

# On Federalism: Preserving Strong Federal and State Governments

Justice Sandra Day O'Connor

Most Americans recognize the term “federalism,” but an exact definition of the term is elusive. Disputes over the bounds of state and federal sovereignty implicate “perhaps our oldest question of constitutional law.”<sup>1</sup> I propose that recent decisions of the Supreme Court indicate the emergence of a definition of “federalism” that may guide legislators and judges in solving national and local problems in a spirit of cooperation.

Our country has come a long way since its most early days, when Federal power over individuals was severely constricted because the Articles of Confederation required the cooperation of state legislatures in achieving national goals. The Framers resolved that problem by permitting the Federal Government to act directly upon the people. In my view, the allowance for federal regulation of *individuals* and protection of their national interests, while preserving the sovereignty of *States* acting within their

own boundaries, is crucial to our constitutional framework.

The Framers recognized the need for a strong and functional government, but, as Justice Harlan once explained, they “were suspicious of every form of all-powerful central authority.”<sup>2</sup> By establishing two levels of government, the Framers sought to guarantee both national unity and individual liberty.

The framework they designed seems so deceptively simple that the Tenth Amendment has been described as “but a truism.”<sup>3</sup> Nonetheless, “the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court’s most difficult and celebrated cases.”<sup>4</sup> In part, this may be due to the fact that the Framers could not envision the problems of today’s world, in which interstate (or even international) commerce touches every product we use, and “technology [has] converted every local problem into a national one.”<sup>5</sup>

The modern expansion of federal

power rests on two major provisions of the Constitution, the Commerce Clause<sup>6</sup> and the Spending Clause.<sup>7</sup> Application of the Commerce Clause in what has become known as the “dormant” context permits federal review of state laws that impede national interests. Such provisions, when interpreted broadly together with the Supremacy Clause,<sup>8</sup> have given the Federal Government “a decided advantage in the delicate balance” of power between the Federal and State Governments.<sup>9</sup>

But despite the Federal Government’s advantage, it is subject to one significant constraint. Congress lacks the power to compel the States to act. Thus, there is a balance: States cannot be forced into legislative or executive action and national interests cannot be unnecessarily compromised. The Supreme Court has attempted to give effect to this balance through a variety of approaches.

Most recently, the Court has focused on the view of federalism as a cooperative

## Footnotes

1. *New York v. United States*, 505 U.S. 144, 149 (1992).
2. Harlan, “Thoughts at a Dedication: Keeping the Judicial Function in Balance,” 49 *A.B.A. J.* 943, 944 (1963).
3. *United States v. Darby*, 312 U.S. 100, 124 (1941).
4. *New York*, 505 U.S. at 155.
5. *Garcia v. SAMTA*, 469 U.S. 528, 581 (1985) (O’Connor, J., dissenting).
6. U.S. CONST. art. I, § 8, cl. 3.
7. U.S. CONST. art. I, § 8, cl. 1.
8. U.S. CONST. art. VI, cl. 2.
9. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991).
10. *See Hughes v. Oklahoma*, 441 U.S. 322, 325 (1979).
11. *Gregory*, 501 U.S. at 458.
12. 117 S. Ct. 2365, 138 L.Ed. 2d 914 (1997).
13. *Id.* at 2379, 138 L.Ed. 2d at 938.
14. *Id.* at 2379-83, 138 L.Ed. 2d at 938-43.
15. 514 U.S. 549 (1995).
16. *Garcia*, 469 U.S. at 577 (Powell, J., dissenting).

enterprise, by which Congress may encourage state regulation in a manner that maintains the responsiveness and accountability of State Governments. The same cooperative notion allows Congress to regulate interstate commerce to avoid the economic Balkanization of any of the States.<sup>10</sup>

The benefits of this system should be real to each of us. We rightfully expect this country's national *and* local governments to accommodate our interests, and we must recognize that a robust balance of power reduces the risk of tyranny.<sup>11</sup> With this in mind, the courts must often tackle difficult issues, ones that strike at the heart of many people's beliefs. In a decision in the 1996-97 Term, *Printz v. United States*,<sup>12</sup> the Supreme Court struck down portions of the Brady Handgun Violence Prevention Act that obligated local officials to comply with federal standards in a manner akin to "Federal commandeering of state governments,"<sup>13</sup> while forcing upon the States the financial and political impact of the federally compelled action.<sup>14</sup>

The boundaries of federal pre-emption power were at issue in *United States v. Lopez*,<sup>15</sup> in which the Court struck down a federal statute punishing the possession of weapons near schools. Although there is interstate commerce in guns, by enacting a strictly criminal provision aimed at non-commercial schoolyard conduct, Congress went too far. In overstepping its bounds, Congress also usurped the traditional role of States as laboratories for solutions to local problems. That role is more than hypothetical. The Nation's workers compensation and minimum wage laws were derived from similar State laws. Wyoming granted women the vote thirty years before their federal right to the franchise was established. As Justice Powell explained, "[i]t is at ... state and

local levels — not in Washington ... — that 'democratic self-government' is best exemplified."<sup>16</sup>

Therefore, even though a concise definition of our federalism may be hard to come by, it is clear that our government was elegantly designed to accommodate individual freedoms, and we must treasure the protection provided by powerful Federal *and* State Governments.



*Justice Sandra Day O'Connor became the first woman to serve on the United States Supreme Court when she was appointed by President Reagan in 1981. Previously, she had briefly had her own law practice and had served in all three branches of state government in Arizona. She served there as an Assistant Attorney General, as majority leader of the Arizona State Senate, and as a trial and appellate judge.*