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INSTRUMENTAL AND NON-INSTRUMENTAL FEDERALISM

Michael C. Dorf[*]

I.

Although superficial appearances might suggest that the United States Supreme Court is divided into two blocs on questions of state sovereignty, there are at least three. At one end are the Nationalists. They take the view that the judiciary has virtually no role to play in protecting the States against national encroachment by the federal government. Protection for the States, if there is to be any, must, in their view, come from the political branches, especially the Senate, where power is allocated equally to large and small states.[1] At the other end are the latter-day Anti-Federalists. They view the States as both deserving and in need of judicial protection against federal encroachment. Although Anti-Federalists grudgingly accept the last two centuries of expansion of the power of the federal government at the expense of the States,[2] at least in symbolic ways,[3] they refuse to accept Congressional omnipotence when it comes to state sovereignty. Beyond the positions I am labeling *Anti-Federalist* and *Nationalist* lies a third view that I shall call *Federalist*; Federalists recognize the utility of the States as a rival for power with the federal government, but look upon the States with a more jaundiced eye than do Anti-Federalists. Federalists distrust governmental power at the national and the state level (and for that matter, at all levels).[4]

These positions are, of course, approximations, but they do a reasonably good job of describing particular Justices. The Nationalist bloc currently includes Justices Stevens, Souter, Ginsburg, and Breyer; it recently included

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1. *See* Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 550-51 (1985).

2. *But see* United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624, 1642-51 (1995) (Thomas, J., concurring).

3. *See* Henry Paul Monaghan, Comment: *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102, 132 (1996).

4. *See* Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78, 80 n.18 (1995) (identifying modern "Federalists" and "Anti-Federalists").

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Justices Brennan, White, Marshall, and Blackmun.[5] The Anti-Federalist bloc presently consists of Chief Justice Rehnquist and Justices O'Connor, Scalia, and Thomas; it recently included Chief Justice Burger and Justice Powell. This leaves Justice Kennedy as the lone Federalist. Although he usually votes with the Anti-Federalists, he does not invariably do so, and his most recent disagreement with them illustrates the fundamental divergence in their philosophies.

In *U.S. Term Limits, Inc. v. Thornton*,[6] Justice Kennedy joined with the Nationalists to invalidate Arkansas' efforts to impose term limits on its Congressional delegation. For both the majority and the dissent, the case turned on whether the federal government is a creation of The People of the United States as a whole (as the majority held), or of The People of the individual States (as the dissent would have ruled). In his concurrence, Justice Kennedy explained why he could not join the Anti-Federalists:

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.[7]

One might wonder why Justice Kennedy views the revolutionary mechanism of dual sovereignty as reflecting genius rather than mere political compromise. The answer comes in his concurrence in the other critical federalism case of the 1994-95 Term, *United States v. Lopez*,[8] in which the Court held that a federal statute imposing criminal penalties for possession of a firearm in the vicinity of a schoolyard was outside Congress' authority to regulate interstate commerce. Although clearly troubled by the possibility that Chief Justice Rehnquist's opinion for the Court might be taken to herald a large-scale rollback of the federal role in regulating the national economy, Justice Kennedy nonetheless joined because he saw it as essential that the principle of limited government be affirmed. As he stated

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5. Justice Blackmun began as an Anti-Federalist, but between the Court's decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976) and *Garcia v. San Antonio Metro. Trans. Auth.*, 469 U.S. 528 (1984), he switched to the Nationalist side.

6. 514 U.S. 779, 115 S. Ct. 1842 (1995).

7. *Id.* at 1872.

8. 514 U.S. 549, 115 S. Ct. 1624 (1995).

