining those two debates, however, is bound to confuse rather than illuminate both of these important issues and the political decisions that are at stake.

2. *Conservative* Activism?

At the outset, an inquiry into the Rehnquist Court's federalism as a form of "conservative judicial activism" raises the question of whether the Court's federalism—assuming that it constitutes activism—is distinctly conservative. That is not a meaningless question. The conjunction of the ideological attribute ("conservative") with "activism" reflects a historical pattern: Periods that are commonly identified as activist—the Marshall Court, the *Lochner* Court, and the Warren-Brennan Court—owe their reputation to the fact that the Court's decisions during those periods coincided with the political agenda of identifiable political constituencies and, usually, of a political party. The politics have varied: the *Lochner* Court curtailed and impeded the Democratic Party's program, whereas the Brennan Court enacted the agenda of the Democratic Party's liberal constituencies. But the identification was close in both these (and all other) cases, which gave the "activism" charges of those eras their plausibility and political force.

The Rehnquist Court's federalism, in sharp contrast, is "conservative" only in the trivial sense of being the work of Justices who are generally viewed as conservative. Unlike activisms past, it does not enact, or thwart, a particular political program or agenda.[2] Its principal beneficiaries have been state and local governments, which are bipartisan; and criminal defendants, who are a constituency (of sorts) but not one on

which the Supreme Court would stake its reputation. With those exceptions, federalism has no consistent champion, conservative or otherwise (certainly not big business, which detests federalism). Conversely, federalism has no predictable political target or victim.[3] One can think of numerous contexts where judicially enforced federalism guarantees are useful for liberal constituencies and causes and/or are harmful to conservatives. The Court's decisions may have made it easier for state institutions to invade privately held patents: in what sense were those "conservative" decisions? The Court's Commerce Clause decisions have arguably (to my mind, conclusively) established that the national government may not criminalize the mere possession of marijuana: in what sense would *that* be a conservative decision?[4]

The Rehnquist Court's federalism, then, must be activist in some other sense. "Activism" may denote (1) the overruling of the Supreme Court's own precedents, and perhaps sharp departures from precedents; (2) an eagerness to enforce constitutional norms against the Congress, rather than state and local governments; or (3) departures from the constitutional text and structure.[5]

The Rehnquist Court has been so resolutely anti-activist in the first dimension (precedents) that little comment is required. While the Court has over the past decade shown a renewed judicial respect for enforceable federalism principles, that shift has occurred well within the confines of extant case law. The Justices have overruled only two past decisions in this area.[6] They have otherwise gone out of their way to reaffirm the Court's precedents, including questionable decisions that are in my mind best viewed as period pieces.[7] Accordingly, I will limit the remainder of my testimony to activism's second and third dimensions—the Court's role vis-à-vis the Congress, and its departures from the Constitution.

3. The Court and the Congress: The Record

Critics of an "activist" Rehnquist Court have often observed that the Court has, over the past decade, found unconstitutional (or "struck down," as the popular though inaccurate phrase has it) an unusually large number of congressional enactments—as distinct from invalidating state laws (typically, under the Bill of Rights). Many such decisions have implicated structural federalism issues.

The good sense behind this criticism lies in what the late Alexander M. Bickel, perhaps the greatest defender of the judiciary's "passive virtues," called the "antimajoritarian difficulty."[8] Congress is, under the Constitution, a co-equal branch of government, with an independent right and a responsibility to interpret and enforce the Constitution. Unlike the Supreme Court, Congress possesses an unquestionable democratic pedigree and legitimacy. So the Court ought to be circumspect in second-guessing Congress's judgments. For several reasons, however, the claim that the Rehnquist Court's federalism betrays an unusual lack of respect for the Congress seems quite unpersuasive.

First, and respectfully, charges of judicial aggression vis-à-vis the Congress would gain credibility if Congress itself were to guard its constitutional duties and prerogatives with greater care. The proliferation of expedited review provisions over the past years—most recently, in the just-enacted campaign finance reform legislation—

suggests that Congress does not in fact view itself as co-equal but rather as subordinate to a constitutionally supreme Supreme Court. The dearth of constitutional deliberation and argument in congressional debates points in the same direction. The political incentives that induce such conduct are perfectly understandable. Still, against a backdrop of congressional abdication, selective complaints about judicial overreach invariably look opportunistic rather than principled.[9]

Second, *federalism* decisions are inherently less anti-democratic than individual rights decisions. Federalism decisions merely hold that one level of government—the national government—may not pursue a particular objective. *States* are still free and indeed invited to do so. To the extent that limitations on national power invite public debate and politicking in the states, and to the further extent that state-level decisions often reflect varying popular sentiments and preferences more accurately than a uniform national rule, federalism decisions in fact promote democracy. Judicial decisions that affirm, protect or expand individual constitutional rights, in contrast, terminate democratic debate and decisionmaking at all levels of government, including the national level. As briefly discussed below, the Rehnquist Court has continued to issue such decisions with great regularity, and some those cases richly merit the "activism" appellation. But they are precisely *not* federalism decisions.

