DOES FEDERALISM ADVANCE LIBERTY?

ERWIN CHEMERINSKY†

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I. INTRODUCTION: THE ISSUE

One of the most frequently advanced justifications for federalism is that the division of power between federal and state governments advances liberty. For example, Chief Justice Rehnquist wrote, "[t]his constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'"\(^1\) Similarly, Justice Scalia declared that "[t]his separation of the two spheres is one of the Constitution's protections of liberty."\(^2\) Justice O'Connor wrote: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."\(^3\) Indeed, it is striking that so many of the Supreme Court's recent federalism decisions repeat the same language as a premise for judicial invalidation of federal laws.\(^4\)

†Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. B.S., 1975, Northwestern University; J.D., 1978, Harvard Law School. I want to thank Allison Meshekow for her excellent research assistance. I also want to thank the participants at a workshop at the University of Kentucky Law School for their excellent comments and suggestions.

4. Scholars, too, have made this claim. See Martin A. Feigenbaum, The
Unfortunately, none of the cases explain how federalism enhances liberty. The idea expressed is simply that limiting federal power means restricting the ability of the federal government to enact laws inimical to individual freedom. The problem with this claim is that the federal government could use its authority to advance liberty or to restrict it. The Court's assumption is that the latter is more likely than the former. The Court never has justified this premise; neither it nor scholars have even tried to show this.

Proving the majority's claim with regard to individual freedom is complicated. In all likelihood, over time, limiting the federal government's power probably will strike down some laws that advance liberty and some that restrict it. The majority needs to offer some reason to believe that, on balance, federal actions will be more harmful than beneficial to liberty. Nothing of this sort is found in any of the Supreme Court's federalism decisions.

This article examines the relationship between federalism and individual liberty. For purposes of this paper, "federalism" refers to the limits on federal power imposed by the Supreme Court. There are, of course, other aspects to federalism, some of which more clearly advance individual rights. For instance, Supreme Court decisions allowing state governments to protect greater rights under state constitutions than are safeguarded under the United States Constitution clearly advance liberties. The focus here, though, is on the Supreme Court's rulings that restrict federal power in the name of federalism. Specifically, this article examines decisions that limit the scope of Congress's commerce power, restrict Congress's authority under section 5 of the Fourteenth Amendment, use the

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Tenth Amendment to constrain Congress, and expand the scope of state sovereign immunity.

Do these decisions advance liberty? Is there reason to believe that such decisions, over a long period of time, would enhance freedom? The majority in so many of these cases defends federalism in instrumental terms as a means to the end of increasing liberty. This paper examines this claim.

I come to two conclusions. First, overwhelmingly, the Supreme Court's federalism decisions are "rights regressive"—that is, they limit rather than enhance individual liberties. Part II of the article discusses this. Second, as a more theoretical matter there is no reason to believe that federalism will increase freedom. The traditional explanations for why the vertical division of powers enhances liberty do not withstand scrutiny. Moreover, judicial review may invalidate laws that infringe constitutional rights, making federalism unnecessary as an additional protection. This is considered in Part III of the article.

Perhaps there are other reasons for limiting federal power as the Supreme Court has. One thing, however, is clear: federalism has not been about increasing liberty. By claiming that federalism enhances freedom, the Court and its defenders have masked a very powerful criticism of its recent decisions: they actually undermine liberty.

II. HAVE THE SUPREME COURT'S FEDERALISM DECISIONS ADVANCED LIBERTY?

Over the course of American history, and particularly in the last decade, have the Supreme Court's federalism decisions been "rights progressive," meaning they advance rights, or "rights regressive," meaning they limit individual liberty? Looking at the


10. I recognize, of course, that in many instances there could be debate over what is "rights progressive" as opposed to "rights regressive." For example, supporters and opponents of affirmative action would disagree as to whether it is "rights progressive" or "rights regressive." But, as explained below, the Court's decisions do not raise hard questions as to what is "rights progressive" and what is "rights regressive." The invalidation of laws, such as the Religious Freedom Restoration Act and the civil damages provision of the Violence Against Women Act, seem unquestionably "rights regressive."
decisions, it becomes startlingly apparent how often they are “rights regressive” and how rarely they have ever expanded the scope of rights.

