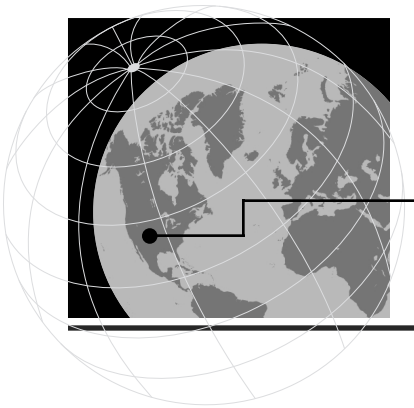

Presidential politics *and the* future *of the* U.S. Supreme Court

BY *JOHN KINCAID*

The United States Supreme Court is rarely an election issue, but the next president—Republican George Bush or Democrat Al Gore—will have opportunities to nominate new justices, possibly four. One will surely be Hispanic, the Court's first. Hence, future federalism rulings will be shaped by the party that wins the White House and the party that wins the U.S. Senate in November. (The president nominates candidates for the nine-member Court; the Senate confirms or rejects them.)

Why the controversy?

The Court is a hot issue because it has voided some popular federal laws. Opponents of the state-friendly rulings believe that the Court's "conservative majority" ("The Federalism Five"—Kennedy, O'Connor, Rehnquist, Scalia, and Thomas) is building precedents to curtail many federal civil-rights and social-welfare laws. Feminists, especially, fear that Bush justices would overturn the Court's 1973 abortion-rights decision, *Roe v. Wade*.

The Court's behavior is new and unusually assertive. From 1937 to the mid-1990s, the justices routinely deferred to congressional and presidential interpretations of federal constitutional powers. Indeed, virtually all of the Court's new state-friendly rulings have been five–four decisions. One new justice could tip the Court back toward favoring national power.

Why the Court became more state-friendly during the 1990s is debatable. The change is due partly to conservative justices appointed by Republican presidents who wanted the U.S. Constitution interpreted narrowly. Liberals had long led the Court into broad interpretations that expanded national power and transformed American society. But public opinion has changed too. The federal government, once the most trustworthy, is now trusted the least—behind local governments (trusted most) and state governments.

Additionally, the Court's 1973 abortion ruling galvanized into political action evangelical Protestants and Roman Catholic traditionalists. This Christian Right views the Court as an enemy of traditional values and the true Constitution.

By the 1980s, conservatives had also constructed more effective political and legal organizations to challenge liberals, thus escalating the "culture wars" that agitate American politics. Given the federal Constitution's sacred status for Americans, politics often rises to constitutional heights, enticing or dragging the U.S. Supreme Court into the fray. Hence, in the world's most litigious society, conservatives now litigate as aggressively as liberals.

Essentially, since 1990, the U.S. Supreme Court has revived seven constitutional limits on federal power.

State republican autonomy

The opening salvo came in 1991. The Court ruled that the federal Age Discrimination Act did not preempt (i.e., displace) the Missouri Constitution's requirement that state judges retire by age 70. The decision was based on the U.S. Constitution's Tenth Amendment and on a little-used clause, which states: "The United States shall guarantee to every State in this Union a Republican [i.e., democratic] Form of Government." The authority of the people of Missouri to enact a constitutional retirement age for their judges is, reasoned the Court, basic to republican government. Although narrow and uncontroversial, the ruling signaled readiness to curtail federal expansions of individual rights viewed as secondary to the self-governing rights of the peoples of the states.

State reserved-powers protection

The Tenth Amendment, ratified in 1791, reserves to the states, or the people, all powers not delegated to the federal government. The Court had abandoned this amendment in 1941 and, again, in 1985, advising states to protect their autonomy through the national political process, not through appeals for Tenth-Amendment judicial relief.

In 1992, however, the Court declared unconstitutional a provision of a 1985 federal Low-Level Radioactive Waste act, which required states to dispose of such waste in prescribed ways by 1996 or face civil liability. Even though the act exemplified "cooperative federalism" because it resulted from negotiations between state governors and Congress, the Court held that governors lack Tenth-Amendment authority to surrender state sovereignty to Congress and, thereby, sell out the republican citizenship rights of state taxpayers (*New York v. United States*).

Through the Tenth Amendment, which has informed most of the Court's federalism decisions, the majority has resurrected the 19th-century doctrine of "dual sovereignty," namely, that the federal and state governments possess separate and independent constitutional sovereignty and that neither can invade the other's sovereignty.