Third, and most important, the record simply does not support the contention that the Rehnquist Court's federalism represents a unique and distinct form of judicial aggression against the Congress. As a first approximation, we can count judicial declarations of unconstitutionality. While admittedly incomplete, rough, and in some ways misleading, that examination supplies a patch of firm ground in a sea of abstractions.

During Chief Justice Rehnquist's tenure (excluding only the current Term), the Supreme Court has issued 35 decisions holding portions of federal statutes unconstitutional. These decisions—listed in Appendix A to this testimony—were rendered under the following constitutional provisions and doctrines (in order of frequency):

Constitutional Issue	Number of Decisions
First Amendment	14
Federalism	11
Separation of Powers	3
Fifth Amendment (Takings)	3
Export Clause	2
Seventh Amendment	1
We-Said-So Clause[10]	1

Federalism decisions amount to less than one-third of all Rehnquist Court decisions declaring federal legislative provisions unconstitutional, and they are fewer in number than First Amendment rulings (which, with the recent ruling in Ashcroft v. ACLU, have increased to 15). If that "nose count" supports an activism debate about the

Court's federalism, it just as easily supports an activism debate about a judicial "First Amendment rampage."[11]

A somewhat closer—though still impressionistic—look confirms this picture. The federalism count lumps together decisions issued under several different constitutional provisions (the Commerce Clause, the Tenth Amendment, the Eleventh Amendment, and the Fourteenth Amendment), whereas the First Amendment damage—if that is the word—was done under a single provision. Moreover, as observers across the political spectrum have noted, the Rehnquist Court has tended to aim its federalism fire at symbolic federal enactments that resemble congressional press releases more than serious operational statutes.[12] Its First Amendment decisions, in contrast, have tended to affect statutes of intense interest to regulated industries, the general public, and members of this body. On the eve—or at least the afternoon—of a judicial invalidation of sizeable chunks of the just-enacted campaign finance legislation, the Rehnquist Court's First Amendment jurisprudence might make a fine subject for an activism debate.

4. The Court and the Congress: Doctrine

In important respects, the preceding assessment still exaggerates the anti-democratic implications of the Rehnquist Court's federalism. Overwhelmingly, the Court's decisions do not forbid Congress to pursue a given objective (while leaving states free to do so). More modestly still, they hold that Congress may not pursue a particular objective *in a certain fashion* (*e.g.*, by "commandeering" state governments or by abrogating their sovereign immunity). Congress has legislated around *United States v. Lopez* and around *City of Boerne v. Flores*;[13] it could easily legislate its way around *United States v. Morrison* and any other federalism decision of the past decade.[14] Most obviously, Congress can always *spend* its way around judicially enforced federalism limitations. Barring a drastic and highly unlikely judicial curtailment of congressional authority under the Spending Clause, that will continue to be the case.

That said, I disagree with interpretations (from left, right, and center) of the Rehnquist Court's federalist "means restrictions" as merely procedural, inconsequential, or neutral "good government" doctrines. Congress generally chooses particular means to facilitate interest group bargains (*i.e.*, legislation). The means chosen are usually the most efficacious to that end (though not necessarily to the statutory objectives). If the means are ruled out of constitutional bounds, then the ends themselves may move beyond reach or at least, become extravagantly more expensive. Accordingly, judicial means restrictions systematically disadvantage political constituencies that favor federal intervention, while favoring constituencies that oppose intervention.

By way of a generic but pertinent example: if the Court "strikes down" a statute that imposes the costs of some federal program on state and local governments, Congress can always re-enact the program by providing full federal funding. That program, though, may never be enacted; it passed in its original form precisely because its beneficiaries and their congressional patrons managed to hide the costs. Thus, the Supreme Court's federalism has the predictable effect of inhibiting Congress's ability to accede to interest group demands. It is in that sense vulnerable to the charge of infringing, in an activist fashion, on congressional prerogatives. That criticism is most plausibly leveled (1) at the

Court's determined resistance to private lawsuits as an instrument of federal policy implementation, and (2) its increased stringency in reviewing congressional fact-finding and means-ends relationships under federal statutes, especially those enacted under Section 5 of the Fourteenth Amendment.