This should not be surprising because, almost without exception, conservatives have used federalism as a rhetorical tool to argue for results that were clearly “rights regressive.” During the early 19th century, John Calhoun and other pro-slavery advocates argued that states had independent sovereignty and could interpose their authority between the federal government and the people to nullify federal actions restricting slavery.11

In the early 20th century, federalism was successfully used as the basis for challenging federal laws regulating child labor, imposing the minimum wage, and protecting consumers.12 During the 1950s and the 1960s, objections to federal civil rights efforts were phrased primarily in terms of federalism. Southerners challenged Supreme Court decisions mandating desegregation and objected to proposed federal civil rights legislation by resurrecting the arguments of John Calhoun.13 Segregation and discrimination were defended less on the grounds that they were desirable practices, and more in terms of the states’ rights to choose their own laws concerning race relations.

Indeed, it is difficult to think of any instance in American history where the Supreme Court limited federal power and the result was “rights progressive” rather than “rights regressive.” Some decisions, such as New York v. United States,14 which invalidated a federal law that required state governments to clean up their nuclear wastes, have nothing to do with individual rights. But virtually every other federalism decision in the last decade left individuals with less rights, not more. To demonstrate this, I want to consider three sets of recent Supreme Court rulings: the restriction of the scope of Congress’s commerce power, the limitation of Congress’s authority under section five of the Fourteenth Amendment, and the expansion of state sovereign immunity.

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13. See BEER, supra note 11, at 19-20.
A. Commerce Clause

The Supreme Court's most recent decision invalidating a federal law as exceeding the scope of Congress's commerce power was United States v. Morrison. The case presented the question whether the civil damages provision of the federal Violence Against Women Act, is constitutional. The provision authorizes victims of gender-motivated violence to sue for money damages. Congress enacted the Violence Against Women Act based on detailed findings of the inadequacy of state laws in protecting women who are victims of domestic violence and sexual assaults. For example, Congress found that gender-motivated violence costs the American economy billions of dollars a year and is a substantial constraint on freedom of travel by women throughout the country. The Violence Against Women Act obviously increased the rights of women to sue and to gain some redress for gender-motivated violence.

The case was brought by Christy Brzonkala, who allegedly was raped by football players while she was a freshman at Virginia Polytechnic Institute. The players ultimately avoided punishment by the University, and Brzonkala filed suit against her assailants and the University under the Violence Against Women Act.

The issue before the Supreme Court was whether the civil damages provision of the Act could be upheld, either as an exercise of Congress' commerce clause authority or as permissible under Congress' power pursuant to section five of the Fourteenth Amendment. In a 5-4 decision, the Court held that Congress lacked the authority to adopt the provision under either of these powers. The split was the same as in all of the recent federalism rulings: Chief Justice Rehnquist wrote the opinion for the Court, joined by Justices O'Connor, Scalia, Kennedy and Thomas.

17. See Morrison, 529 U.S. at 601-02.  
19. See Morrison, 529 U.S. at 653.  
20. See id. at 632.  
21. See id. at 634.  
23. See Morrison, 529 U.S. at 602.  
24. See id.  
25. See id. at 607.  
26. See id. at 619.  
27. See id. at 627.  
28. See id. at 602.
Justices Stevens, Souter, Ginsburg, and Breyer dissented. 29

The United States government and the plaintiff, Christy
Brzonkala, defended the law on the ground that violence against
women has a substantial effect on the national economy. 30 The
Supreme Court expressly rejected this argument as insufficient to
sustain the law. 31 Chief Justice Rehnquist emphasized that Congress
was regulating non-economic activity that has traditionally been
dealt with by state laws. 32 Moreover, the Court stressed that there
is no jurisdictional requirement in the statute necessitating proof of
an effect on interstate commerce. 33

