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No drugs and no guns, says a sign in English and Spanish outside an elementary school in Arlington, Texas. The U.S. Supreme Court struck down a federal statute creating gun-free zones near schools. State and local legislation is still legal.

U.S. Supreme Court shifts to centre in recent constitutional rulings

There has been no federalism revolution in the courts, nor is there likely to be

BY G. ALAN TARR

SETTLING DISPUTES BETWEEN the federal government and the states has been and will continue to be a key role of the United States Supreme Court.

“The question respecting the extent of the powers actually granted [to the federal government], is perpetually arising, and will probably continue to arise, as long as our system shall exist.” So wrote Chief Justice John Marshall of the United

States Supreme Court in *McCulloch v. Maryland* (1819), and his statement has proven prophetic. Many Supreme Court cases have focused on the distribution of power between the federal and state governments. In some the Supreme Court has upheld the federal government’s claims, while in others it has safeguarded the powers of the states.

The nine justices of the U.S. Supreme Court play a crucial role in American fed-

eralism. They police the boundary between the federal government’s powers and those of the states, striking down as unconstitutional those federal laws that invade state powers and those state laws that infringe upon federal rights. Aside from their appointment by the president with the “advice and consent” of the Senate, the justices remain free from interference by the legislative and executive branches, and this independence enables them to serve as a neutral umpire in resolving federalism disputes.

The U.S. Supreme Court has over time offered varying answers to the question of how the Constitution divides power

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between the federal and state governments. After 1937, a shift toward the federal government occurred, continuing, though somewhat diminished, until the early 1990s. Another shift appeared imminent in the mid-1990s. A crucial source of federal power is the Commerce Clause of the U.S. Constitution, which authorizes Congress to regulate trade with foreign nations, with the Indian (Native American) tribes, and among the states. Congress has relied on this clause as authority for many laws that it has enacted, regulating both commercial and non-commercial activity. From 1937–1994, the Supreme Court consistently rejected claims that Congress had exceeded its powers under the Commerce Clause. But in *United States v. Lopez* (1995) and *United States v. Morrison* (2000), a five-member majority struck down federal statutes as beyond congressional power under the Commerce Clause.

When states fail to protect individual rights

Another major source of congressional power is the Fourteenth Amendment, adopted in 1867 after the Civil War. This amendment gave Congress the power to legislate when states fail to protect individual rights. During the twentieth century, the Court largely upheld federal

laws enacted under the Fourteenth Amendment. But in *City of Boerne v. Flores* (1997) and subsequent cases, the justices invalidated federal statutes as beyond Congress's power under the Fourteenth Amendment. In two cases during the 1990s, they also struck down congressional statutes that "commandeered" state officials into implementing federal programs. And in *Seminole Tribe of Florida v. Florida* (1996) and subsequent cases, the justices invalidated several federal laws that allowed states to be sued without their consent.

Some hailed the Court's aggressive policing of constitutional boundaries as a "federalism revolution." But members of Congress saw in the Court's rulings a lack of respect for Congress. Thus, when Congress was holding hearings in 2005 to confirm John Roberts as the new Chief Justice, Senator Arlen Specter of Pennsylvania blasted the Court's rulings as a "usurpation" of congressional authority. Whatever the assessment, there was overwhelming agreement that the Supreme Court's decisions signalled a major shift, fulfilling former Chief Justice Rehnquist's pledge to respect the principle that "the Constitution creates a Federal Government of enumerated powers." In other words, the Constitution grants only limited powers to Congress.

With the benefit of hindsight, however,

it is clear that both the hopes and the fears were exaggerated. There has been no federalism revolution, nor is there likely to be. Let us examine what actually occurred and why.

Invoking the "Commerce Clause"

In the 1995 case of *United States v. Lopez*, the Supreme Court struck down a federal statute creating gun-free zones near schools. Five years later, the Court invalidated a provision of the federal Violence Against Women Act that established a right to sue perpetrators of gender-based violence in federal court. These decisions might have signalled a fundamental shift on the Court. But in neither case was Congress directly regulating economic activity, so the rulings might merely have meant that federal laws regulating non-commercial activity in areas of traditional state concern would have a difficult time in the Supreme Court.

This narrower reading was confirmed by the Supreme Court in 2005 in *Gonzales v. Raich*. In this case, a federal law conflicted with a California program that authorized doctors to prescribe marijuana for medical purposes and permitted patients to grow or purchase marijuana for those purposes. The Court upheld the applicability of the federal law, noting that Congress was directly regulating economic activity, since there was a thriving (albeit illegal) market for marijuana, and that Congress could regulate even intrastate non-commercial activity in order to achieve its regulatory ends.

Interpreting the Fourteenth Amendment

The Fourteenth Amendment protects individual rights against infringement by state governments and authorizes Congress to enforce the amendment. In 1990 the Supreme Court ruled that state governments did not have to exempt persons from obeying laws that conflicted with their religious beliefs, as long as the laws were applied even-handedly to everyone. Congress sought to reverse this ruling. Relying on the Fourteenth Amendment, it enacted a law that required states to demonstrate a "compelling state interest" before requiring persons to act in violation of their religious beliefs. But in *City of Boerne v.*

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Four Supreme Court justices flank President George W. Bush at his state of the union address in January. From left: John Roberts, Anthony Kennedy, Stephen Breyer and Samuel Alito.