Entitlements And Mandates. For the most part, Rehnquist Court decisions restricting the means of federal legislation enjoin a specific legislative strategy—to wit, *the enlistment of federal courts* in the pursuit of congressional and interest-group objectives. At the constitutional level, Eleventh Amendment sovereign immunity cases provide the clearest example. The tendency is even more pronounced in infra-constitutional, statutory interpretation cases. It is evident, for example, in the Court's great reluctance to detect "implied" private rights of action in federal statutes; in its increasingly restrictive view of Section 1983 actions; in numerous cases that apply a "clear statement" canon of statutory construction; and in other, still more esoteric contexts, such as the scope of the *Ex Parte Young* doctrine.[15]

The Rehnquist Court's campaign against the private enforcement of federal mandates is an open secret—open, because the Chief Justice himself has officially complained, in this body, about the continued proliferation of federal causes of action;[16] secret, because the case law in this area—with the possible exception of the sovereign immunity cases—has attracted far less comment than, for example, *Lopez* and *Morrison*, the highly visible but much less consequential Commerce Clause cases. The Court's entitlement jurisprudence warrants attention, though, for two reasons.[17]

First, the Court's entitlement decisions have a predictable, determinate political effect. They have tended to transform the operation of "cooperative" (federally funded and state-administered) programs from litigation-driven entitlement politics to intergovernmental bargaining. They have strengthened the hand of state governments and, correspondingly, weakened the hand of the intended beneficiaries of federal legislation, of their congressional patrons, and of (some of) the advocacy groups that litigate on behalf of those constituencies.[18] The Rehnquist Court's jurisprudence in this area has already had a substantial impact on intergovernmental relations and constituency politics, and it has yet to run its full course.

Second, the Rehnquist Court's entitlement decisions have already worked a substantial legal regime change. The Court has not touched and will not seriously touch the judicial legacy of the New Deal or the civil rights era. What it will do, however, is to unmake the Brennan Court's welfare state agenda. After the flood of statutory federalism decisions, the Rehnquist Court is only two or three decisions from accomplishing that intended result.

The Brennan Court's agenda rested on the premise that the federal judiciary should facilitate, and expand upon, the congressional imposition of entitlement mandates on state and local governments. The Rehnquist Court, in contrast, views federal Spending Clause statutes as being "in the nature of a contract,"[19] which it will in doubtful cases construe, like all other contracts, against the party that wrote them (the Congress.) The courts will cooperate in the imposition of federal mandates only when Congress has expressed an unmistakable intent to recruit the judiciary for that purpose and when the states have been put on notice that their acceptance of federal funds will entail exposure to private enforcement actions.

The systemic effects of the Rehnquist Court's private-enforcement decisions, coupled with the unmaking of the Brennan legacy, lend initial plausibility to a charge of judicial activism. For three reasons, however, that charge is ultimately unpersuasive.

First, the most immediate and transparent implication of the Rehnquist Court's anti-entitlement federalism decisions is a sharp curtailment of the federal judiciary's role in the design and implementation of federal entitlement programs. It seems odd to describe that sort of jurisprudence as "activist."

Second, the "activism" charge here at issue must presume that federalism (or, more likely, some other constitutional principle) demands unquestioning judicial collusion in the interest-group driven imposition of federal mandates on state and local governments. That presumption, however, runs up both against the Constitution—which enshrines the separation of powers, rather than congressional government—and against a broad, bipartisan consensus. State and local government officials of both parties have aggressively and consistently supported—and, in litigation, advanced—the Rehnquist Court's statutory federalism.[20] Congress itself has over the past decade recognized that federal mandates often harm not only federalism but also the intended beneficiaries of those mandates.[21]

Third, a judicial change of direction may signal, not activism but rather a departure from activist precedents.[22] So here: It was the Brennan Court, in its eagerness to serve as the handmaiden of an omnipotent Congress, that discovered rights and entitlements in statutes that had for decades (in the case of Section 1983, nearly a full century) been understood to imply nothing of the sort. It was the Brennan Court that transformed AFDC from an entitlement program *for the states* into an entitlement program *for individuals*—until Congress, in the 1996 Personal Responsibility and Work Opportunity Act, undid the Court's policy choice and restored welfare policy as a cooperative program between the states and the national government.[23] The Rehnquist Court may in individual cases misconstrue, in an unduly restrictive fashion, a federal contract with the states. For *bona fide* activism, however, one must look to the Brennan Court.

