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**THE SUPREME COURT'S FEDERALISM
REVIVAL AND REINVIGORATING THE
"FEDERALISM DEAL"**

PREETA D. BANSAL*

Since 1991, the Supreme Court has been dominated by a five-Justice voting block that some commentators argue has reflected a judicial philosophy based on judicial restraint: the notion that unelected judges should defer to settled precedents and to the

* Partner, Skadden, Arps, Slate, Meagher & Flom LLP (New York); Solicitor General of the State of New York in Attorney General Eliot Spitzer's first Term (1999-2001); Commissioner (2003-present) and Past Chair (2004-2005), U.S. Commission on International Religious Freedom; Special Counsel, White House and U.S. Department of Justice (1993-1996); Law Clerk, Justice John Paul Stevens, United States Supreme Court (1990-1991). Special thanks to John Barrett and Tim Zick and St. John's Law School for this symposium.

considered judgments of legislative bodies. Proponents of this version of judicial restraint contend that judges should give force to Congressional-made law and narrowly interpret the Constitution, and should eschew invoking unenumerated constitutional principles or broadly interpreting the scope of constitutional provisions in order to upset judgments of popularly elected branches of government. A contrary judicial approach, they argue, would constitute judicial activism or “legislating from the bench.”

At the same time, the same five-Justice block of the Rehnquist Court that purportedly has reflected this view of judicial restraint invalidated more than three dozen acts of Congress, whereas the Supreme Court invalidated only two acts of Congress in its first 75 years, up until the end of the Civil War. Much of the basis for this largely unprecedented rate of legislative invalidation by the Court in the last decade and more was the revived doctrine of “federalism” – or the notion that unelected judges *should* play an active constitutional role in policing the boundaries of appropriate federal and state activities. The revival of federalism was based on the view that states must be accorded the respect accorded to them as joint sovereigns with the national government, as envisioned in the original constitutional design of the founders.

But is federalism a meaningful, first-level constitutional commitment? Or is it a secondary-level, instrumental value (and occasional doctrinal cover) that yields to ideological or policy ends? Lawyers, scholars and commentators on both sides of the political divide have suggested that both the federalism revival, as well as the critique of it, have been based less on a neutral commitment to certain structural features of our Constitution, than on a substantive ideological agenda.

Progressives, for example, note that federalism has been the mantle by which the Court invalidated important civil rights and regulatory protections. One notable commentator, Erwin Chemerinsky, now Dean at Duke Law School, has written that “what animates the Rehnquist Court is not a concern for states’ rights and federalism. Rather, the Court is hiding its value choices to limit civil rights laws and to protect businesses from regulation in decisions that seem to be about very specific doctrines of constitutional law, such as the scope of the commerce

power and the circumstances of preemption.”¹

Conservative commentators, on the other hand, note that the *critique* of modern federalism has been impelled by policy preferences rather than legal commitments. Michael Greve of the American Enterprise Institute has written that “[p]erhaps, one could still argue that the conservative Justices’ anti-regulatory policy preferences too often override their ostensible federalism commitments. But if so, one ought to be prepared to entertain the hypothesis that the same opportunism might be at work on the liberal side. How is it that Justices Stevens, Souter, and Ginsburg, the most implacable opponents of the Rehnquist Court’s federalism, suddenly discover their federalist credentials and affections in preemption cases?”²

Whatever the underlying ends, the federalism revival was not, as Professor Barnett and Professor Devins have noted today, a consequence of a popular movement or the result of a political push by the Congress, grassroots interest groups or the American people to devolve authority to the state level. Nor, as I contend, was it the result of a “ground-up” movement by coalitions of states expressing themselves in the Supreme Court and seeking greater institutional protection through constitutional doctrine. Rather, a review of states’ filings in the Supreme Court’s significant cases during the height of the federalism revival suggests that the Court’s federalism was, in many cases, adopted by the Court *over* the desires of states.