Unlike the law struck down in United States v. Lopez, 34
Congress made detailed legislative findings about the economic
impact of violence against women. 35 The Supreme Court expressly
found these findings to be inadequate to sustain the law under the
commerce clause. 36 The Court said that Congress was relying on a
“but-for causal chain from the initial occurrence of violent
crime . . . to every attenuated effect upon interstate commerce.” 37
The Court said that “[i]f accepted, petitioners’ reasoning would
allow Congress to regulate any crime as long as the nationwide,
aggregated effect of the that crime has substantial effects on
employment, production, transit or consumption.” 38 By this
reasoning, the Court explained, Congress could regulate all violent
crimes in the United States. 39 The Court thus concluded, “[w]e
accordingly reject the argument that Congress may regulate
noneconomic, violent criminal conduct based solely on that
conduct’s aggregated effect on interstate commerce. The
Constitution requires a distinction between what is truly national
and what is truly local.” 40

Whatever its other merits, there seems no possible argument
that Morrison is rights progressive. Congress enacted a law to

29. See id. at 628.
30. See id.
31. See id.
32. See id. at 617.
33. See id. at 614.
35. See S. Rep. No. 101-545 (1990); Majority Staff of the Senate Committee
   as the Judiciary, Violence Against Women: The Increase of Rape in America,
36. See Morrison, 529 U.S. at 614.
37. Id. at 615.
38. Id.
39. See id. at 617.
40. Id. at 617-18.
expand the rights of victims of gender-motivated violence based on findings of a serious social problem and the inadequacy of remedies in the state courts. The Supreme Court's invalidation of the statute thus restricts the rights of women throughout the country. Conceivably it could be argued that *Morrison* protects the rights of those accused of sexual violence by preventing them from being sued in federal court. Then the question would have to be: which is more rights progressive expanding the ability of victims of gender-motivated violence to sue or protecting those accused of such acts from being sued? Merely stating the question makes the answer obvious.

**B. Section 5 of the Fourteenth Amendment**

Perhaps the Court's most rights regressive actions have been the decisions limiting the scope of Congress' powers under section 5 of the Fourteenth Amendment. Section 5 broadly empowers Congress to enact laws to enforce the Fourteenth Amendment. In the last five years, the Court has greatly narrowed this authority in two respects: first, it has held that Congress cannot expand the scope of rights, but rather only provide remedies for rights recognized by the judiciary; and second, it has held that Congress under section 5 may not regulate private conduct.41

As to the former, in a series of decisions beginning with *City of Boerne v. Flores*,42 the Court has held that Congress under section 5 of the Fourteenth Amendment cannot expand the scope of rights. Rather, Congress only can enact laws to prevent or remedy violations of rights recognized by the courts and these laws must be "proportionate" and "congruent" to the violations.43 Individually and collectively, these decisions are tremendously rights regressive. They dramatically limit the ability of Congress to expand the scope and protections of individual liberties.

In *Flores*, for example, the Court struck down a federal statute, the Religious Freedom Restoration Act,44 that expanded the safeguards accorded to the free exercise of religion.45 The Act was adopted in 1993 to overturn a recent Supreme Court decision that had narrowly interpreted the free exercise clause of the First

41. See infra text accompanying notes 41-84.
42. 521 U.S. 507 (1997).
43. See *Flores*, 521 U.S. at 533.
44. 42 U.S.C.S. § 2000bb (Law Co-op. 1993)
45. See *Flores*, 521 U.S. at 507.
Amendment. In Employment Division Department of Human Resources of Oregon v. Smith, the Supreme Court significantly lessened the protections of the free exercise clause. Oregon law prohibited the consumption of peyote, a hallucinogenic substance. Native Americans challenged this law claiming that it infringed free exercise of religion because their religious rituals required the use of peyote. Under prior Supreme Court precedents, government actions burdening religion would be upheld only if they are necessary to achieve a compelling government purpose. The Supreme Court, in Smith, changed the law and held that the free exercise clause cannot be used to challenge neutral laws of general applicability. The Oregon law prohibiting consumption of peyote was deemed neutral because it was not motivated by a desire to interfere with religion and it was a law of general applicability because it applied to everyone.