Standard of Review. In a series of federalism decisions, the Rehnquist Court has applied an increasingly stringent standard of judicial review both with respect to congressional fact-finding and the requisite means-ends relationship for federal statutes enacted pursuant to Section 5 of the Fourteenth Amendment.[24] These decisions have attracted much forceful criticism,[25] and the Court's tests and their application in individual cases demand a thoughtful defense. But if the defense of those decisions is more complicated than partisans may wish to acknowledge, the same is true of the attack.

Criticism of the Court's tests cannot start from a baseline of a "rational basis" test and proceed to denounce any more stringent test as "activism." Rational basis review effectively means no judicial review at all (regardless of whether the subject is free speech or federalism). No judicial review means that the structural federalism protections of the Constitution are dead and gone, and federalism will be no more. States will continue to exist—but only as recipients of federal largesse, not as rival centers of power. Therefore, if we are to have federalism at all, the judicial tests must be something more than rational basis review. The Rehnquist Court's tests may not be precisely the right ones, in design or application, and individual decisions may merit the "activism"

moniker. But (to repeat) that conclusion cannot rest on the bare fact that the tests exceed mere rationality.

Moreover, one cannot readily explain why a lessened standard of review is appropriate in federalism cases *but not* in individual-rights or equal-protection cases, where we presumably wish to retain a probing standard. Until the U.S. Supreme Court conceived this double standard in the wake of the New Deal, nothing in our constitutional history (let alone the Constitution itself) remotely suggested such a double standard. Viewed in its most charitable light, the double standard rests on a particular political theory (about, respectively, the "underrepresentation" of minority interests and the "adequate representation" of the states in the political process) that many scholars find highly implausible.[26] It may be possible to think of a more plausible political theory to support a dual standard of review and to link that theory, in a reasonably direct fashion, to the structure of the Constitution. In the absence of such a theory, it is the double standard for individual-rights and federalism cases, rather than the recent, modest convergence of those standards in the Rehnquist Court's decisions, that warrants a suspicion of judicial activism.

One might contest the step from "no judicial review" to "no federalism." In other words, and as just suggested, one might contend that the political process itself provides protection for federalism. That, of course, was the premise of the Supreme Court's wholesale abdication at the federalism front prior to the Rehnquist Court's rediscovery of judicially enforceable federalism norms. Only a handful of scholars, however, continue to defend that premise,[27] which makes it difficult to characterize its judicial demise as activist *per se*.

One might also contend that federalism, in the sense of protecting states as partially autonomous power centers, is not worth having.[28] That is a respectable argument and, in my estimation, one that merits a far more serious and thoughtful response than federalism's defenders have so far seen fit to provide. It marks, however, the contours of a substantive debate about federalism, rather than judicial style. If critics of the Rehnquist Court's federalism wish to rest their case on this substantive ground, they should say so.

5. Constitutional Federalism

The most meaningful definition of judicial activism centers on the spread between the constitutional structure and judicial decisions. The larger the spread, the more activist the decision. It is in the end impossible to conduct a meaningful debate about judicial activism in isolation from a substantive debate about the Constitution.

That observation is not an endorsement of "strict constructionism." Even assuming—to my mind, implausibly—that such an approach makes sense in some contexts, it makes no sense at all with respect to federalism. As a matter of constitutional text, structure, and history, the Constitution establishes a "compound republic," containing both national and federal elements.[29] It is subject to highly nationalist interpretations and to competing, states-oriented interpretations. The plethora of qualifying nouns and adjectives—"dual federalism," "cooperative federalism," "states' rights federalism," "administrative federalism," "fiscal federalism," "competitive federalism," and so on—suggests the range. Not all those variants are equally plausible or

attractive, and the Constitution plainly establishes outer limits. But federalism's constitutional architecture is much more open than either judicial decisions or the partisans of this or that brand of federalism would lead one to suspect. The Constitution defines a range of possibilities over which we are supposed to argue, rather than a rigid rule of decision.

Judges do not enjoy the luxury of this common-sensical perspective. They must render up-or-down decisions in individual cases, and so they tend to view a structural constitutional principle—federalism—as rather more determinate than in fact it is. Nothing, however, compels us to adopt the judiciary's artificial perspective for all purposes of constitutional discussion. In fact, doing so is quite probably unhealthy. For judges, the view of federalism as a fixed "thing" is a professional hazard; in a broader debate, that view typically signals partisan myopia or demagogy.