This has implications for federalism’s future as a judicial doctrine. In the short paper I present today, I will discuss the position of the states as reflected in their *amicus curiae* submissions in some of the leading cases of the Supreme Court’s federalism revival. I will then offer some observations on the effects and future of federalism. My basic conclusion is that the federalism revival has had a salutary effect both on constitutional doctrine, by reviving the importance of the

¹ See Erwin Chemerinsky, *Empowering States When It Matters: A Different Approach to Preemption*, 69 BROOKLYN L. REV. 1313, 1315 (2004); see also Herbert Semmel, *It’s Not About States’ Rights: Double-Talk by the Activist Supreme Court Majority*, in AWAKENING FROM THE DREAM: CIVIL RIGHTS UNDER SIEGE AND THE NEW STRUGGLE FOR EQUAL JUSTICE 239, 239-50 (Denise C. Morgan, Rachel D. Godsil & Jay Moses, eds., Carolina Academic Press 2005).

² Michael S. Greve, *Federal Preemption: James Madison, Call Your Office*, 33 PEPP. L. REV. 77, 80-81 (2005).

structural features of the Constitution in protecting individual rights and liberties, and on policy, by reinvigorating creative energy and broad involvement at the state level. But its future effects are contingent upon reviving the flip side of the “federalism deal” – ensuring robust protections at the national level for racial, ethnic and religious minorities. As a countermajoritarian principle designed to empower sub-national geographic groups that might not have majority influence at the national level, and therefore to recognize and enhance geographic group-based rights at the expense of individual rights at the national level, federalism is a form of political “affirmative action” for less populated states that runs contrary to the individual rights framework of the Bill of Rights protections. The liberty-enhancing purposes of federalism can, therefore, only be achieved fully if the Court’s commitment to federalism is accompanied by a vigorous commitment on its part and at the national level to guaranteeing the individual rights of minorities – including racial, ethnic and religious minorities – who live within the sub-national (state) units empowered by federalism.

THE STATES AS *AMICI CURIAE* DURING THE FEDERALISM REVIVAL:
WINNING “THE STATES’ RIGHTS PLEA AGAINST THE STATES
THEMSELVES”³

The Supreme Court’s federalism revival was marked by heightened solicitude to states in four areas of constitutional doctrine: Congress’s powers under the Commerce Clause, Congress’s powers to enact legislation pursuant to Section Five of the Fourteenth Amendment, state sovereign immunity under the Eleventh Amendment, and “reserved” powers under the Tenth Amendment. Notably, in many of these areas, the Court imposed federalism *against* the professed interests and concerns of states.

Congressional Authority/Commerce Clause

Perhaps the most dramatic initial area of the federalism revival was in the Court’s announcement of limits to Congressional authority to enact legislation pursuant to the

³ *United States v. Morrison*, 529 U.S. 598, 654 (Souter, J., dissenting), *see infra* text accompanying note 18.

Commerce Clause. In *United States v. Lopez*,⁴ the Court, for the first time in some 50 years since the end of the *Lochner* era, struck down a federal law as outside the Commerce Clause authority. The only *amici curiae* brief submitted by states in the case was in support of federal power and congressional authority.⁵ These states – Ohio, New York and the District of Columbia – broke rank with the obvious states' rights-sounding position and filed an *amici curiae* brief defending the federal school gun ban. The states acknowledged that “[a]t first blush, it may seem paradoxical that any State would file a brief in this case in support of the authority claimed by the Federal government here. But the amici States believe that the historical cooperation and coordination that has existed between the States and the Federal government in the area of law enforcement is both proper and important, and that these longstanding traditions of complementary efforts should be approved and upheld in this case.”⁶ The states noted the increasing “frequency and severity” of violence in schools, which were straining the combined resources of state and local law enforcement authorities, and welcomed federal efforts in this area “to supplement the continuing efforts of state and local officials.”⁷ The states further argued that there is a close nexus between the protection of public safety from gun violence and interstate commerce, and that “prior congressional findings and common reason” supported the requisite nexus.⁸ Notwithstanding this expressed interest of states as *amici*, the Court in *Lopez* it struck down the Gun-Free School Zones Act.⁹

Just five years later, a much broader coalition of states supported the creation of a federal civil cause of action against gender violence enacted by an overwhelming bipartisan majority of Congress in the Violence Against Women Act (“VAWA”). In *United States v. Morrison*,¹⁰ the Court considered both Congress’s authority under the Commerce Clause and its powers

⁴ 514 U.S. 549 (1995).

