Introduction

THE THESIS

IN THIS BOOK, I challenge the traditional conception of federalism as a limit on federal power very much followed by the Supreme Court over the past ten years. I argue for an alternative vision of federalism as empowerment of government at all levels. The federalism of the 1990s and the early twenty-first century—in both the Supreme Court and Congress—has been about restricting federal authority for the sake of protecting states' autonomy. The new Supreme Court, with Chief Justice John Roberts and Justice Samuel Alito, is likely to be even more aggressive in limiting federal power in the name of states' rights. This book strongly criticizes this approach as failing to serve the underlying goals of federalism and, more generally, of government. Federalism should be reconceived as being about equipping each level of government with expansive tools to enhance liberty and deal with social problems.

The genius of having multiple levels of government is that there are many different actors—federal, state, and local—that can advance freedom and respond to society's needs. Yet, the federalism decisions over the past decade have been striking in that they have ignored these values and have applied federalism principles in a highly formalistic fashion to invalidate desirable government actions.

In the 1990s, the Supreme Court used federalism as the justification for declaring unconstitutional federal laws requiring the cleanup of nuclear waste[1] and background checks for people seeking to own firearms,[2] prohibiting guns near schools,[3] and allowing victims of gender-motivated violence to sue in federal court.[4] All of these are unquestionably socially beneficial laws. Few in our society would argue against containing radioactive material or in favor of having guns near schools and permitting criminals unrestricted access to firearms. Yet, the Supreme Court's

rulings in each of these cases expressly ignored the social benefits of the laws and instead relied on a highly formalistic approach to federalism as the basis for limiting federal authority and striking down these statutes.[5]

During the same time, the Supreme Court also has used federalism to dramatically limit the scope of Congress's power to enforce the post–Civil War, or Reconstruction, amendments, which authorize the federal government to act to prevent and remedy civil rights violations by the states. For example, the Court used federalism as the basis for invalidating the Religious Freedom Restoration Act, a federal law significantly expanding religious freedom.[6] Although the act was adopted by an almost unanimous vote in both houses of Congress, the Court declared it unconstitutional without even considering the benefit of the law in advancing a crucial aspect of liberty. Once more, the Court's reasoning was highly formalistic, and federalism was used entirely as a limit on federal power. Subsequently, in the past decade, the Court has relied on this decision to limit Congress's power to authorize suits against state governments when states infringe patents and when they discriminate in the workplace based on age and disability.[7]

Ironically, at the same time, a Court that professes commitment to states' rights has repeatedly found state laws preempted by federal law. For example, in one case, the Supreme Court found preemption of product liability under state law despite a provision in federal law expressly preserving all other causes of action.[8] In another decision, the Court held that a state could not refuse to contract with companies doing business in Burma, thus denying states a basic choice as to how to spend taxpayers' money.[9] In another, the Court found that federal law preempted state regulation of outdoor billboards and signs in stores advertising cigarettes, even though there was no indication that the federal law had anything to do with the placement of advertisements.[10]

In this book, I argue for a very different approach to federalism. In dealing with federalism, the Supreme Court's decisions should be based on open and express attention, and where necessary, the balancing of how to best advance liberty while enhancing effective governance. Generally, this will mean abandoning the use of federalism as a judicial

limit on federal or state authority and instead employing it to uphold the power of each level of government to deal with social problems.

More specifically, seeing federalism in terms of empowerment rather than limits will profoundly reorient constitutional law in three major ways. First, it will mean a broad conception of congressional power unconstrained by concerns of federalism. Congress's authority under provisions such as the commerce clause and Section 5 of the Fourteenth Amendment[11] should be expansively interpreted, limited primarily by the political process and judicial protection of other parts of the Constitution, such as separation of powers and individual rights. The Tenth Amendment should not be interpreted as an independent basis for invalidating federal laws.[12] This, of course, is not a radical change in the law; it is a return to the approach to federalism followed from 1937 to 1995.

Second, viewing federalism as empowerment will mean significant expansion in the availability of federal courts to hear federal claims. Since the end of the Earl Warren Court, the Supreme Court has repeatedly and significantly narrowed the scope of federal jurisdiction in the name of federalism. This has occurred through the Court's restrictions on who has standing to sue in federal court;[13] its expansion of states' Eleventh Amendment immunity,[14] which bars suits against states in federal court; its creation of new abstention doctrines;[15] and its great narrowing in the availability of federal courts to grant habeas corpus petitions.[16] In particular, I am very critical of the unprecedented expansion of sovereign immunity in which the Court has invented a principle found nowhere in the Constitution and has made it supreme over the enforcement of the Constitution and all federal laws. These rulings neither advance liberty nor enhance effective government. Rather than using federalism to limit federal court authority, a better view would be to use federalism to more broadly open the doors to both federal and state courts to those asserting federal claims, and especially, those federal claims that are constitutional.