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in his concurrence: "Though on the surface the idea may seem counterintuitive, it was the insight of the Framers that freedom was enhanced by the creation of two governments, not one."[9] Justice Kennedy then quoted James Madison for the following proposition:

> In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.[10]

Taken together, Justice Kennedy's concurrences in *U.S. Term Limits* and *Lopez* articulate a clear philosophy of federalism: vigorously enforce the Constitution's division of power between the States and the federal government, so that neither threatens liberty. The maxim requires the Court to protect the States against federal encroachment (*Lopez*) and to protect the federal government against the States (*U.S. Term Limits*). Justice Kennedy appears to be the only Justice of the Supreme Court who holds this view. Although Justice O'Connor joined his *Lopez* concurrence, and has, in an opinion for the Court, invoked Madison's view that dual sovereignty acts as a check on the concentration of power,[11] her concern is solely for protecting the States against the federal government, and not vice-versa. Only Justice Kennedy voted in the majority in both *Lopez* and *U.S. Term Limits*.

The disagreement I have identified here between the Anti-Federalists and (the Federalist) Justice Kennedy might appear to be largely academic. After all, cases like *U.S. Term Limits*, in which the action of a State invades a federal prerogative, are quite rare.[12] In the more typical federalism case,

9. *Id.* at 1634, 1638 (Kennedy, J., concurring).

10. *Id.* (quoting THE FEDERALIST No. 51, at 323 (Clinton Rossiter ed., 1961)).

11. *See* Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (stating that "[p]erhaps the principal benefit of the federalist system is a check on abuses of government power," in much the same way as the separation of powers among the branches of the federal government preserves liberty) (citing Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985) and Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 572 (1985) (Powell, J., dissenting)).

12. I should qualify the statement in the text by noting that cases frequently arise under constitutional doctrines that ultimately preserve federal supremacy. Principal among these are the doctrines of: federal immunity to state taxation, *see, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819); preemption of state laws that conflict with federal law, *see, e.g.*, Gade v. National Solid Waste Management Ass'n, 505 U.S. 88 (1992); and the dormant commerce clause, *see, e.g.*, Philadelphia v. New Jersey, 437 U.S. 617 (1978). But while these doctrines

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federal action is alleged to interfere with state sovereignty; in such cases, Justice Kennedy joins with the Anti-Federalists in believing that the courts should enforce constitutional norms of state sovereignty. In practice, then, there appears to be a working majority (for now) for a relatively active judicial role.[13]

Nonetheless, the reason *why* the Supreme Court sometimes intervenes on the States' behalf in State/Federal disputes will affect *when* and *how* it intervenes. Therefore, in the space below, I take a closer look at the reasons the Anti-Federalists typically give for the positions they take.

II.

Writing for the Court in *Gregory v. Ashcroft*,[14] a case of statutory interpretation with constitutional overtones, Justice O'Connor catalogued some of the virtues of American dual sovereignty. In addition to the Madisonian virtue of dividing power to preserve liberty, federalism has the following advantages:

> It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.[15]

Thus, the Court's list of federalism's virtues consists of: (1) division of power; (2) decentralization/specialization; (3) democratic accountability; (4) experimentation; and (5) competition.

I shall return to this catalogue shortly, but for now, note one additional factor. The Anti-Federalists sometimes add that state sovereignty is an

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may ultimately serve federal as against state interests, their application rarely calls for the sort of direct consideration of fundamental questions of federalism that one encounters in cases testing the limits of the federal government to override state sovereignty.

13. Three decisions written or joined by Justice Kennedy that were handed down at the end of the 1996-97 Term confirm the power of the state sovereignty bloc. *See* Printz v. United States, ___ U.S. ___, 117 S. Ct. 2365 (1997); Idaho v. Coeur d'Alene Tribe of Idaho, ___ U.S. ___, 117 S. Ct. 2028 (1997); City of Boerne v. Flores, ___ U.S. ___, 117 S. Ct. 2157 (1997).

14. 501 U.S. 452 (1991).

15. *Id.* at 458 (citing Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1491-1511 (1987); Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 3-10 (1988)).