⁵ Brief for the States of Ohio, New York and the District of Columbia as Amici Curiae, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260).

⁶ *Id.* at 1-2.

⁷ *Id.* at 1.

⁸ *Id.* at 4-5.

⁹ *Lopez*, 514 U.S. at 551.

¹⁰ 529 U.S. 598 (2000).

under section 5 of the Fourteenth Amendment. A 36-state coalition joined a brief authored by New York urging the Court to uphold VAWA.¹¹ Only one state, Alabama, asked Congress to strike down the law.¹² The 36-state coalition noted that the National Association of Attorneys General had supported the reauthorization of VAWA, and argued extensive findings by Congress demonstrated that violence against women substantially affects interstate commerce.¹³ The states argued that this nexus between gender violence and commerce was supported by many other reports and the states' own experience – given the lowered productivity, increased health care costs and other related effects (including depression and homicide) of gender violence which resulted in a \$3-\$5 billion annual cost on businesses.¹⁴ The state coalition also agreed with congressional findings that existing state-law remedies, while substantial and improving, were still not adequate.¹⁵ They cited studies conducted by 21 state task forces concluding that state reform efforts do not sufficiently provide redress for gender-based violence, and that VAWA's civil remedy complements state efforts, much like parallel state-federal remedies for racial and other discrimination.¹⁶

The Court disagreed and struck down VAWA's civil remedy as exceeding Congress' commerce clause authority, beginning with the conclusion that gender-related crimes are not economic activity.¹⁷ Notably, Justice Souter in dissent noted that thirty-six states and the Commonwealth of Puerto Rico "have filed an *amicus* brief in support of petitioners in these cases, and only one State has taken respondents' side. It is, then, not the least irony of these cases that the States will be forced to enjoy the new

¹¹ Brief for the States of Arizona, Alaska, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Utah, Vermont, Washington, West Virginia and Wisconsin, and the Commonwealths of Massachusetts and Puerto Rico as Amici Curiae, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

¹² Brief for the State of Alabama as Amici Curiae, *United States v. Morrison*, 529 U.S. 598 (2000) (Nos. 99-5, 99-29).

¹³ Brief for the States of Arizona et. al. as Amici Curiae, *supra* note 11, at 2.

¹⁴ *Id.* at 5-6.

¹⁵ *Id.* at 15-16.

¹⁶ *Id.* at 16.

¹⁷ *United States v. Morrison*, 529 U.S. 598, 613 (2000).

federalism whether they want it or not. For with the Court's decision today, Antonio Morrison, like *Carter Coal's* James Carter before him, has 'won the states' rights plea against the states themselves."¹⁸

Section Five of the Fourteenth Amendment

In 1997, the Court for the first time in almost twenty years addressed the scope of Congress's power to enact legislation under the enforcement clause (Section 5) of the Fourteenth Amendment. In *City of Boerne v. Flores*,¹⁹ the Court considered whether the Religious Freedom Restoration Act ("RFRA") was a valid exercise of Section 5 powers, given that Congress had enacted RFRA "in direct response" to a prior Court decision which had constricted free exercise rights as they had been construed in *Sherbert v. Verner*, and in order "to restore the compelling interest test as set forth in *Sherbert v. Verner*" for free exercise claims.²⁰ Fourteen states argued that Congress lacked authority to enact RFRA,²¹ and six states joined *amicus* briefs in support of Congressional power.²² The Court held that Congress lacked power under Section Five to enact RFRA because Congress had attempted to enact a "substantive change in constitutional protections," and not a measure "responsive to, or designed to prevent, unconstitutional behavior."²³

When the Court then considered in *United States v. Morrison* whether the civil remedy provisions of the Violence Against Women Act could be upheld as validly enacted pursuant to the Fourteenth Amendment (since the Commerce Clause basis was not upheld), the Court recognized that "state-sponsored gender discrimination" might very well violate the Equal Protection

¹⁸ *Id.* at 654 (Souter, J., dissenting).