Third, reorienting federalism as being about empowerment and not limits also would mean an enhancement in state and local power. Actions by these levels of government are repeatedly limited in the name of federalism by preemption. Removing the shackles of federalism would

mean a much more limited preemption doctrine, with courts finding for preemption based only on an express congressional declaration of a need to serve an important governing interest, or in cases where federal law and state law are mutually exclusive. It is important to recognize that seeing federalism as empowerment is not about aggrandizing federal authority; it is empowering government at all levels, including at the state and local levels, to deal with society's urgent needs.

The central idea is that federalism should not be a highly formalistic doctrine used to limit the ability of government to deal with important problems. Instead, federalism should be reconceived as a functional analysis of how to best equip each level of government with the authority that it needs to respond to the serious problems facing American society.[17]

My primary focus in this book is on the approach to federalism that should be followed by the Supreme Court in interpreting the Constitution. I analyze and criticize the approach to federalism that the Court has followed throughout the twentieth century and particularly in recent years. This book is descriptive of the constitutional doctrines that have been developed, normative in its criticism of them, and prescriptive in offering an alternative approach to constitutional federalism. Additionally, I argue that Congress should approach federalism in a functional way and be guided by the underlying values of federalism—including efficiency, participation, concern for externalities, and fostering community—in deciding the scope of federal law.

THE POLITICAL CONTEXT

No area of constitutional law has changed more dramatically in the past fifteen years than federalism. In 1995, for the first time in sixty years, the Supreme Court declared a federal law unconstitutional as exceeding the scope of Congress's commerce clause power.[18] For only the second and third times in sixty years, the Court invalidated a federal law for violating the Tenth Amendment, and the first case had been expressly overruled.[19] At the same time, the Court has used federalism to enlarge the states' immunity to sue in federal court for violations of federal statutes.[20] These decisions have spawned literally hundreds of lower court

decisions concerning federalism and ensure that federalism will be a constant issue before the Supreme Court for years to come. Although it is unclear how far the Court will extend these rulings, the cases signal a major change in constitutional law and American government. There is no mistaking the Court's ardent desire to use federalism to limit the powers of Congress and the federal courts.

At the same time, federalism was often invoked in the Republican-controlled Congress of the 1990s. Soon after the Republican triumph in the 1994 election, the new congressional leaders, Bob Dole and Newt Gingrich, held a press conference at which they displayed a large poster containing the words of the Tenth Amendment and proclaimed a return to the principles of federalism.[21] In fact, one of the first laws adopted by the new Congress was the "unfunded mandates law," which prohibits Congress from enacting statutes that impose substantial costs on state and local governments.[22] Another example of a law with important federalism implications is the Antiterrorism and Effective Death Penalty Act of 1996, which greatly restricts the ability of federal courts to grant habeas corpus relief to those convicted in state courts.[23]

Not surprisingly, these changes have occurred at times when conservatives were in control of both the Supreme Court and Congress. In the Supreme Court, recent federalism rulings usually have been decided by a 5–4 margin, with the majority comprised of the five most conservative Justices: Chief Justice William Rehnquist and Justices Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and Clarence Thomas.[24] The shift from Justice O'Connor to the more conservative Justice Alito offers the likelihood of even greater limits imposed by the Supreme Court based on federalism. In Congress, of course, it has been the conservatives that have invoked federalism in a wide variety of areas, such as in arguing for the radical changes in welfare law enacted in 1996.[25]

At the time that this book is going to press, Democrats control both houses of Congress. There have not been any major federalism decisions in the first two years of the Roberts Court. Yet, analysis of the issue at this time is no less important. The future political composition of Congress, of course, is uncertain, but there is no doubt that the Supreme Court will be quite conservative for many years to come. The first

two years of the Roberts Court have shown a Court significantly more conservative than its predecessor,[26] and there is no doubt that soon it will turn its attention to federalism.

Conservative use of federalism is nothing new in American history. Since the country's earliest days, federalism has been used as a political argument primarily in support of conservative causes. During the early nineteenth century, John Calhoun argued that states had independent sovereignty and could interpose their authority between the federal government and the people to nullify federal actions restricting slavery.[27] During Reconstruction, Southern states claimed that the federal military presence was incompatible with state sovereignty and federalism.

