

# INTRODUCTION: CONSTITUTIONAL FEDERALISM REBORN

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In recent years, the Supreme Court has issued a number of decisions that tip the balance of power away from Congress and back to the states. The Court has revitalized federalism with interpretations of several different clauses of the Constitution.

The Tenth Amendment was central to the holdings in *New York v. United States*,<sup>1</sup> in which the Court invalidated federal regulation of states' toxic waste laws, and in *Printz v. United States*,<sup>2</sup> in which the Court invalidated the Brady Bill. Most scholars had long considered the Tenth Amendment to be "a mere truism" that left the states only such power as Congress chose not to exercise.<sup>3</sup>

In *Lopez*,<sup>4</sup> the Court acknowledged the limit of Congress's power under the Commerce Clause.<sup>5</sup> In *Seminole Tribe*<sup>6</sup> and *Coeur d'Alene*,<sup>7</sup> the Court gave new life to the Eleventh Amendment. Even *City of Boerne v. Flores*,<sup>8</sup> in which the Court struck down the Religious Freedom Restoration Act, can be viewed as a federalism case. In *Boerne*, the Court identified the limits of Congress's power to enact remedial legislation under section five of the Fourteenth Amendment.<sup>9</sup> This is the Court's

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1. 505 U.S. 144 (1992) (invalidating portions of the Low-Level Radioactive Waste Policy Amendments Act).

2. 117 S. Ct. 2365 (1997).

3. See Scott Boehne, Mack v. United States: *The Federal Eagle Nestles into the Executive Branches of State Government*, 30 GA. L. REV. 1117, 1123 (1996) (quoting *United States v. Darby*, 312 U.S. 100, 124 (1941)).

4. *United States v. Lopez*, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act of 1990).

5. U.S. Const. art. I, § 8, cl. 3.

6. *Seminole Tribe v. Florida*, 517 U.S. 44 (1996).

7. *Idaho v. Coeur d'Alene Tribe*, 117 S. Ct. 2028 (1997).

8. 117 S. Ct. 2157 (1997).

9. See *id.* at 2172 ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain

most recent statement of federalism.

All of these cases have two things in common. First, each had a slim majority of the Justices expressing a desire to limit the power of Congress vis-à-vis the states. Second, each case revealed the Court's inability to articulate with any precision what the limits to Congress's powers are or should be. This inability leaves judges like me struggling with very little guidance to figure out what the limits of Congress's power are.

Fortunately, the panel today will help us figure out if the rebirth of federalism is a blip on the historical screen or if it is the beginning of something truly wonderful.