Flores (1997), the Court declared this law unconstitutional. According to the Court, Congress's powers under the Fourteenth Amendment did not extend to the "intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." It was the Court's responsibility to determine whether Congress had overstepped its bounds. This seemed to promise a continuing judicial scrutiny of congressional legislation affecting the states. However, the Court has since retreated from a confrontation with Congress, and its rulings show considerable deference to congressional judgment.

Accused of commandeering

In other cases, the Supreme Court ruled against the federal government when it dictated specific behaviours to state governments.

For example, the court found that part of a law dealing with radioactive waste was unconstitutional. The provision required a state that had failed to provide for the disposal of low-level radioactive waste to take possession of the waste and become liable for damages associated with it. Justice Sandra Day O'Connor held that the Constitution simply does not give Congress the authority to require the states to regulate.

"Where a federal interest is sufficiently strong to cause Congress to legislate, it must do so directly; it may not conscript state governments as its agents," she held.

The court followed with a ruling striking down provisions of a handgun law that commanded state and local law-enforcement officers to conduct background checks on prospective handgun purchasers. The justices held that conscripting state officers to carry out a federal program violated the states' sovereignty.

But despite the publicity generated by these rulings, they had little impact on American federalism. For one thing, Congress has only rarely relied on commandeering state officials to achieve its ends. For another, as the court noted in *New York v. United States*, Congress could still regulate directly and to pre-empt contrary state regulations. Or Congress could establish grant programs that

would induce states to adopt the policies it favored as a condition for receiving federal funds.

States invoke immunity against lawsuits

The Supreme Court has given a mixed message when it comes to whether Congress can enact laws allowing state governments to be sued without their consent. The Court struck down seven federal statutes in the 1990s in which Congress had authorized persons to sue the states. In one case, then Chief Justice Rehnquist wrote that "each State is a sovereign entity in our federal system" and that "it is inherent in the nature of sovereignty not to be amenable to suit without its consent."

However, the justices have since ruled that Nevada employees could sue their employers in federal court for violation of the Family and Medical Leave Act. And in subsequent rulings the Court has continued its deference to Congress, upholding a federal law that guarantees that disabled persons can sue states in federal court. And in a Virginia case the justices ruled that the Bankruptcy Clause of the Constitution gives Congress the authority to take away the immunity that usually protects states from private suits.

Judges divided

The Supreme Court's federalism initiatives in the 1990s have proved less revolutionary than most commentators had predicted. In part, this may reflect the divisions among the justices. Many of the Court's federalism rulings have been 5-to-4 decisions, and efforts to pursue a more fundamental break with existing judicial doctrine might have splintered the Court majority. In part, however, it may reflect a lack of judicial commitment to federalism itself. Some commentators have suggested that the Court's rulings reveal less a principled attachment to federalism than a desire to enhance judicial power at the expense of Congress. Certain decisions support such an interpretation. Whatever the case, the recent replacement of two strong advocates of federalism – Chief Justice Rehnquist and Justice O'Connor – suggests that the final word on the question respecting the extent of the powers actually granted to the federal government has yet to be written. 

all borrowing. Another is the introduction of an "early warning system" to avoid unhappy budgetary surprises. But such moves would only help to prevent future indebtedness. Legislators still need to deal with the current debt of the *Länder* and the federation. Günther Oettinger, co-chair of the commission, proposed the introduction of a special solidarity fund to assist the *Länder* in reducing the debt. Some *Länder* argue there first must be agreement about how to avoid accumulating even more debt in the future before considering how to deal with the accumulated debt.

However, the *Länder* – especially the poorer ones in the east – obviously will face a huge challenge if a debt brake is introduced. Currently, they have had only two ways of balancing their budgets: cutting expenditures, or borrowing more money, thereby increasing their total debt. But cutting expenditures is not a viable option because most expenditures are prescribed by federal law. And if a debt brake is introduced, they will not be able to borrow money any more.

It seems like a no-win situation, but Hans-Peter Schneider, executive director of the Institute of Federalism in Hannover, argues that the East German *Länder* might be interested in receiving more fiscal responsibility because they know that this will be their salvation. "The *Länder* need greater fiscal autonomy," Schneider said. "First, they should have the competency to legislate on those taxes which are attributed to them. Second, they should be empowered to (place a) surcharge on shared revenues to finance specific tasks for a restricted period of time. Finally, they should be able to deal more flexibly in administering federal laws and to deviate from federal standards, which often are very costly for the *Länder*." In general, he argued that Germany's form of federalism needs to be shifted more from an administrative one to a creative, constructive model.

Federalism Reform II will not be completed until 2008 at the earliest. The grand coalition needs to be able to compromise with the *Länder* to reach agreement on legislation and get it passed in Berlin. When it is, it will represent more than a major step in the development of German federalism. 