Federalism's partial constitutional indeterminacy entails that judicial federalism decisions can easily be wrong (or wrongly reasoned, or on balance less sensible than a different decision) without being necessarily or even probably "activist" in the sense of straying from the Constitution. By way of example, a decision to the effect that the Commerce Clause has no judicially recognizable limits is obviously outside the bounds of the Constitution. (For that reason, no Supreme Court decision has ever so held.) There must be a line that identifies the limits of "interstate commerce." One can debate whether *Lopez* or *Morrison* drew the line in the right place, for the right reasons. But that is a question of better or worse arguments and more or less plausible federalism conceptions. Charges of activism merely confound the debate.

That observation may hold true even when federalism cases involve a binary choice, rather than line-drawing. Consider the highly controversial question of whether Congress may abrogate the states' sovereign immunity pursuant to its Article I powers: *Union Gas* said "yes," while *Seminole Tribe* and its progeny say "no."[30] That is not a line-drawing exercise; one of the answers must be wrong, in a rather fundamental way. I profess agnosticism as to the correct answer. (Even without my comparatively uninformed voice, there are notoriously more opinions than scholars on the true meaning of the Eleventh Amendment.) I am quite confident, however, that *Union Gas* and *Seminole Tribe* are both consistent with constitutionally plausible, albeit very different, conceptions of federalism. I am likewise confident that neither shouts of "activism" nor a posture of "strict constructionism" will assist an informed debate about the scope of sovereign immunity and its constitutional grounding.[31]

I can think of one pro-federalism, pro-states-rights decision in reasonably recent memory—although it pre-dates the Rehnquist Court—that is unquestionably outside the constitutional boundaries.[32] A few other decisions may push those boundaries,[33] and I apprehend that the Court might mistakenly affirm those decisions. Only in that event, however, would I be inclined to revisit my judgment that the Rehnquist Court's federalism has remained, and will remain, well within federalism's constitutional bounds.

6. Activism *or* Federalism

Some Supreme Court decisions strain the constitutional text, structure, and logic so far as to invite a debate about judicial activism. A few decisions are so far beyond any

plausible constitutional argument—and so disrespectful of precedent and so contemptuous of democratic decision-making—as to compel that debate.

Some Rehnquist Court decisions comfortably fit that description. As already suggested, though, those decisions are precisely *not* federalism decisions. For what it's worth, they are also not conservative decisions. They are ruthlessly nationalist precedents that, by force of expansive judicial interpretations of individual rights, drastically curtail state and local autonomy. The Rehnquist Court has either issued itself or else, pointedly refused to discard earlier precedents. The clearest example is *Roe v. Wade*: Bereft of any conceivable constitutional rationale, and all by itself more profoundly anti-democratic than the Rehnquist Court's entire federalism corpus, *Roe* has since been confirmed on the grounds that the Supreme Court said so (and the rest of us must follow).[34]

Between 1986 and 2000, the Rehnquist Court has issued over 70 such decisions. (*See* Appendix B.) Needless to say, not all those decisions are controversial, let alone indefensible, and as it happens, I agree with the reasoning and results in most instances. Still, the Rehnquist Court's lapses into extra-constitutional, nationalist judicial imperialism are sufficiently frequent and disconcerting to make a serious debate about judicial activism very much worthwhile. That debate would have to start with *Roe v. Wade*. It might move on to *Planned Parenthood v. Casey*, and *Romer v. Evans*, and *United States v. Virginia*, and *Stenberg v. Carhart*, and *Dickerson v. United States*, and the Equal Protection analysis of seven Justices in *Bush v. Gore*.[35] One could spend weeks in this pantheon of judicial activism without coming anywhere near a federalism decision that is comparably untethered from the constitutional text and structure.

Perhaps, the Rehnquist Court's federalist enthusiasm partakes of, or provides an additional outlet for, a dismayingly activist disposition that is evidenced more clearly by other types of decisions. On that theory, what distinguishes the Rehnquist Court's activism is (a) its randomness (in that it is no longer practiced, in a predictable fashion, on behalf of a particular cause and clientele or, for that matter, any substantive concern other than the Court's own self-importance) and (b) the fact that the Court now feels sufficiently confident to confront Congress as well as state and local governments.[36] Distressing proclamations of judicial supremacy have in fact tagged along with paeans to federalism, and individual federalism opinions raise troubling questions concerning the Court's priorities.[37] But an attempt to *limit* the activism debate to federalism—to the exclusion of nationalist judicial impositions on government at all levels, and in isolation of the larger jurisprudential edifice—would be a transparent charade and, constitutionally speaking, an absurd joke.