¹⁹ 521 U.S. 507 (1997).

²⁰ *Id.* at 512, 515.

²¹ Brief for the States of Ohio, Arizona, Colorado, Delaware, Florida, Hawaii, Idaho, Mississippi, Nevada, New Hampshire, North Carolina, Oklahoma, The Commonwealth of Pennsylvania, and the Territories of American Samoa, Guam, and the Virgin Islands as Amici Curiae, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074).

²² Brief for the States of Maryland, Connecticut, Massachusetts and New York as Amici Curiae, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074); Brief for the State of Texas as Amicus Curiae, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074); Brief for the Commonwealth of Virginia as Amicus Curiae, *City of Boerne v. Flores*, 521 U.S. 507 (1997) (No. 95-2074).

²³ *City of Boerne*, 521 U.S. at 519, 532.

clause and thus be the subject of remedial legislation under Section 5.²⁴ Nevertheless, the Court held that the provisions were not valid under Section 5 because they were “directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias” and thus were not congruent or proportional to unconstitutional conduct by States.²⁵ The Court did not heed the views of the 36 states as *amici* who favored the federal legislation on grounds that their own state justice systems were still plagued by gender bias.²⁶ Following *Morrison*, based on the Court’s decisions in the Commerce Clause and Section Five areas, commentators noted that a full-scale federalism revolution was underway in which the Court no longer appeared loath to invalidate legislation as exceeding Congress’s enumerated powers.

State Sovereign Immunity/Eleventh Amendment

The consequences of the Court’s constricted jurisprudence concerning the scope of Congress’s Section Five powers had immediate effect in the area of state sovereign immunity. In *Seminole Tribe of Florida v. Florida*,²⁷ the “Federalism Five” had adopted a view of state sovereign immunity that was not based on the text of the Constitution. They posited that the common-law doctrine of state sovereign immunity protecting states from suit in another sovereign’s courts had been constitutionalized in the original document despite the absence of any text to that effect, and that the Eleventh Amendment merely affirmed and evidenced this already constitutionalized status for state sovereign immunity in only one particular circumstance (suits against a State by citizens of another State) without purporting to limit the broader constitutionalized principle in the document itself (extending also to suits against a State by its own citizens).²⁸ Thus, the Federalism Five concluded that Congress could not act to alter or abrogate such sovereign immunity even for suits brought a State’s own citizens, because sovereign immunity was a principle having constitutional status, unless it

²⁴ *United States v. Morrison*, 529 U.S. 598, 620 (2000).

²⁵ *Id.* at 626.

²⁶ *See supra* note 11.

²⁷ 517 U.S. 44 (1996).

²⁸ *Id.* at 64.

did so by legislation enacted pursuant to a source of constitutional authority that post-dated the original Constitution – or the Fourteenth Amendment. Congress could not, in legislation enacted under its Article I powers including the Commerce Clause, purport to abrogate state sovereign immunity.

The confluence of the Court's jurisprudence limiting Section 5 authority with its view that sovereign immunity could only be abrogated by Section 5 legislation led to a series of decisions holding that states were immune and could not be sued in federal court for a range of federal statutory violations – including for violations of the Age Discrimination in Employment Act which, in *Kimel v. Florida Board of Regents*,²⁹ the Court held had not been validly enacted pursuant to Section 5.³⁰ Then despite the majority of states *opposing* the assertion of state sovereign immunity in *Board of Trustees of the University of Alabama v. Garrett*,³¹ the Court held that Title I (the employment provisions) of the Americans with Disabilities Act had not been validly enacted under Section Five and so Congress could not abrogate state sovereign immunity for such claims.³² Even where states spoke out against the interests of their own fiscs, the Court acted to “protect” their interests.