In response to this decision, Congress overwhelmingly adopted the Religious Freedom Restoration Act, which was signed into law by President Clinton. The Religious Freedom Restoration Act ("RFRA") expressly states that its goal was to overturn Smith and restore the test that was followed before that decision. The Act requires courts considering free exercise challenges, including neutral laws of general applicability, to uphold the government's actions only if they are necessary to achieve a compelling purpose. Specifically, RFRA prohibited "[g]overnment from "substantially burden[ing]" a person's exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."

Flores involved a church in Texas that was prevented from constructing a new facility because its building was classified a historic landmark. The church sued under the Religious Freedom

49. See Smith, 494 U.S. at 874-75.
51. See Smith, 494 U.S. at 877-78.
52. See id.
54. See id.
55. See id.
56. Id.
Restoration Act and the City challenged the constitutionality of the law. Justice Kennedy, writing for the Court, held that the Act was unconstitutional. The Court held that Congress under section 5 of the Fourteenth Amendment may not create new rights or expand the scope of rights; rather Congress is limited to laws that prevent or remedy violations of rights recognized by the Supreme Court and these must be narrowly tailored—“proportionate” and “congruent”—to the constitutional violation.

Justice Kennedy explained that section 5 gives Congress the power to enact laws “to enforce” the provisions of the Fourteenth Amendment. He stated that “[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is. It has been given the power ‘to enforce,’ not the power to determine what constitutes a constitutional violation. Were it not so, what Congress would be enforcing would no longer be, in any meaningful sense, the ‘provisions of [the Fourteenth Amendment].’”

Congress thus is limited to enacting laws that prevent or remedy violations of rights already recognized by the Supreme Court. Moreover, the Court said that “[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”

Justice Kennedy defended this conclusion by invoking the need to preserve the Court as the authoritative interpreter of the Constitution. Justice Kennedy, quoting Marbury v. Madison wrote, “If Congress could define its own powers by altering the Fourteenth Amendment’s meaning, no longer would the Constitution be ‘superior paramount law unchangeable by ordinary means.’ It would be ‘on a level with ordinary legislative acts, and like other acts, . . . alterable when the legislature shall please to alter it.’” Justice Kennedy concluded this part of the majority opinion by declaring, “Shifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed

58. See id.
59. See id. at 536.
60. See id. at 533.
61. See id. at 517.
62. Id. at 519.
63. See id.
64. Id. at 520.
65. See id.
66. 5 U.S. (1 Cranch) 137 (1803).
67. Flores, 521 U.S. at 529.
amendment process contained in Article V."^{68}

Justice Kennedy's majority opinion then declared RFRA unconstitutional on the grounds that it impermissibly expanded the scope of rights and that it was not proportionate or congruent as a preventative or remedial measure. He wrote:

RFRA is not so confined. Sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. . . . Any law is subject to challenge at any time by any individual who alleges a substantial burden on his or her free exercise of religion. The reach and scope of RFRA distinguish it from other measures passed under Congress' enforcement power, even in the area of voting rights . . . . The stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved.^{69}

RFRA prohibits much that would not violate the Constitution and thus was deemed to exceed the scope of Congress' section 5 powers.

Again, there is no doubt that this decision, like Morrison, is rights regressive. Flores means that people in the United States will have far less protection for their religious practices. Laws of general applicability—whether prison regulations or zoning ordinances or historical landmark laws—that seriously burden religion might have been successfully challenged under RFRA, but not any longer. Put most simply, Flores means that many claims of free exercise of religion that would have prevailed, now certainly will lose. People in the United States have less protection of their rights after Flores than they did before it.

The decisions following Flores have likewise been quite rights regressive. Three times so far—in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank,^{70} Kimel v. Florida Board of Regents,^{71} and University of Alabama v. Garrett,—the Court has considered whether laws are valid exercises of Congress' section 5 powers and a permissible basis for suits against state governments. In all three cases, the Court applied Flores and found

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68. Id.
69. Id. at 532-33.
70. 527 U.S. 627 (1999).
the law invalid as an exercise of Congress' section 5 powers and precluded the suit against the state government.