The Rehnquist Court's federalism may, however, with a bit of good will on all sides, prompt a debate about federalism. The fact that the Court's federalism cases cannot hold an activist candle to *Roe* does not mean that those decisions are in all instances and respects wise, or well-reasoned, or consistent with the kind of federalism we should aspire to. We can have a judicially enforced federalism that restrains the power of distributional coalitions in American politics—or a federalism that tends to the opposite result. We can have a judicially enforced federalism that empowers states—or a federalism that disciplines the states (along with the federal government), by exposing them to competitive pressures. An increasingly global, interdependent world may render federalism more plausible and salient—or it may render federalism a "national neurosis."

These and other federalism questions matter greatly. The Constitution forecloses none of the options; it rather challenges us to confront and debate them. In that sense, the Supreme Court's federalism is profoundly faithful to the Constitution: if federalism questions have after a long slumber re-appeared on the political agenda, that is largely because the Supreme Court has put them there. We should gratefully accept that invitation.

Respectfully submitted,

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Appendix (A, B)
Exhibits (Curriculum Vitae, Federalism Publications)

Notes

1 529 U.S. 598 (2000).

2 Experts who view the Supreme Court's federalism jurisprudence with a very jaundiced eye share that sentiment. *See, e.g.*, Keith E. Whittington, *Taking What They Give Us: Explaining the Court's Federalism Offensive*, 51 DUKE L. J. 477, 514 (2001) ("In the present circumstances, the relationship between interpretations of the Constitution's structural features and any particular political agenda is highly contingent and uncertain.")

3 As noted *infra* Sec. 4, *some* constituencies stand to lose from federalism. But the political branches can easily compensate for those losses.

4 *See, respectively*, *College Savings Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.,* 527 U.S. 627, 527 U.S. 666 (1999) (certain patent and trademark infringement actions against state governments are barred by Eleventh Amendment); and *United States v. Morrison*, 529 U.S. 598 (2000) (Commerce Clause authority does not extend to regulation of non-economic conduct).

5 Another possible meaning of "activism," the judicial intrusion into political disputes, tends to collapse into a departure-from-the-Constitution analysis. Many First Amendment cases (for example, about campaign finance legislation) have momentous political implications, but no one doubts that the Court should nonetheless decide them. Judicial interference with political results or processes become troublesome when, and because, its political effects are more than merely incidental to the exercise of genuine judicial power—that is, the authority to decide cases and controversies in accordance with law.

6 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66 (1996) (overruling *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989)); *College Savings Bank v. Fla. Prepaid Postsec. Educ. Expense Bd.,* 527 U.S. 666, 680 (1999) (overruling the constructive waiver doctrine of *Parden v. Terminal Ry.*, 377 U.S. 184 (1964)).

7 *See, e.g., United States v. Lopez*, 514 U.S. 549, 560 (1995) (explicitly reaffirming the holding of, *inter alia*, *Wickard v. Filburn*, 317 U.S. 111 (1942), and *Katzenbach v. McClung*, 379 U.S. 294 (1964)); *United States v. Morrison*, 529 U.S. 598, 620 (2000) (explicitly reaffirming *Katzenbach v. Morgan*, 384 U.S. 641 (1966)).

8 *See* ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2nd ed. 1986).

9 *See* Neal Devins, *Congress as Culprit: How Lawmakers Spurred on the Court's Anti-Congress Crusade*, 51 DUKE L. J. 435 (2001).

10 The decision at issue, *Dickerson v. United States*, 530 U.S. 428 (2000) , held that the federal provision (of the Omnibus Crime Control Act) violated no constitutional provision at all but rather a "constitutional" protection created by the Court.

11 In truth, a mere count tells us little about judicial activism. The frequency of judicial invalidations *may* signal activism vis-à-vis the Congress; it may signal something else, such as a greater proclivity on the part of the Congress to test the constitutional boundaries. A responsible assessment requires a more nuanced examination, including an examination of the merits of individual cases. *See infra* Sec. 5.