10th Amendment/Anti-commandeering

Finally, the Court's federalism revival was evident in its Tenth Amendment jurisprudence – again beyond the professed wishes of the states. In *New York v. United States*,³³ the majority of states *did* support New York in successfully challenging provisions of the Low-Level Radioactive Waste Act as violating the Tenth Amendment on grounds that the provisions

²⁹ 528 U.S. 62 (2000).

³⁰ *Id.* at 82-83.

³¹ Fourteen states supported the respondents in favor of abrogating state sovereign immunity, *see* Brief for the States of Minnesota, Arizona, Connecticut, Illinois, Iowa, Kentucky, Maryland, Massachusetts, Missouri, New Mexico, New York, North Dakota, Vermont, and Washington as Amici Curiae, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240), whereas seven states supported the petitioner State of Alabama, *see* Brief for the States of Hawaii, Arkansas, Idaho, Nebraska, Nevada, Ohio, and Tennessee as Amici Curiae, *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001) (No. 99-1240).

³² *Garrett*, 531 U.S. 356, 374 (2001).

³³ 505 U.S. 144 (1992).

commanded states to enact legislation.³⁴ But notably, the Court went even further than what the states advocated and suggested that even if a state *consented* to enacting what Congress commanded it to enact, state legislation enacted at the behest of a federal directive would be invalid.³⁵ So once again, the Court took upon itself the responsibility of protecting the states from themselves, because ultimately, the “constitution protects us from our best intentions.”³⁶ And in *Printz v. United States*,³⁷ although 13 states supported the constitutionality of the federal Brady Handgun Prevention Act at issue³⁸ (whereas 8 took the side of state sovereignty³⁹), the Court invalidated the legislation for commanding local law enforcement officers to enforce the federal scheme by conducting background checks in furtherance of the legislation.⁴⁰

SOME OBSERVATIONS ON FEDERALISM GOING FORWARD:
THE NEED TO REINVIGORATE THE “FEDERALISM DEAL”

As a jurisprudential framework that began not at the behest of states or popular pressure but instead arguably as one that was “top-down” and court-imposed, federalism’s future may be limited, perhaps not unlike other “top-down” court-imposed movements without consistently strong proponents. This is especially so because of changes in Court personnel: the Court’s loss of federalism’s staunchest proponents – Chief Justice

³⁴ Eighteen states submitted *amici curiae* briefs in support of New York. See Brief of the States Of Ohio, Arkansas, Guam, Illinois, Indiana, Kentucky, Maine, Massachusetts, Nebraska, New Jersey, Pennsylvania, Rhode Island, South Dakota, Texas, West Virginia and Wisconsin as Amici Curiae, *New York v. United States*, 505 U.S. 144 (1992) Nos. 91-543, 91-558, 91-563); Brief of the State of Michigan as Amicus Curiae, *New York v. United States*, 505 U.S. 144 (1992) Nos. 91-543, 91-558, 91-563); Brief of the State of Connecticut as Amicus Curiae, *New York v. United States*, 505 U.S. 144 (1992) Nos. 91-543, 91-558, 91-563). The States of Washington, Nevada and South Carolina were intervenor-respondents in the case.

³⁵ *New York v. United States*, 505 U.S. at 182.

³⁶ *Id.* at 187.

³⁷ 521 U.S. 898 (1997).

³⁸ See Brief for the States Of Maryland, Connecticut, Florida, Hawaii, Iowa, Michigan, Minnesota, Mississippi, Nevada, North Carolina, Oregon, Rhode Island, and Wisconsin as Amici Curiae, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

³⁹ See Brief for the States Colorado, Idaho, Kansas, Montana, Nebraska, South Dakota, Virginia, and Wyoming as Amici Curiae, *Printz v. United States*, 521 U.S. 898 (1997) (Nos. 95-1478, 95-1503).