In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Supreme Court ruled that Congress under section 5 of the Fourteenth Amendment could not authorize suits against states for patent infringement. In *Kimel v. Florida Board of Regents*, the Court ruled that Congress lacked authority to enact the Age Discrimination in Employment Act under section 5. In *University of Alabama v. Garrett*, the Court came to the same conclusion about Title I of the Americans with Disabilities Act, which prohibits employment discrimination based on disabilities and requires reasonable accommodations for disabilities.

Again, there seems no question that these decisions are rights regressive. *Florida Prepaid* means that patent owners have less protection of their rights because they cannot sue state governments that engage in infringement. *Kimel* and *Garrett* limited the ability of Congress to prohibit employment discrimination based on age and disability. The result of these two cases is that state government employees have much less protection from discrimination.

There has been one other aspect of the Court's section 5 decisions: the Court has ruled that Congress cannot use this provision to regulate private conduct. In the *Civil Rights Cases*, in 1883, the Supreme Court greatly limited Congress' ability to use its power under the Reconstruction Amendments to regulate private conduct.

In *United States v. Guest*, five Justices, although not in a single opinion, concluded that Congress may outlaw private discrimination pursuant to section 5 of the Fourteenth Amendment. *Guest* involved the federal law which makes it a crime for two or more persons to go "in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege." The Court held that interference with the use of facilities in interstate commerce violated the law, whether or not motivated by a racial animus.

The majority opinion did not reach the question of whether

73. See *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. at 630.
74. See *Kimel*, 528 U.S. at 67.
75. See *Garrett*, 531 U.S. at 360.
76. 109 U.S. 3 (1883).
78. See *Guest*, 383 U.S. at 762, 782.
80. See *Guest*, 383 U.S. at 760.
Congress could regulate private conduct under section 5 of the Fourteenth Amendment. However, six of the Justices—three in a concurring opinion and three in a dissenting opinion—expressed the view that Congress could prohibit private discrimination under its section 5 powers. Justice Tom Clark, in a concurring opinion joined by Justices Hugo Black and Abe Fortas, said that "the specific language of section 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights." Likewise, Justice William Brennan in an opinion that concurred in part and dissented in part, and that was joined by Chief Justice Earl Warren and Justice William Douglas, concluded that Congress may prohibit private discrimination pursuant to section 5.

But in Morrison, the Supreme Court expressly reaffirmed the Civil Rights Cases and disavowed the opinions to the contrary in Guest. As described above in the discussion of Congress' commerce power, Morrison involved a constitutional challenge to the civil damages provision of the Violence Against Women Act which authorized victims of gender-motivated violence to sue under federal law.

The United States government intervened to defend the law and it and the plaintiff argued that the civil damages provision was constitutional both as an exercise of Congress' commerce clause power and of its authority under section 5 of the Fourteenth Amendment. As explained above, the Court in a 5-4 decision held that the law exceeded the scope of the commerce power because Congress cannot regulate non-economic activity based on a cumulative impact on interstate commerce.

By the same 5-4 margin, the Court held that the law is not constitutional as an exercise of Congress' section 5 power. Chief Justice Rehnquist writing for the Court said that Congress under this authority may regulate only state and local governments, not private conduct. Chief Justice Rehnquist relied on "the time-honored principle that the Fourteenth Amendment, by its

81. Guest, 383 U.S. at 762 (Clark, J., concurring).
82. See Guest, 383 U.S. at 777 (Brennan, J., concurring in part and dissenting in part).
83. See Morrison, 529 U.S. at 602.
84. See id. at 601-02.
85. See id. at 607, 619.
86. See id. at 617-18.
87. See id. at 627.
88. See id. at 621-27.
very terms, prohibits only state action.\textsuperscript{89} He said that the opinions in \textit{United States v. Guest} indicating Congressional power to regulate private conduct were only dicta.\textsuperscript{90} Thus, the civil damages provision of the Violence Against Women Act was deemed to exceed the scope of Congress’ section 5 powers because it “is not aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it is directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”\textsuperscript{91}

Again, it is clear that this decision in the name of federalism is very rights regressive. Congress is denied the ability to expand rights and protections against private infringers of liberty. More generally, the Court’s narrowing of Congress’ ability to protect rights is inherently rights regressive. Perhaps there is some other justification for what the Court has done, but the limitation on Congress’ section 5 powers clearly lessens the protection of rights.