12 *See, e.g.*, *Printz v. United States*, 521 U.S. 898 (1997) (invalidating certain interim gun registration requirements); *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating federal Gun Free School Zones Act where vast majority of states had equivalent criminal laws in place); *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating rarely used civil remedies provision). *See also* Jeffrey Rosen, "Dual

Sovereigns," THE NEW REPUBLIC, July 28, 1997, pp. 16-19. The evidence of the Court's tactical decisionmaking at the federalism front is overwhelming; the only question is whether one wants to celebrate it as statesmanlike and pragmatic or rather criticize it as calculating. The latter charge, however, does not translate into a plausible case for "activism." It rests on the contention that the Court has failed to apply its federalism principles consistently and in all cases (specifically, the cases where such applications might trigger unforeseen or undesirable consequences, including a congressional backlash). Quite so. (S*ee*, *e.g.*, GREVE, REAL FEDERALISM 79-82 (1999).) But "activism"? If the Court were to bend First Amendment principles in accordance with perceived political realities, we would call its conduct lots of names, but "activist" is not among them. Much more likely, we would argue that the Court is insufficiently activist in enforcing constitutional norms.

[13] In 1995, both the Senate and House proposed legislation to enact "gun free school zones" (see The Gun-Free School Zones Act of 1995, S. 890, 104th Cong. and H.R. 1608, 104th Cong.). The former, sponsored by Sen. Herb Kohl (D-Wis.), passed, in modified form, as part of the Omnibus Appropriations Bill for fiscal year 1997. Also s*ee* Religious Land Use and Institutionalized Persons Act, 42 U.S.C.A. §§ 2000cc (2000).

[14] *See United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., diss.) (suggesting ways to legislate around the majority decision and opinion).

[15] While the origins of these lines of decisions pre-date the Rehnquist Court, the pace of change has accelerated since the Chief Justice's appointment. *See, e.g., Alexander v. Sandoval*, 532 U.S. 275 (2001) (no private right of action for disparate impact violation under Title VI); *Blessing v. Freestone*, 520 U.S. 329 (1997) (narrow scope for implied private rights of action); *Suter v. Artist M.*, 503 U.S. 347 (1992) (restrictive view of Sec. 1983 actions); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (clear statement on congressional intent required for imposition of federal mandates that invade core state functions); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (detailed statutory remedial scheme precludes *Ex Parte Young* relief).

[16] *See, e.g.*, WILLIAM H. REHNQUIST, THE 1997 YEAR-END REPORT ON THE FEDERAL JUDICIARY 6.

[17] For a fuller development of the following paragraphs see Michael S. Greve, *Federalism, Yes. Activism, No*. FEDERALISM OUTLOOK No. 7 (July 2001) (available at http://www.federalismproject.org).

[18] "Some of," because certain entitlement constituencies have remained, and will continue to remain, largely immune from the sweep of the Rehnquist Court's statutory federalism. Racial minorities enjoy a *de facto* exemption: it is not easy to explain why the application of the disparate impact provisions of Title VII of the Civil Rights Act (42 U.S.C.A. § 2000e-17) is constitutional under the test of *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* Jesse Choper, *On the Difference in Importance Between Supreme Court Doctrine and Actual Consequences: A Review of the Supreme Court's 1996-1997 Term*, 19 CARDOZO L. REV. 2259, 2297 (1998). Still, those protections will remain constitutional in fact. Feminist constituencies, too, are "safe," *see Davis v. Monroe County School Board*, 526 U.S. 629 (1999) and *id*. at 654-5 (Kennedy, J. diss., arguing that majority decision is utterly inconsistent with federalism precedents). Environmental advocacy groups likewise appear to enjoy special judicial favor and consideration, *see Friends of the Earth v. Laidlaw Environmental Services*, 528 U.S. 167 (2000). All three constituencies may well suffer occasional federalism-induced setbacks in the courts. For already extant examples *see Alexander v. Sandoval*, 532 U.S. 275 (2001); *United States v. Morrison,* 529 U.S. 598 (2000)*; Solid Waste Assn. of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001). Such losses, however, have been marginal; they do not affect the scope and operation of the major federal programs. The reasons why that will remain so are political, not legal. The affected constituencies enjoy too much congressional and media support to become targets of the Supreme Court's federalism. Both the pro-federalism Justices and state litigants know better than to push their federalism luck at these fronts.

[19] *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

[20] *See*, for one among countless other examples, the *amicus* brief submitted by fifteen states (spanning the ideological spectrum) in *Gonzaga Univ. v. Doe*, 143 Wash 2d 687, 24 P.3d 390 (2001), *cert. granted*, 122 S.Ct. 865 (Jan. 11. 2002). The brief argues (at the outer limits of extant precedent, though to my mind very plausibly) that *no* Spending Clause statute is enforceable under Section 1983.