⁴⁰ *Printz*, 521 U.S. at 935.

Rehnquist and Justice Sandra Day O'Connor, the "frontier Justices" – may result in a dampening of its march.⁴¹ Moreover, the war on terror and the growing internationalization of world affairs from which legal problems and cases emerge, together with the trend toward harmonization and uniformity in legal frameworks in other parts of the world, may make the drive toward fragmentation and re-centering of authority at the state level increasingly seem to be quaint nostalgia.

Regardless of its genesis or its future, there is much to be celebrated with the federalism revival. In the policy arena, the federalism revival has provided an intellectual tool that has spurred some states to flex their regulatory authority, which in turn has had important catalytic and other effects in the securities,⁴² environmental⁴³ and other areas.⁴⁴ Notwithstanding that as a matter of historical practice state governments have long conjured up, for many progressives, notions of backwater politics, resistance to civil rights and other regressive policies, progressives have increasingly joined the fray with conservatives at the state level to invest their energies into reinventing state governments to become effective loci for regulatory action.⁴⁵ Of course, one's view of effective regulatory action at the state level may vary widely, but states are now drawing upon the energies of actors with a variety of viewpoints

⁴¹ Even before their departures from the Court, the Court's federalism zeal seemed to have dampened. See, e.g., *Gonzales v. Raich*, 545 U.S. 1 (2005) (Congress' Commerce Clause authority includes the power to prohibit the purely local cultivation and use of marijuana for medicinal purposes in compliance with California law, even though the marijuana was entirely home grown and no money changed hands); *Tennessee v. Lane*, 541 U.S. 509 (2004) (Title II of the Americans with Disabilities Act, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' authority under section 5 of the Fourteenth Amendment to enforce that Amendment's substantive guarantees); *Nevada v. Hibbs*, 538 U.S. 721 (2003) (Congress validly abrogated state sovereign immunity in the Family and Medical Leave Act, because that Act was validly enacted pursuant to section 5 of the Fourteenth Amendment).

⁴² See, e.g., Renee M. Jones, *Dynamic Federalism: Competition, Cooperation and Securities Enforcement*, 11 CONN. INS. L.J. 107 (2004); compare Justin O'Brien, *The Politics of Enforcement: Eliot Spitzer, State-Federal Relations, and the Redesign of Financial Regulation*, 35 PUBLIUS 443 (June 22, 2005).

⁴³ See, e.g., *New York v. EPA*, 443 F.3d 880 (D.C. Cir. 2006) (vacating EPA rule that would have eased clean air rules on aging power plants, refineries and factories as contrary to Clean Air Act).

⁴⁴ See, e.g., Franklin Foer, *The Joy of Federalism*, N.Y. TIMES, March 6, 2005, at sec. 7, col. 1, p. 12.

⁴⁵ See, e.g., Adam Cohen, *Editorial Observer: Brandeis's Views on States' Rights, and Ice-Making, Have New Relevance*, N.Y. TIMES, December 7, 2003, at sec. 4, col. 1, p. 12.

who are operating within the states' political arenas.⁴⁶

In the arena of constitutional doctrine, the federalism revival has had the salutary effect of reestablishing the importance of the structural features of the Constitution as guarantors of liberty and freedom. Whereas constitutional law casebooks just a few decades ago focused perhaps disproportionately upon the individual rights protections of the Bill of Rights, current casebooks are more equally and properly divided between the structural protections of our constitutional system and Bill of Rights protections. Federalism was, after all, originally conceived and designed as a structure of government to promote individual liberty and protection, not less, amid the vicissitudes of politics.⁴⁷ Indeed, the structural features of the Constitution (federalism and separation of powers) were originally the principal constitutional guarantors of individual liberty. The individual rights guarantees of the Bill of Rights later supplemented the fundamental structural protections in the original document. The federalism revival helps to restore an important structural protection of our Constitution for individual rights and liberties.