In the early twentieth century, federalism was successfully used as the basis for challenging federal laws regulating child labor, imposing the minimum wage, and protecting consumers.[28] During the depression, conservatives objected to President Franklin Roosevelt's proposals, such as Social Security, on the grounds that they usurped functions properly left to state governments.[29]

During the 1950s and 1960s, objections to federal civil rights efforts were phrased primarily in terms of federalism. Southerners challenged Supreme Court decisions mandating desegregation and objected to proposed federal civil rights legislation by resurrecting the arguments of John Calhoun.[30] Segregation and discrimination were defended less on the grounds that they were desirable practices and more in terms of the states' rights to choose their own laws concerning race relations.

In the 1980s, President Ronald Reagan proclaimed a "new federalism" as the basis for attempting to dismantle federal social welfare programs. In his first presidential inaugural address, President Reagan said that he sought to "restore the balance between levels of government."[31] Federalism was thus employed as the basis for cutting back on countless federal programs.

Hindsight reveals that federalism has been primarily a conservative argument used to resist progressive federal efforts, especially in the areas of civil rights and social welfare. There is, of course, nothing inherent to federalism that makes it conservative. In the relatively recent past, prominent liberals, such as Justice William Brennan, have argued that there

should be more use of state constitutions to protect individual liberties.[32] But the federalism of the 1990s and the early twenty-first century, like federalism throughout much of American history, has been mostly a tool employed by conservatives to champion conservative goals.

FEDERALISM AS A BASIS FOR LIMITING GOVERNMENT

More specifically, and more subtly, throughout American history, and especially in the 1990s, federalism has been used by conservatives as a way of trying to limit government power.[33] In other words, conservatives have used federalism as a procedural way of blocking substantive reforms with which they disagree. During the first third of this century, a conservative Supreme Court used federalism to limit Congress's power and to strike down many federal laws. Since 1970, the conservative Warren Burger and William Rehnquist Courts used federalism as a basis for limiting federal court jurisdiction, especially in suits against state governments and in reviewing state court decisions.

Over the last ten years of the Rehnquist Court, again federalism was used to limit Congress's power by restricting the scope of the commerce clause, limiting authority under Section 5 of the Fourteenth Amendment, reviving the Tenth Amendment as a constraint on federal power, and greatly restricting Congress's ability to authorize suits against state governments. In each instance, a conservative Court has employed federalism to invalidate progressive legislation, such as gun control efforts and the expansion of religious freedoms. Simultaneously, federalism was used by the conservative Congress of the 1990s in a similar fashion, such as in greatly restricting access by prisoners to federal court in the Prison Litigation Reform Act and the Antiterrorism and Effective Death Penalty Act. In other words, conservatives use federalism as a tool to limit the power of the federal government, whether out of true concern for protecting state governments or as a way of blocking federal actions opposed on other grounds.

It is striking that the Court's use of federalism as a limit on government power has little to do with the values that it has identified as being served by federalism.[34] The values traditionally invoked to justify federalism—states are closer to the people, states serve as a barrier

to tyranny by the federal government, states are laboratories for experimentation—have virtually nothing to do with the Court's decisions and, on reflection, are of little use in constitutional decision making. For example, it is difficult to see how preventing Congress from requiring states to clean up their nuclear waste lessens the likelihood of government tyranny or enhances desirable experimentation. These frequently mentioned values of federalism are little more than slogans invoked to explain the benefits of having multiple levels of government. They have essentially no relationship to any of the Court's federalism decisions.

Moreover, these values, and the Court's use of them, focus on only an aspect of federalism: protecting state governments. Although the phrase "dual sovereignty" has always been invoked as a basis for protecting the states, the other half of *dual* is the federal government and its interests under the Constitution. Federalism also is about safeguarding the federal government and the supremacy of federal law. Yet, the federalism decisions of the 1990s have given no weight, or even mention, to this consideration. For example, in expanding the Eleventh Amendment's bar on federal court jurisdiction, the Court did not even discuss whether this jeopardizes the successful enforcement and implementation of federal laws.