C. Sovereign Immunity

A final aspect of the Court’s federalism decisions has been a substantial expansion of state sovereign immunity. In \textit{Seminole Tribe v. Florida},\textsuperscript{92} the Court held that Congress may authorize suits against state governments only pursuant to section 5 of the Fourteenth Amendment and not under any other congressional power.\textsuperscript{93} It was based on this decision that the Court handed down the rulings described above in \textit{Florida Prepaid, Kimel, and Garrett}, that state governments could not be sued for patent infringement, violating the Age Discrimination in Employment Act, or infringing Title I of the Americans with Disabilities Act. Also, in \textit{Alden v. Maine},\textsuperscript{94} the Court held that state governments cannot be sued in state court, even on federal claims, without their consent.\textsuperscript{95}

Again, there is no doubt that expanding sovereign immunity is rights regressive. Sovereign immunity protects the government as an entity and denies relief to those that are injured.\textsuperscript{96} Rights are undermined whenever there is a violation and no remedy for it.

\textsuperscript{89} Id. at 621.
\textsuperscript{90} See id. at 624.
\textsuperscript{91} Id. at 626.
\textsuperscript{92} 517 U.S. 44 (1996).
\textsuperscript{93} See id. at 47.
\textsuperscript{94} 527 U.S. 706 (1999).
\textsuperscript{95} See \textit{Alden}, 527 U.S. at 712.
D. Anything Else?

I have reviewed the Court’s recent federalism decisions in some detail, even though they are familiar, to show how they all point in one direction: the Court’s protection of federalism has restricted, not enhanced, individual freedom. I have omitted mention of three federalism cases. Two invalidated federal regulation of firearms. In United States v. Lopez, the Court invalidated the Gun Free School Zone Act which made it a federal crime to have a gun within 1,000 feet of a school. In Printz v. United States, the Court struck down the Brady Handgun Violence Prevention Act that required states to conduct background checks before issuing permits for guns. Arguably, these two decisions advance rights by safeguarding the Second Amendment’s protections.

This, however, assumes that the Second Amendment should be interpreted as protecting an individual right to have guns, as opposed to being understood as preventing Congress from regulating firearms in a manner that keeps states from defending themselves. There is a heated debate among scholars, as well as in society, about the proper interpretation of the Second Amendment. On the one hand, some believe that the Second Amendment safeguards a right of individuals to keep and own firearms. From this perspective, federal laws that infringe this right are at least presumptively unconstitutional. On the other hand, some believe that the Second Amendment means only that Congress cannot regulate firearms in a manner that keeps state governments from protecting themselves. This view does not read the Second Amendment as creating a constitutional right for individuals to own guns.

98. See id. at 551.
100. 107 Stat. 1536 (repealed 1997).
101. See Printz, 521 U.S. at 935.
As one firmly in latter camp, I do not see *Lopez* or *Printz* as expanding rights in any way. But even if one took the opposite perspective, these cases are not rights progressive. Even if the Second Amendment is about safeguarding an individual's right to have a gun, that does not mean that it includes a right to have guns near schools or a right to have guns without a background check.