But federalism stands opposite the Bill of Rights mode of protection in important ways that must be recalled in considering the federalism balance going forward. As a doctrine designed to empower geographically based groups who otherwise might constitute political minorities in the national process,⁴⁸ federalism may be likened to a kind of affirmative action that elevates group rights – in the form of membership in a geographic group – over our constitutional commitment to individual rights that are not group based. That is to say, federalism provides an individual voter in a less populated state such as Nebraska or Wyoming with greater influence at the national level by virtue of her membership in a geographic group

⁴⁶ See, e.g., James Traub, *The Attorney General Goes to War*, N.Y. TIMES MAG., June 16, 2002, at 38.

⁴⁷ See A.E. Dick Howard, *The Values of Federalism*, 1 NEW EUROPE L. REV. 143 (1993); Erwin Chemerinsky, *Federalism Not as Limits, But as Empowerment*, 45 KANSAS L. REV. 1219 (1997).

⁴⁸ See generally James F. Blumstein, *Federalism and Civil Rights: Complementary and Competing Paradigms*, 47 VAND. L. REV. 1251, 1259 (1994) (noting that federalism's commitment to empowering geographically-based minority groups must coincide with a commitment to protecting "the interests of political, racial, religious or ethnic minorities within those quasi-autonomous areas").

(as a resident of one of fifty states) than she would have simply as one of 250-plus million Americans at the national level alone.⁴⁹

As such, federalism is and can be salutary only when and if the other part of the “federalism deal” – as one commentator has termed it – is accepted and reinvigorated: if state communities are empowered, then “local power with regard to civil rights issues [must] be constrained” in favor of robust “national protection and national control of civil rights.”⁵⁰ That is because federalism may convert minorities in the national political process into majorities at the sub-national level; empowerment of these new majorities can only be justified if the “interests of political, racial, religious, or ethnic minorities within those quasi-autonomous areas” are not placed at risk by denying or reducing their recourse to national institutions and to robust national civil or individual rights protections.⁵¹

If, therefore, the affirmative liberty-enhancing values of federalism are to be realized and if federalism is not to become the mantle by which an anti-civil rights ideological agenda is to be carried out, the revival of federalism and the protection of sub-national (state) units must be accompanied by revival of the flip side of the federalism deal: robust national and judicial protection for the individual rights of racial, religious or ethnic

⁴⁹ In reviewing Robert A. Dahl’s 2002 book, *How Democratic is the American Constitution?*, Hendrik Hertzberg poignantly compares the federalism-enhancing feature of the Constitution that accords two senators for each state, regardless of population, with affirmative action:

Even if it were true that the condition of being a citizen of a state with a small population entails such grievous disadvantages that, to correct for them, the very votes of such citizens must be assigned a greater weight than the votes of other Americans, how much is enough? Are the special needs of people who live in small states – people who can, after all, escape their condition by moving somewhere else – greater than the special needs of people who are short, or people who are disabled, or (more to the point of American history) people who are black? Here’s a little thought experiment, inspired by Dahl’s reflections. Imagine, if you can, that African-Americans were represented “fairly” in the Senate. They would then have twelve senators instead of, at present, zero, since black folk make up twelve per cent of the population. Now imagine that the descendants of slaves were afforded the compensatory treatment to which the Constitution entitles the residents of small states. Suppose, in other words, that African-Americans had as many senators to represent them as the Constitution allots to the twelve per cent of Americans who live in the least populous states. There would be forty-four black senators. How’s *that* for affirmative action?

Hendrik Hertzberg, *Framed Up: What the Constitution Gets Wrong* (summary and review of Robert Dahl, *How Democratic is the American Constitution?*), *NEW YORKER*, July 29, 2002.

⁵⁰ Blumstein, *supra* note 48, at 1253.

⁵¹ *Id.* at 1259.

minorities within states. Any other notion not only would subvert the underlying purposes of federalism itself, but also would result in less individual liberty and less individual rights protection, which all features of our Constitution – including the structural provisions and the Bill of Rights – are designed to preserve.