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inherent good, a first principle of our system of government that must be respected regardless of the costs and benefits of doing so. For example, in his dissent in *Garcia v. San Antonio Metropolitan Transit Authority*,[16] Justice Powell compared states' rights to individual rights, contending that just as consequentialist calculations are ordinarily thought to be insufficient to override the latter category of rights, so they should be insufficient to override the former category.[17] Similarly, writing for the Court in *New York v. United States*,[18] Justice O'Connor declared that the judicial "task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[19] Perhaps most starkly, writing for the Anti-Federalist bloc in dissent in *U.S. Term Limits*, Justice Thomas chastised the majority for failing to honor what he understood to be the terms of the historical compact by which the federal government derived its sovereignty from that of the States.[20]

Whereas the five *Gregory* factors all name instrumental justifications for federalism, this last rationale is non-instrumental. It asserts that state sovereignty is one of the cold hard facts of life. Even though it might be thought to be expedient or sensible for the Federal government to supersede state sovereignty—for example, by enacting legislation criminalizing the possession of handguns near schoolyards—such legislation is simply outside the authority of the federal government. The federal government can no more invade state sovereignty than it can enact legislation for Canada, no matter how wise the legislation. Or, to choose a somewhat more realistic example, at least in some respects, the States occupy the same position vis-à-vis the federal government as nations occupy vis-à-vis international treaty organizations. Were the organs of the Treaty on European Union to attempt to impose a uniform European currency on the member States, it would be a sufficient objection on their part that they have not authorized such a decision—even if all calculations of utility were to indicate that everyone would be better off with the uniform currency.

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16. 469 U.S. 528 (1985).

17. *Id.* at 565 n.8 (Powell, J., dissenting).

18. 505 U.S. 144 (1992).

19. *Id.* at 157.

20. 115 S. Ct. at 1875 ("The ultimate source of the Constitution's authority is the consent of the people of each individual State, not the consent of the undifferentiated people of the Nation as a whole.").

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There are, I believe, two ways to understand this sort of non-instrumental claim. First, one might believe that American States are distinct political communities in the way that independent nations are. If what is meant by this is the observation that different states have different laws and government structures, or that the federal Constitution gives the States important powers to block national action—such as the role States play in the Senate, in the Electoral College, and in the ratification of constitutional amendments—then the claim merely states a tautology: the States in fact have whatever political powers they have. For the claim to do any work in persuading the Court to construe state power broadly as against federal power, it must assert that the States *deserve* to be treated as separate political communities. Yet this is a difficult claim to sustain. American States do not, for the most part, track distinctive linguistic or cultural groups; differences such as these, where they exist, tend to be regional. More fundamentally, Section One of the Fourteenth Amendment makes it extraordinarily easy for a citizen of the United States to change her state citizenship—simply by establishing a new residence. This provision, enacted to overrule *Dred Scott v. Sandford*,[21] reflects a deep national commitment at least since the end of the Civil War to the view that national citizenship is primary. On those rare occasions that a federalism decision draws an analogy between American States and independent nations, the comparison rings hollow.[22]

The second sense in which one might view state sovereignty in non-instrumental terms is historical. Justice Thomas' dissent in *U.S. Term Limits* provides the model for this understanding, which rests ultimately on a version of social contract theory. On this view, the parties to the contract were sovereign States and therefore honoring the contract means protecting state sovereignty. As a matter of 18th century history, one might well reject this account in favor of the one set forth by Justice Stevens or Justice Kennedy in their *Term Limits* opinions, but even if we were persuaded that the latter-day Anti-Federalists' account of 18th Century history were correct, two (to my mind, insurmountable) difficulties remain. First is the problem of all historically based social contract theory: we have no good reason to believe that a legal document's legitimacy rests entirely, or even principally, on adherence to some original understanding.[23] Second, even if one were to

21. 60 U.S. (19 How.) 393 (1856).

22. *See, e.g.*, Michigan v. Long, 463 U.S. 1032, 1068 (1983) (Stevens, J., dissenting) (analogizing the relation of the United States to Michigan to the relation of the United States to Finland).

23. For a concise statement of the proper domain of historical argument, see Richard H.

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accept originalism as the principal approach to constitutional interpretation, the terms of the social compact were significantly altered in the wake of the Civil War. Thus, the claim that history provides a non-instrumental basis for robust judicial protection of state sovereignty is quite weak.[24]

III.