The only other federalism decision from the last decade was *Reno v. Condon*.¹⁰⁴ Unlike the other recent cases, in *Reno v. Condon* the Supreme Court rejected a Tenth Amendment challenge and upheld the federal law.¹⁰⁵ The case involved a challenge to the Driver's Privacy Protection Act of 1994,¹⁰⁶ a federal law that prohibited states from disclosing personal information gained by departments of motor vehicles, such as home addresses and phone numbers, social security numbers, and medical information.¹⁰⁷ California Senator Barbara Boxer introduced the bill after an actress in *Los Angeles, Rebecca Schaeffer, was stalked and murdered by a man who obtained her home address from the California Department of Motor Vehicles.*

The law enhances liberty by protecting privacy. The Supreme Court unanimously rejected a Tenth Amendment challenge and declared the law constitutional.¹⁰⁸ What is striking is that the one recent federalism decision that has been rights progressive is the one where the Court rejected the federalism challenge and upheld the federal law.

III. The Theoretical Relationship Between Federalism and Rights⁷

The fact that the Court's recent federalism decisions have been rights regressive does not mean that this must always be the case. In theory, federalism doctrines could be used to strike down laws that limit individual freedom. Putting the specific cases aside, is there reason to believe that federalism will enhance liberty?

A primary explanation offered for protecting state governments from federal intrusions is that the division of power vertically,
between federal and state governments, lessens the chance of federal tyranny. How do state governments prevent federal tyranny? Perhaps most importantly, the framers thought that the possibility of federal abuses could be limited by restricting the authority of the federal government. The framers envisioned that the vast majority of governance would be at the state and local levels and that federal actions would be relatively rare and limited. If the powers of the federal government are limited, most governing, of necessity, must be done at the state and local levels.

Yet, the notion of radically limited federal powers seems anachronistic in the face of a modern national market economy and decades of extensive federal regulations. Additionally, there has been a major shift over time in the views about how abusive government is best controlled. Now it is thought that if a federal action intrudes upon individual liberties the federal judiciary will invalidate it as unconstitutional. Judicial review is seen as an important check against tyrannical government actions.

Professor Rapaczynski offers a more sophisticated and contemporary explanation for why state governments limit the likelihood of federal tyranny. He writes that:

[The most influential protection that the states offer against tyranny is the protection against the special interest of government itself. For the fact that the federal government may be less likely than the states, in what we may call “normal times,” to oppress small minorities whose mode of life offends a homogeneous majority does not mean that it is never likely to oppress them as well as to deprive the citizenry as a whole of their legitimate voice in running the national affairs. Should the federal government ever be captured by an authoritarian movement or assert itself as a special cohesive interest, the resulting oppression would almost certainly be much more severe and durable than that of which any state would be capable.109]

Professor Rapaczynski is undoubtedly correct that a tyrannical federal action stemming from the capture of the federal government would be extremely undesirable. But the relationship of this observation to the content of federalism is not clear. Is it an argument that the fewer the powers accorded to the federal government the better it is because federal powers might be used

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for ill? Ultimately this is an argument against having any federal powers because all could be abused. Once it is decided that there should be a federal government and federal powers, it is necessary to decide which federal powers offer enough prospect for benefits to outweigh their prospect for tyrannical use.

More subtly, certain groups could capture federal power and use its power to advance liberty. Laws such as the Violence Against Women Act or the Religious Freedom Restoration Act undoubtedly reflect the legislative power of the coalitions behind the laws. No reason is offered as to why federal power is more likely to be used in a rights regressive way than in a rights progressive manner.

A second frequently invoked value of federalism is that states are closer to the people and thus more likely to be responsive to public needs and concerns.110 Professor David Shapiro clearly summarizes this argument when he writes: "[O]ne of the stronger arguments for a decentralized political structure is that, to the extent that the electorate is small, and elected representatives are thus more immediately accountable to individuals and their concerns, government is brought closer to the people, and democratic ideals are more fully realized."111 This argument has intuitive appeal. It suggests that the smaller the area governed, the more responsive the government will be to the interests of the voters. The argument then must be that a government that is more responsive to the people will be one that better protects liberty.

But this premise is highly questionable; it assumes that popular sentiment is likely to be rights progressive rather than rights regressive. To the extent that voters at the state and local level prefer rights regressive legislation—or more likely a rule that abuses a particular minority group—greater responsiveness increases the dangers of government tyranny. In other words, the substantive result of decreasing tyranny will not always be best achieved by the process approach of maximizing electoral responsiveness; indeed, the reverse might well be the result.