AN ALTERNATIVE VISION

The conservative conception of federalism as a way of limiting federal power, on examination, is highly formalistic and should be replaced by a functional analysis of how to equip each level of government with the authority to deal with social problems and enhance liberty. While the traditional approach to federalism has been about limiting federal power, an alternative conception would be to see federalism as a basis for empowering each level of government to deal with social problems. The benefit of having three levels of government is that there are multiple power centers capable of action. Federal and state courts, from this view, both should be available to protect constitutional rights. Federal, state, and local legislatures should have the authority to deal with social problems, such as guns near schools, criminals owning firearms, and the disposal of nuclear waste.

Constitutional doctrines about federalism should focus on how to empower each level of government with the necessary authority to deal with the complex problems of the twenty-first century. Viewing federalism as empowerment, not limits, would have major implications for areas of constitutional law, such as the scope of Congress's power, federal court jurisdiction, and preemption doctrines.

THE ORGANIZATION OF THIS BOOK

I develop this thesis in six chapters. Chapter 1 focuses on the paradox of post-1937 federalism. It seeks to answer the questions: How did constitutional law get here? and Where is it going?

From 1937 to 1992, the Supreme Court aggressively used federalism as the basis for limiting federal *judicial* power. At the same time, the Court almost completely refused to employ federalism as the grounds for limiting federal *legislative* power. This approach to federalism persisted almost unchanged for those 55 years, with only one federal statute being declared unconstitutional on federalism grounds, and that case—*National League of Cities v. Usery*[35]—was later expressly overruled. The Court's frequent use of federalism as the basis for limiting federal judicial authority was reflected in decisions that included the requiring of abstention, the expanding the scope of the Eleventh Amendment and state immunity to federal court litigation, and the limiting the availability of federal habeas corpus review.

Chapter 1 explores this paradox and argues that the inconsistent approach rested primarily on two premises. One is that judicial enforcement of federalism as a limit on Congress is unnecessary because the political process will adequately protect state government interests. In contrast, the emphasis on federalism as a limit on federal judicial power is based on the premise that comity—respect for state governments—is a crucial value in the two-tiered system of government created by the Constitution. At a minimum, these premises do not explain the paradox because each assumption can be applied equally in analyzing the power of Congress and the authority of the federal courts. More importantly, each assumption is dubious; it is highly questionable whether the interests of states are adequately protected through the national political process

and it is doubtful whether comity should be regarded as a decisive constitutional value.

The chapter concludes by showing how the Supreme Court's federalism decisions over the past ten years have ended the paradox of post-1937 federalism. Federalism is now used as a significant limit both on the federal judicial and the federal legislative powers. I then look to the future and suggest that based on their past writings and judicial opinions, the two newest justices, Roberts and Alito, are likely to consistently vote to limit federal power in the name of states' rights. Chapter 2 examines the formalistic nature of the federalism decisions during the 1990s, and hence federalism's failure. The Supreme Court's formalism can be seen in rulings that have been reasoned deductively from largely unjustified major premises to conclusions, without consideration of what would be the most desirable allocation of power between the federal and state governments.

I then argue that federalism decisions must be based on a functional, not formal, analysis. In part, this is because it is not possible to identify any clear premises for reasoning with regard to federalism issues. The text of the Constitution says virtually nothing about the allocation of power between the federal and state governments. The framers were largely silent about this issue and their views are of limited relevance given that the government is now so vastly different from what they envisioned. There has been no consistent tradition in Supreme Court decisions that deal with federalism; quite the contrary, the rulings have been remarkably inconsistent.

Analysis must be functional because ultimately the issue of federalism is about what allocation of power provides the best governance with the least chances of abuse. Federalism is about how power should be divided between federal and state governments, and this must be based on a functional analysis of what provides for best governance in each context. Functional analysis is preferable to formalism in analyzing federalism, because it considers both the interests of the federal and the state governments and because it sees federalism as a means to effective government and not an end in itself. For example, in determining the meaning of the Eleventh Amendment, the Court must balance the ben-

efits of state accountability with the desirability of state immunity. Yet, such functional analysis is completely absent from the Eleventh Amendment decisions of the 1990s.

Chapter 3 begins analysis of the content of a functional approach to federalism by considering the values served by federalism. Initially, I argue that the values traditionally identified as underlying federalism are of little use in a functional analysis. From time to time, the Court alludes to the underlying benefits of federalism: limiting tyranny by the federal government; enhancing democracy by providing governance that is closer to the people; providing laboratories for experimentation; and enhancing liberty. But these values are seldom more than just conclusions as to why states are important and why a federalist structure of government is desirable. Rarely, if ever, is there any explanation as to how these particular values are compromised by particular federal laws.