[21] That is the premise of the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, Pub.L. 104-193, 110 Stat. 2105 (1996), 42 U.S.C, § 1305, at seq., which abolished private entitlements to welfare. (*See infra* n. 23). The substantial drop in welfare enrollments since the enactment of the statute lends support to the contention that discretionary programs may be more effective than entitlement- and litigation-driven ones.

[22] While considerations of stability, reliance interests, etc. counsel a general rule of *stare decisis* especially in a statutory context (*see Patterson v. McLean*, 491 U.S. 164, 172-3 and authorities cited *id*. (1989)) the Supreme Court should, on suitable occasions, reverse its own precedents. A complete failure to do so would signal that the Supreme Court, rather than the Constitution itself, is the supreme law of the land. A stubborn adherence to questionable precedents, on the grounds that "the Court said so," is often an alarming sign of judicial imperialism—activism, if you will. For cases on point *see Planned Parenthood v. Casey*, 505 U.S. 833 (1992); and *Dickerson v. United States,* 530 U.S. 428 (2000).

[23] R. SHEP MELNICK, BETWEEN THE LINES 65-111 (1994) (chronicling Brennan Court's transformation of AFDC); and Melnick, *Federalism and the New Rights*, 14 YALE L. & POL'Y REV. 325, 332-37 (1996) (arguing that repeal of individual entitlements constituted the central element of PRWOA).

[24] *See*, respectively, *United States v. Morrison*, 529 U.S. 598 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Section 5 statutes must be congruent and proportionate to the Fourteenth Amendment violations Congress intends to remedy).

[25] *See, e.g.*, Michael W. McConnell*, Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153 (1997) (criticizing the decision as slighting Congress's interpretive functions and prerogatives under the Constitution); and Even H. Caminker, *Appropriate Means-Ends Constraints on Section 5 Powers*, 53 STAN L. REV. 1127 (2001).

[26] *See, e.g.*, Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985) (criticizing "underrepresentation" theory as implausible in most contexts); Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 325 and id. n. 22 (1997) (describing Supreme Court's heavy reliance on process federalist theorists as "somewhat stunning given the many persuasive critiques of their position"; citing several of those critiques); William W. Van Alstyne, *The Second Death of Federalism*, 83 MICH. L. REV. 1709, 1724 n. 64 (1985) (process federalism is difficult to understand "as other than a good-hearted joke").

[27] *See, e.g., United States v. Morrison* , 529 U.S. 598 (2000) (determination of what constitutes interstate commerce for constitutional purposes is a judicial rather than congressional task); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (probing inquiry into legislative record and means-ends congruence and proportionality of Section 5 statute); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356 (2001) (same).

[28] For a powerful argument along these lines see Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

[29] FEDERALIST PAPERS No. 39 (Madison) (Clinton Rossiter ed. 1961).

[30] *Pennsylvania v. Union Gas Co*., 491 U.S. 1 (1989); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

[31] Here is why: *Seminole Tribe* rests squarely on a line of precedents dating back to *Hans v. Louisiana*, 134 U.S. 1 (1890), unbroken except for *Union Gas*. In that sense, *Union Gas* was the activist departure. On the other hand, the text of the Eleventh Amendment says nothing about governmental immunity from suit by a state's own citizens, and in fact cuts against such immunity. In that sense, *Seminole Tribe* is "activist." We can trade shouts of activism, or we can discuss whether *Hans v. Louisiana* was correctly decided. I do not profess to know the answer to that question, but it strikes me as the right question.

[32] *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

[33] I would put *Barclay's Bank, PLC v. Franchise Tax Bd.*, 512 U.S. 298 (1994), in that category.

[34] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[35] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Romer v. Evans,* 517 U.S. 620 (1996); *United States v. Virginia*, 518 U.S. 515 (1996); *Stenberg v. Carhart*, 530 U.S. 914 (2000); *Dickerson v. United States*, 530 U.S. 428 (2000); *Bush v. Gore,* 531 U.S. 98 (2001).

[36] Jeremy A. Rabkin, *A Supreme Mess at the Supreme Court*, WEEKLY STANDARD, July 17, 2000, at 24.

[37] A prime example is *City of Boerne v. Flores*, 521 U.S. 507 (1997). *See* GREVE, REAL FEDERALISM 37-39 and sources cited *id*.