In fact, there is a greater danger of special interests capturing government at smaller and more local levels. In Federalist 10,112 James Madison wrote of the danger of "factions"113 and modern

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110. See Rapaczynski, supra note 109, at 391.
113. See id. at 122-23.
political science literature offers support for his fears. Indeed, in *City of Richmond v. J.A. Croson Co.*, the Supreme Court emphasized the dangers of special interest capture at the local level in invalidating a city’s affirmative action to benefit minority businesses. Justice Scalia, in his concurrence, distinguished *Fullilove v. Klutznick* that had upheld a similar federal program on the ground that capture by special interests was much less likely at the federal level than at the local level.

Scholars have frequently argued that federalism allow states to serve as laboratories for experimentation. Justice Brandeis apparently first articulated this idea when he declared:

>To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.

More recent federalism decisions, too, have invoked this notion. Justice O’Connor, dissenting in *Federal Energy Regulatory Commission v. Mississippi*, stated that “...the Court’s decision undermines the most valuable aspects of our federalism. Courts and commentators frequently have recognized that the 50 States serve as laboratories for the development of new social, economic, and political ideas.”

Any federal legislation preempting state or local laws limits experimentation, however, the application of constitutional rights to the states limits their ability to experiment with and provide less safeguards of individual liberties. The key questions are, when is it worth experimenting and when is experimentation to be rejected because of a need to impose a national mandate? The value of states as laboratories provides no answer to this issue.

There also is a related process question: who is in the best position to decide when further experimentation is warranted or
when there is enough knowledge to justify federal actions? A strong argument can be made that the need for using states as laboratories is a policy argument to be made to Congress against federal legislation and not a judicial argument that should be used to invalidate particular federal laws on the grounds that they unduly limit experimentation. Additionally, Congress and even federal agencies can design experiments and try differing approaches in varying parts of the country.

Professors Rubin and Feeley take this argument even further. They argue that political realities mean that relatively few experiments will be done at the state and local levels. They write:

To experiment with different approaches for achieving a single, agreed-upon goal, one sub-unit must be assigned an option that initially seems less desirable, either because that option requires changes in existing practices, or because it offers lower, although still-significant chances of success . . . . As a result, individual states will have no incentive to invest in experiments that involve any substantive or political risk, but will prefer to wait for other states to generate them; this will, of course, produce relatively few experiments.\(^{121}\)

Moreover, Congress, in choosing whether to protect rights, certainly can make the choice whether to allow experimentation or whether to impose a national standard.\(^{122}\) Congress' creation of a federal right may be seen as a decision that protecting the liberty is more important than permitting states to experiment with it.

The point is that none of the traditional justifications for federalism explain why it is likely to enhance liberty nor is it ever explained why federalism is needed to secure liberty. The basic protection of individual rights comes from judicial review. If government at any level—federal, state, or local—infringes rights, courts can invalidate that action. Therefore, the claim must be that the restrictions imposed on the federal government by virtue of federalism will prevent actions that interfere with rights that would not be invalidated by the courts. Those who maintain that federalism enhances liberty have never supported this claim.

Actually, the burden on those who defend federalism on this basis is even greater. Restricting federal power inherently risks

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122. See id.
invalidating federal laws that are advancing rights, such as the Violence Against Women Act or the Religious Freedom Restoration Act. Therefore it must be shown that, on balance, federalism will do more to protect rights that otherwise would not be safeguarded by the courts, than it will cost in terms of liberties lost by striking down rights protective laws. There is no reason to believe this is true.

IV. CONCLUSION

In countless cases involving federalism in recent years, the Court has declared that limiting the powers of the federal government advances freedom. But the Court never has gone beyond simply assuming this to be true. An examination of the claim shows that it has no basis. Quite the contrary, examining the Court’s use of federalism shows that in practice and in theory judicially imposed limits on federal power are likely to lessen liberty. This, then, is more than just a criticism of one of the justifications for the Court’s decisions. Any doctrine that lessens liberty must be regarded as undesirable.