
ARTICLES

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Most Americans don't give a damn about federalism. To the extent they think about politics at all, most people ask, "What is the best policy for health care, abortion, or gay rights?" not the more abstract question, "Which level of government should resolve such issues?" Politicians talk a lot more about federalism. In fact, they will chatter endlessly about the virtues of devolution and the dangers of "one size fits all" national policies. But most politicians quickly jettison their love of federalism as soon as it produces inconvenient outcomes. Remember when Republicans were the chief defenders of federalism? Now most Republicans seem to support a national definition of marriage, strict national educational standards, federal preemption of state tort law, and federal judicial supervision of state courts' end-of-life decisions. For the time being at least, Democrats seem to have rediscovered the virtues of federalism. But one suspects this trend would quickly come to an end were they to recapture Congress, the White House, and the Supreme Court.

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At first blush most law professors seem more interested in federalist principles. Law reviews are filled with hundreds of articles on the subject each year. For law professors, though, the dominant response to federalism is not apathy or hypocrisy, but hostility. The vast majority of these articles are devoted to demonstrating how misguided the Rehnquist Court's "Federalist Five" have been. One well-known article described the American attachment to federalism as a "neurosis"—"a dysfunctional belief to which we cling despite its irrelevance to our present circumstances."¹

Between 1995 and 2003 the Supreme Court struck down all or part of thirty-three federal statutes—an unusually large number by historical standards—mostly on federalist grounds.² This has rekindled a lively debate on federalism. Unfortunately, the Supreme Court has offered surprisingly few explanations of why federalism is worth reinvigorating. It is no longer enough to say that federalism is part of our constitutional structure and political heritage. The words of the Constitution alone do not tell us much about federalism. For the past fifty years our political tradition has been one of steady expansion of the power of the national government. Reversing this trend requires a compelling rationale, not reciting a list of discarded precedents or a few pieties about "our federalism."³

1. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 950 (1994).

2. THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM* 40 (University of Chicago Press 2004); R. Shep Melnick, *Deregulating the States: The Political Jurisprudence of the Rehnquist Court*, in *INSTITUTIONS AND PUBLIC LAW: COMPARATIVE APPROACHES* 69, 69 (Tom Ginsburg and Robert A. Kagan, eds., Peter Lang 2005).

3. See, e.g., *Younger v. Harris*, 401 U.S. 37 (1971).