If the non-instrumental basis for robust judicial protection of state sovereignty is weak, might the instrumental justifications identified by Justice O'Connor in *Gregory v. Ashcroft* fare better? Certainly the Supreme Court sometimes invokes various of these advantages of federalism when it invalidates federal legislation on state sovereignty grounds. For example, in *New York v. United States*,[25] the Court, speaking through Justice O'Connor, stated that Congress could not require a State to enact a law because, among other things, allowing such "commandeering" would undermine democratic accountability (the third *Gregory* factor). As the Court stated:

> where the Federal Government directs the States to regulate, it may be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision. Accountability is thus diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.[26]

One difficulty with invoking instrumental reasons for caring about state sovereignty—such as accountability—is that sometimes the instrumental reason will not apply, or worse, will provide the basis for an argument *against* protecting state sovereignty. Consider, for example, the Supreme Court's decision in *Seminole Tribe of Florida v. Florida*.[27] There the Court held invalid under the Eleventh Amendment the provision of the Indian Gaming Regulatory Act that authorized tribes to sue a State in federal court

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Fallon, *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 11-14 (1997). For a less concise statement, see Michael C. Dorf, *Integrating Normative and Descriptive Constitutional Theory: The Case of Original Meaning*, 85 GEO. L.J. (forthcoming 1997).

24. *See* Michael C. Dorf, *Truth, Justice, and the American Constitution*, 97 COLUM. L. REV. 133, 172-75 (1997).

25. 505 U.S. 144 (1992).

26. *Id.* at 169.

27. 116 S. Ct. 1114 (1996).

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to enforce the State's obligation to bargain in good faith toward the formation of a tribe/State compact on Indian gaming.[28] The *Seminole Tribe* Court also held that, in light of the complete statutory scheme created by Congress, it would be improper to infer a right of action against a state officer pursuant to the doctrine of *Ex parte Young*.[29] Given the possibility of suits in state court and other enforcement mechanisms that avoid the Eleventh Amendment bar, *Seminole Tribe* may ultimately prove to be more symbol than substance.[30] But in the short run at least, and perhaps in areas going well beyond tribe/State relations, the effect of the decision is to make government, here state government, *less accountable* than it would be under a narrower interpretation of the Eleventh Amendment. Yet the *Seminole Tribe* Court does not consider the possibility that the prospect of state governments being able to escape federal court jurisdiction for putatively unlawful conduct raises the sorts of accountability issues that go to the heart of federalism's justification.[31]

So long as the Court relies upon instrumental rationales for protecting state sovereignty it will face the possibility that protecting state sovereignty disserves one or more of the rationales for state sovereignty. Looking behind the concept of state sovereignty to its rationales would then appear to require a frank balancing of the interests involved in a particular case. But if the task calls for balancing competing policy goals, why should the Court, rather than Congress, do the balancing? Instrumental accounts of federalism would seem rather hostile to an active judicial role.

One possible solution for the Court is to adopt a kind of rule-consequentialism about state sovereignty. If the Court thought that case-by-case balancing would lead Congress systematically to undervalue the interests served by state sovereignty, then it might adopt a more or less indefeasible principle of state sovereignty that, for practical purposes, closely resembles a non-instrumental principle of state sovereignty. And in fact, we do have a reason to believe that Congress will systematically undervalue state interests: the Madisonian concern that government actors—

28. 25 U.S.C. § 2710(d)(3)(A) (1994) (state's duty to negotiate in good faith); *Id.* at § 2710(d)(7) (tribe's right to sue).

29. 209 U.S. 123 (1908). *See Seminole Tribe*, 116 S. Ct. at 1132-33.

30. *See* Monaghan, *supra* note 3, at 125-32.