Initially in Chapter 3, I consider these values and especially the Court's treatment of them. I suggest that neither aspect of the paradox of post-1937 federalism has any relationship to the traditionally identified values of federalism. More significantly, the Supreme Court's decisions in the 1990s that have been highly protective of states' institutional interests have little relation to the underlying values of federalism.

I then consider the values served by the existence of both federal and state governments. The ultimate goals for government are enhancing liberty and effectively meeting society's needs. Federalism accomplishes both by securing multiple actors that can protect freedom and respond to social problems.

Moreover, federalism has other benefits: efficiency, as sometimes it is more efficient to have action at the national level and sometimes at the local; participation, as sometimes national action better engages involvement and other times localism does so; community empowerment, which is sometimes a benefit of decentralization; and economic gains, as sometimes national action is needed to deal with externalities for the sake of the economy. I suggest that these are the values that Congress should consider in deciding when national action is needed and when it is preferable to leave matters to state and local actors.

Chapter 4 suggests that federalism can be reinvented primarily in

terms of empowerment, not limits.[36] The chapter begins by describing the extent to which federalism doctrines have been about limiting government power. Not only has this manifested itself as limits on federal authority but also as decisions in areas such as preemption, which have used federalism to limit state and local power.

I then outline the alternative conception of federalism. Reconceiving federalism in terms of empowerment is the best way to achieve the underlying goals of advancing liberty and enhancing effective government: having multiple levels of government means that there are several different actors capable of dealing with society's needs.[37]

Reorienting federalism in this way would mean a dramatic change in the scope of Congress's authority. Congress's power under the commerce clause and Section 5 of the Fourteenth Amendment, as well as its spending power, would be broadly defined.

Several examples are used and discussed in detail to illustrate how my proposed functional approach to federalism would be different than the Rehnquist Court's rulings. For instance, in light of the historical failure of many states to provide an adequate remedy for women who are victims of gender-motivated violence, it was appropriate and desirable for Congress to decide as it did in the Violence Against Women Act. From a functional perspective, this law very much advanced liberty and provided more effective government. The law is a paradigm illustration of how if one level of government is failing, as many states were, it is beneficial for another level of government to act. Another example discussed in detail to help showcase functionalism's benefits, and explain how functionalism differs from formalism, is the Rehnquist Court's many decisions concerning state sovereign immunity. I argue that the Court's decisions in this area have been misguided and have wrongly sacrificed government accountability; an express balancing of the goals of federalism leads to exactly the opposite conclusions reached by the majority on the Supreme Court.

Chapter 5 develops what it would mean to reconceptualize federalism in terms of empowering federal court jurisdiction. For decades, courts and scholars have focused on whether there is parity between fed-

eral and state courts in their willingness to uphold constitutional rights in defining the scope of federal jurisdiction. I argue that this is misguided in that there is no meaningful way of assessing the comparative virtues of two levels of courts. The goal in defining federal court jurisdiction should be this: allowing litigants with constitutional claims to choose the forum that they believe is most likely to vindicate their claims. For example, such an approach would mean much narrower abstention doctrines and much greater availability of federal habeas corpus relief.

Chapter 6 looks at federalism as empowerment in terms of preemption. In recent years, the Supreme Court has broadly defined preemption doctrines, frequently finding progressive state and local regulations to be preempted by federal law. I argue for a much narrower approach to preemption that would leave more authority to state and local governments. Under this approach, preemption should be found only if a federal law expressly preempts state and local action, or if there is a direct conflict with federal law.

WHY

The challenge for the twenty-first century is to reinvent American government so that it can effectively deal with the enormous, enduring social problems and the growing threats to personal freedom. Increasing the chains on government—as the Court and Congress are now doing in the name of federalism—is exactly the wrong way to enter the new millennium. Today, government is often perceived as unresponsive to or incapable of addressing society's most pressing problems. The possibility of effective government is maximized by having three levels of legislative power capable of action, and two levels of judicial power capable of protecting rights. In this book, I want to challenge the currently dominant conception of federalism as limiting government and argue for a new, empowering vision.

This alternative approach is actually more protective of states. By basing federalism not on formalism but on advancing the underlying values, the interests of all levels of government can be advanced. State and local governments, as much as the federal government, can benefit

from the increased authority that comes from a vision of federalism as empowerment.

Contrary to the current Court's approach, the structure of government should not be regarded as an end in itself. Government at all levels exists to advance human freedom and to meet the needs of society. In this book, I seek to offer an alternative conception of federalism that is consciously oriented to achieving these goals.