Without a doubt, the greatest changes in constitutional law in the last decade have been in the area of federalism. The U.S. Supreme Court has significantly limited the scope of Congress's powers under the Commerce Clause and pursuant to section 5 of the Fourteenth Amendment. Additionally, the Court has revived the Tenth Amendment as a limit on federal authority. The Court also has greatly expanded the sovereign immunity of state governments and has barred suits against them in state and federal court. Virtually all of these cases have been decided by a 5-4 margin, with the five most conservative justices—Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas—in the majority.

Frequently, the Court has justified its protection of state governments as a way of enhancing liberty. For example, Chief Justice Rehnquist wrote: "This constitutionally mandated division of authority was adopted by the Framers to ensure protection of our fundamental liberties." United States v. Lopez, 514 U.S. 549, 552 (1995). Similarly, Justice Scalia declared: "The separation of the two spheres is one of the Constitution's protections of liberty." Printz v. United States, 521 U.S. 898, 921 (1997).


Indeed, it is striking, though not surprising, that so many of the Supreme Court's recent federalism decisions repeat the same language as a premise for judicial invalidation of federal laws. Scholars, too, have made this claim. See Martin A. Feigenbaum, The Preservation of Individual Liberty Through the Separation of Powers and Federalism: Reflections on the Shaping of Constitutional Immorality, 37 Emory L. Rev. 613 (1998). Advancing freedom is a widely shared goal; the Court's federalism decisions, which have struck down many popular laws in the last decade, seem far more acceptable if they are understood as protecting liberty.

Have the recent federalism decisions by the Supreme Court advanced liberty? Is there reason to believe that such decisions, over a long period of time, would enhance freedom? My conclusion is that the Court's recent decisions have lessened liberty, not enhanced it. In fact, over time, there is no reason to believe that federalism decisions will do more to advance than restrict liberty.

The Rehnquist Court's Decisions
Perhaps the Court's most rights regressive actions have been the decisions limiting the scope of Congress's 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.

As to the former, in a series of decisions beginning with City of Boerne v. Flores, 521 U.S. 507 (1997), the Court ruled 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.

In City of Boerne v. Flores, the Court struck down a federal statute, the Religious Freedom Restoration Act (RFRA) that expanded the safeguards accorded to the free exercise of religion. 42 U.S.C. § 2000bb. The Act was adopted in 1993 to overturn a recent Supreme Court decision that had narrowly interpreted the Free Exercise Clause of the First Amendment. In Employment Division Department of Human Rights of Oregon v. Smith, in 1990, the Supreme Court significantly lessened
the protections of the Free Exercise Clause. 494 U.S. 872 (1990). The Court held that no matter how much a law burdened religion, it could not be challenged as violating the Free Exercise Clause so long as it was neutral, not motivated by a desire to interfere with religion, and of general applicability, applying to everyone in the state. In Smith, the Court rejected a challenge by Native Americans to an Oregon law that prohibited the consumption of peyote on the grounds that the law was neutral and of general applicability.

In response to this decision, in 1993, Congress overwhelmingly adopted RFRA, which was signed into law by President Clinton. The House of Representatives approved the Act by a unanimous vote, and the Senate approved it by a margin of 97-3. RFRA was express in stating 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 to neutral laws of general applicability, to uphold the government’s actions only if they are necessary to achieve a compelling purpose. Specifically, RFRA prohibited “government” from “substantially burdening” a person’s exercise of religion even if the burden results from a rule of general applicability unless the government can demonstrate that the burden “(1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.”

City of Boerne v. Flores involved a church in Texas that was prevented from constructing a new facility because its building was classified as an historic landmark. The church sued under RFRA and the city challenged the constitutionality of the law. Justice Kennedy, writing for the Court, held that the Act is 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.

Boerne means that people in the United States will have far less protection for their religious practices. Laws of general applicability that seriously burden religion might have been successfully challenged under RFRA, but not any longer. Put most simply, Boerne means that many claims of free exercise of religion that would have prevailed, now certainly will lose.