State protection against federal conscription

In *New York*, and then *Printz v. United States* (1997), the Court prohibited Congress from commandeering state and local officials to execute federal law. The Court voided a provision of the 1993 Brady Act that required local law-enforcement officers to conduct background checks of handgun buyers until the federal government established its own system. State and local officials can cooperate voluntarily (and most did), opined the Court, but Congress cannot compel cooperation.

State protection against the federal commerce power

More surprising was *United States v. Lopez* (1995). For the first time since 1936, the Court voided a statute as unconstitutionally exceeding Congress's power to regulate interstate commerce. The majority struck down the 1990 Gun-Free Schools Zones Act, which made it a federal crime to possess a gun within 1000 feet of a school. (Education is overwhelmingly state-local, and 41 states already had gun-free schools laws in 1990.) Congress had reasoned that possessing a gun near a school—whether or not it is used, displayed, or obtained via interstate commerce—disrupts schooling. Because education is vital to the economy, Congress can wield its commerce power to regulate or criminalize disruptive behavior in schools.

No, said the Court. Such broad interpretations would convert Congress's commerce power into "a general police power of the sort retained by the States." Indeed, when asked, federal officials could cite no human activity that Congress could not regulate under its elastic definition of interstate commerce.

State protection as laboratories of democracy

In 1997, the Court refused to recognize physician-assisted suicide as a national right under the 14th Amendment to the U.S. Constitution, thus upholding 49 state bans on such suicide. Allowing the states to decide whether physician-assisted suicide is a right, the Court opined: there is "no reason to think the democratic process [in the states] will not strike the proper balance." In 1998, Oregon became the first state to permit physician-assisted suicide.

Ruling otherwise, the Court would have ignited a political firestorm, intensifying the national conflagration still burning from its 1973 pro-abortion decision. One rationale for federalism is to prevent national firestorms by diffusing divisive cultural conflicts across the constituent units. Americans disagree about abortion, suicide in all forms, capital punishment (permitted in 38 states), homosexuality, and the like.

State protection against 14th amendment overreach

Under the 14th Amendment (1868), no state can "deprive any person of life, liberty, or property, without due process of law; nor deny to any person...equal protection of the laws." Congress can enforce this amendment, which was ratified after the Civil War to protect free southern blacks from state retribution. Since 1931, the amendment has been used to vastly expand individual rights for all persons and to protect them against state infringement.

In 1997, however, the Court limited Congress's 14th Amendment reach by striking down the 1993 Religious Freedom Restoration Act (RFRA) and declaring itself the final arbiter of the Constitution. A mission-style church located in an historic preservation zone had sued Boerne, Texas, under RFRA because the city had denied it a permit to enlarge its edifice. The Court ruled against the church, calling RFRA a "considerable intrusion into the states' traditional prerogatives and general authority to regulate for the health and welfare of their citizens."

State sovereign-immunity protection

The 11th Amendment (1798) was ratified to protect the sovereign states from being sued in federal courts without their consent. But the Court has long allowed Congress to abrogate this amendment in order to regulate commerce and protect individual rights. In 1996, however, the Court rejuvenated state "sovereign immunity" by ruling that the Seminole Tribe could not sue Florida for allegedly violating the federal Indian Gaming Regulatory Act. In 1999, it ruled that state government employees cannot sue their state in either federal court or state court under the 1938 Fair Labor Standards Act. Such suits, argued the majority, burden "the States' ability to govern in accordance with the will of their citizens."

Most controversial was a May 2000 that voided a provision of the 1994 Violence Against Women Act (VAWA), which allowed women to sue alleged assailants in federal court (even if assailants had not been charged or convicted of any offense in state court). Congress based the VAWA on its 14th Amendment and commerce powers, arguing that states are lax in protecting women and that gender-motivated violence harms the nation's economy.

The Court ruled that Congress had again stretched "interstate commerce" beyond reason, overreached the 14th Amendment, and invaded the states' sovereign police power in ways that threatened to obliterate "the Framers' carefully crafted balance of power between the States and the National Government."

The ruling is controversial because it invites challenges to many federal civil-rights, social-welfare, labor, and environmental laws—laws enforced by federally granted citizen rights to sue states, corporations, and individuals.

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The U.S. Supreme Court has erected a beaver dam but not yet a Hoover Dam against federal power. All rulings have not limited Congress; some have limited the states. In June 2000, for example, the Court unanimously struck down a Massachusetts' economic sanctions law aimed at Burma.

Thus federalism, usually a MEGO (my eyes glaze over) issue, again animates American national, state, and local politics.