31. Indeed, the only reference to accountability in *Seminole Tribe* is the Court's statement that it would not consider the argument (not raised in the courts below) that the Indian Gaming Regulatory Act was unconstitutional because it allows federal officials to avoid responsibility for their decisions by requiring state legislation, allegedly in violation of the anti-commandeering principle of *New York v. United States*. *Seminole Tribe*, 116 S. Ct. at 1126 n.10.

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including, indeed, especially, Congress—will tend to aggrandize their own power at the expense of other bodies. Thus, what I have been calling the first *Gregory* factor, division of power, provides an instrumental reason for federalism and for *judicial enforcement* of state sovereignty.

IV.

Will the Court embrace this proposed solution? I think not, at least in the short run. The Federalist distrust of all governmental power is unlikely to appeal to the Anti-Federalist bloc, precisely because they, like the original Anti-Federalists, tend to hold generally favorable (perhaps even romantic) views about the States, and are accordingly reluctant to interfere with state government. Although concerns about *judicial* activism as opposed to *federal* activism may play a substantial role in the Court's reluctance to interfere with state processes, this cannot be the whole of the story, for some of the starkest examples of Supreme Court deference to state bodies involve deference to state courts. Most of the doctrines announced over the last quarter century limiting the availability of federal habeas corpus relief for state prisoners have been justified in large part on the ground that state courts are no less capable of enforcing federal law than their federal counterparts.[32]

Of course, the existence of logical tension between the view that, on the one hand, state sovereignty must be protected to limit federal abuses of power and, on the other, the Court can defer to state power without much worrying about its abuse, does not mean that the Court's defenders of state sovereignty will not adopt both positions. Indeed, even Justice Kennedy, the Court's lone Federalist, typically joins the Anti-Federalists in deferring to state power in cases of criminal law enforcement.[33] But this combination of

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32. *See, e.g.*, McCleskey v. Zant, 499 U.S. 467 (1991); Teague v. Lane, 489 U.S. 288 (1989); Wainwright v. Sykes, 433 U.S. 72 (1977). For a summary of the "parity" debate, see RICHARD H. FALLON, DANIEL J. MELTZER & DAVID L. SHAPIRO, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 351-54 (4th ed. 1996). For the opening academic salvo, see Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963).

33. Typically, but not always. Thus, for example, although Justice Kennedy authored one of the most restrictive of the habeas decisions in McCleskey v. Zant, *supra*, he and Justice O'Connor have not been willing to go quite so far as some of the Anti-Federalists. *See* Keeney v. Tamayo-Reyes, 504 U.S. 1, 13-23 (1992) (O'Connor, J., joined by Blackmun, Stevens and Kennedy, JJ., dissenting); *id.* at 24 (Kennedy, J., dissenting); Wright v. West, 505 U.S. 277, 297-306 (O'Connor, J., joined by Blackmun and Stevens, JJ., concurring in the judgment); *id.* at 306-10 (Kennedy, J., concurring in the judgment).

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distrust of the federal government and solicitude for state government, when it occurs, seems more like simple Anti-Federalism than a new form of Federalism.

Nonetheless, were the Court's defenders of the States ultimately to embrace the Madisonian instrumental justification for state sovereignty as a means of checking federal power, they would find that the principal defect of the non-instrumental claims for state sovereignty—the seeming arbitrariness of the States—would become a virtue. In this context, and in these pages, it may be appropriate to recall what Hans Linde said in response to the charge that state constitutional law lacks a raison d'être because the States are not distinctive social, linguistic, cultural, and political communities. In response, Linde observed that "[v]ariations among state law, textual or decisional, have many explanations. Why should independent state constitutional law depend on variations in the states' contemporary 'character' any more than independent tort law, or taxation, or land use systems?"[34] That answer also may well serve defenders of state sovereignty in the United States Supreme Court. The States need not be virtuous political communities; they need not even be real communities; the point is that our Constitution treats them as if they were, and that this treatment has felicitous consequences. One of these consequences is a mechanism for controlling federal power.

34. Hans A. Linde, *State Constitutions Are Not Common Law: Comments on Gardner's Failed Discourse*, 24 RUTGERS L.J. 927, 930-31 (1993).

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