The decisions following City of Boerne v. Flores concerning the scope of Congress’s section 5 powers have likewise been quite rights-regressive. Three times so far—in Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999); Kimel v. Florida Board of Regents, 528 U.S. 62 (2000); and University of Alabama v. Garrett, 531 U.S. 356 (2001)—the Court has considered

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whether laws are valid exercises of Congress's section 5 powers and a permissible basis for suits against state governments. In all three cases, the Court applied City of Boerne v. Flores and found the law invalid as an exercise of Congress's section 5 powers and precluded the suit against the state government.

In Florida Prepaid Postsecondary Expense Education 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

expressly reaffirmed the Civil Rights Cases and disavowed the positions to the contrary in United States v. Guest. Morrison involved a constitutional challenge to the civil damages provision of the Violence Against Women Act (VAWA) that authorized victims of gender-motivated violence to sue under federal law. The case was brought by Christy Brzonkala, who allegedly was raped by several football players while a freshman at the Virginia Polytechnic Institute. The players ultimately avoided punishment by the University and Brzonkala filed suit against her assailants and the University under VAWA. The case presented the question

of whether the civil damages provision of the federal VAWA (42 U.S.C. § 13981) is constitutional. The provision authorizes victims of gender-motivated violence to sue for money damages. Congress enacted VAWA based on detailed findings of the inadequacy of state laws in protecting women who are victims of domestic violence and sexual assault. 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 Act obviously increased the rights of women to sue and to gain some redress for gender-motivated violence.

The U.S. 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's Commerce Clause power and of its authority under section 5 of the Fourteenth Amendment. The Court in a 5-4 decision held that the law exceeded the scope of the commerce power because Congress cannot regulate noneconomic 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's 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. He said that the opinions in United States v. Guest indicating congressional power to regulate private conduct were only dicta. Thus, the civil damages provision of VAWA was deemed to exceed the scope of Congress's 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."

Congress enacted a law to 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.

Another key aspect of the Court's federalism decisions has been a substantial expansion of state sovereign immunity. In Seminole Tribe v. Florida, 517 U.S. 44 (1996), 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. 517 U.S. 44 (1996). It was based on this decision that the Court handed down the rulings described above in Florida Prepaid, Kimel, and Garrett, that state governments could not be sued for patent infringement, violating the Age Discrimination in Employment Act, or infringing on Title I of the Americans with Disabilities Act. Also, in Alden v. Maine, the Court held that state governments cannot be sued in state court, even on federal claims, without their consent. 527 U.S. 706 (1995). In Federal Maritime Commission v. South Carolina Port Authority, the Court ruled that state governments cannot be sued in federal agency adjudicatory proceedings without their consent. 122 S. Ct. 1864 (2002).

Expanding sovereign immunity is clearly rights regressive. Sovereign immunity protects the government as an entity and denies relief to those who are injured. Rights are undermined whenever there is a violation and no remedy for it.

Over the Long Term, Does Federalism Enhance Liberty?

My point so far has been that the Rehnquist Court's federalism-related decisions have lessened, not enhanced, personal freedom. Is there reason to
believe that, over time, federalism will increase freedom? In some ways, federalism, broadly defined, clearly increases liberty. The authority of state courts to provide more protection of rights under state constitutions than exists under the U.S. Constitution is an example of how federalism enhances personal rights. See, e.g., William Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1997); Pruneyard Shopping Centers v. Robbins, 447 U.S. 74 (1980). But as the Rehnquist Court has construed federalism, it has been about limiting federal power, not about empowering states.

In theory, restricting the authority of the federal government inherently lessens the chances of tyrannical action. The issue, though, is whether striking down federal laws on federalism grounds is likely to do more to enhance or lessen freedom? Statutes violating rights are likely to be invalidated by the courts on other grounds, even without federalism as a constraint. The Supreme Court's use of federalism as a limit on Congress is thus likely to have only a detrimental effect on liberty: laws enhancing freedom—like RFRA or VAWA—are invalidated, while statutes restricting liberty would have been struck down anyway.

This negative effect on liberty is confirmed by American history: conservatives consistently have used federalism as