

ISSUE BRIEF

“Information to Action”

Topic: State Sovereignty

Title: *SUPREME COURT JUSTICES WHO UPHELD STATE SOVEREIGNTY* by Joshua Charles

Over the nearly 250 years of American history, a number of Supreme Court Justices have been particularly well-known for their support of state sovereignty.

One of the most prominent was Justice, and later Chief Justice William Rehnquist.

For example, in *U.S. v. Lopez* (1995), a monumental case dealing with the extent of Congressional power under the Commerce Clause, he opened with a broad statement:

We start with first principles. The Constitution creates a Federal Government of enumerated powers.

The Chief Justice would go on to explain how important the distinction between federal and state sovereignty was, and its relationship with the ability of citizens to maintain their liberties:

The theory that two governments accord more liberty than one requires for its realization two distinct and discernable lines of political accountability: one between the citizens and the Federal Government; the second between the citizens and the States. If, as Madison expected, the Federal and State Governments are to control each other, and hold each other in check by competing for the affections of the people, those citizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function.

Another famous statement on the importance of state sovereignty came from Justice Anthony Kennedy, writing for the Court in *Alden v. Maine* (1999):

Congress has vast power but not all power. When Congress legislates in matters affecting the States, it may not treat those sovereign entities as mere prefectures or corporations. Congress...must respect the sovereignty of the States.

Likewise, Justice O’Connor, writing in *Gregory v. Ashcroft* (1991), observed that:

Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a

healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

Perhaps the most well-known defender of state sovereignty was Justice Antonin Scalia. He frequently made the case that it was not the Bill of Rights that preserved American liberties, but the constitutional structure of federalism. He would often quote provisions from the Constitution of the Soviet Union, which contained all sorts of “protections” of speech, press, religion, etc. But as was well known, such rights were hardly protected in the Soviet Union, but rather routinely violated. Scalia observed of these supposed “protections”:

These were provisions of the 1977 Constitution of the Union of Soviet Socialist Republics. They were not worth the paper they were printed on, as are the human rights guarantees of a large number of still-extant countries governed by Presidents-for-life. They are what the Framers of our Constitution called “parchment guarantees,” because the *real* constitutions of those countries—the provisions that establish the institutions of government—do not prevent the centralization of power in one man or one party, thus enabling the guarantees to be ignored. Structure is everything.

The tension between federal and state sovereignty has been at the heart of constitutional jurisprudence since the earliest days of the Republic. Justices who gave full-throated defenses of it in some cases would, in others, argue that the federal government in fact had the power to do something. Where the line is has rarely been red, and almost always some gradation of gray.