IF MEN WERE ANGELS: THE NEW JUDICIAL ACTIVISM IN THEORY AND PRACTICE

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"If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary."

James Madison (*The Federalist* No. 51)[1]

I. INTRODUCTION: JUDGE WILKINSON'S VIEW OF THE NEW JUDICIAL ACTIVISM

In his concurrence to *Brzonkala v. Virginia Polytechnic Institute*, Chief Judge J. Harvie Wilkinson, III proclaimed a new judicial activism in constitutional jurisprudence—one in which judges are structural referees.[2] The hallmark of this new activism "is an interest in reviving

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1. THE FEDERALIST PAPERS No. 51, at 356 (James Madison) (Benjamin Fletcher Wright ed., 1961).

2. 169 F.3d 820, 895 (4th Cir. 1999) (Wilkinson, C.J., concurring), *cert. granted*, Brzonkala v. Morrison, 144 L. Ed. 2d 842 (1999). Of course, Chief Judge Wilkinson was not the first person to have recognized a new period of activism in the Rehnquist Court's cases. *See, e.g.*, *A Court Running in the Wrong Direction*, N.Y. TIMES, July 6, 1995, at A20; Donald Zeigler, *The New Activist Court*, 45 AM. U.L. REV. 1367 (1996). However, I have chosen Chief Judge Wilkinson's concurrence as the starting point for this article because he clearly stated the tenets of the new judicial activism.

Although some of the cases examined in this article date back to 1992, early scholarly discussions of these decisions were often uncertain as to their effect. *See, e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?* 111 HARV. L. REV. 2180, 2205 (1998); John B. Attanasio, *Forward: Stages of Federalism*, 42 ST. LOUIS U. L.J. 485, 493-94 (1998). While a few articles did predict the strong effect these cases would have on constitutional jurisprudence, *e.g.*, Steven G. Calabresi, *A Government of Limited and Enumerated Powers: In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995), others predicted that the cases would have little effect, *e.g.*, Ronald J. Krotoszynski, Jr., *Listening to the "Sounds of Sovereignty" but Missing the Beat: Does the New Fedralism Really Matter?* 32 IND. L. REV. 11 (1998) ("Congress remains free to buy that which it cannot directly command." *Id.* at 25); Jefferson Powell, *Enumerated Means and Unlimited Ends*, 94 MICH. L. REV. 651 (1995); Robert F. Nagel, *The Future of Federalism*, 46 CASE W. RES. L.

the structural guarantees of dual sovereignty."[3] The era began in 1992 with *New York v. United States*[4] "in which the Supreme Court held that the 'take title' provision of the Low-Level Radioactive Waste Policy Amendments Act of 1985 impermissibly coerced the states into passing legislation."[5] Since then, the Court has invalidated several statutes on the ground that Congress exceeded its authority in passing those statutes and intruded on the states' sovereignty.[6] The areas in which the Court has felt that Congress exceeded its constitutional authority have included (1) enactment of statutes under its commerce power that regulated noncommercial areas of traditional state concern,[7] (2) use of Section 5 of the Fourteenth Amendment to alter the Fourteenth Amendment's meaning,[8] and (3) abrogation of state sovereign immunity.[9] In addition, the Court "has enforced the 'etiquette of federalism,' barring Congress from 'commandeer[ing] the legislative processes of the States,' and forbidding the national government from 'impress[ing] the state executive into its service' by 'command[ing] the state officers... to administer or enforce a federal regulatory program.'"[10] In sum, as Judge Wilkinson has declared, "[t]aken as a whole, the decisions preserve Congress as an institution of broad but enumerated powers, and the states as entities having residual sovereign rights."[11]

Judge Wilkinson asked, "[w]ill the current era of judicial scrutiny stand the tests of time and public acceptance any better than the prior eras have?"[12] These prior periods of judicial activism were the "*Lochner*" era at the beginning of the twentieth century in which courts

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REV. 643 (1996); Jesse H. Choper, *Did Last Term Reveal "A Revolutionary States' Rights Movement" within the Supreme Court*, 46 CASE W. RES. L. REV. 663 (1996); Suzanna Sherry, *The Barking Dog*, 46 CASE W. RES. L. REV. 877 (1996).

3. 169 F.3d at 893.

4. 505 U.S. 144 (1992). One might argue that it began a year earlier with *Gregory v. Ashcroft*, 501 U.S. 452 (1991), which held that the Federal Discrimination in Employment Act did not apply to the mandatory retirement age for Missouri state judges. *See generally* 29 U.S.C. §§ 621-34 (1998).

5. *Brzonkala*, 169 F.3d at 892.

6. *See id.* at 892-93.

7. *See* United States v. Lopez, 514 U.S. 549, 561 (1995).

8. *See, e.g.*, City of Boerne v. Flores, 521 U.S. 507 (1997).

9. *See, e.g.*, Seminole Tribe v. Florida, 517 U.S. 44 (1996); *Brzonkala*, 169 F.3d at 893.

10. *Brzonkala*, 169 F.3d at 893 (citing *Lopez*, 514 U.S. at 561) (Kennedy, J., concuring) (alteration in original) (quoting New York v. United States, 505 U.S. at 161)(quoting Printz v. United States, 521 U.S. 898, 935 (1997)).

11. *Brzonkala*, 169 F.3d at 893.

12. *Id.*

struck down progressive legislation, such as laws protecting union members and minimum wage laws, on substantive due process grounds ("liberty of contract") and commerce clause grounds,[13] and the Warren Court-Early Burger Court era in which the Court found "new substantive rights in the Constitution and down played the document's structural mandates."[14] Commentators have strongly condemned the *Lochner* era and criticized aspects of the Warren Court-Early Burger Court period.[15]

Critics castigated the *Lochner* era's liberty of contract decisions on the ground that the Court was "indulging its 'judicial sense of what was good for the business community' and ignoring the plight of the common citizen."[16] These writers thought that the Court was "picking and choosing without principle... 'simply because... [the statutes were] passed to carry out economic views which the Court believe[d] to be unwise or unsound.'"[17] These commentators also reproached the Court for inconsistency in its commerce clause decisions.[18] Such decisions "solidified the image of an obstructionist Supreme Court, determined to impede legislative efforts to reverse the era's economic dysfunction and to ease the human suffering that it had wrought."[19]

Judge Wilkinson summed up the first period of judicial activism:

> The century's first era of judicial activism proved a painful experience for the courts, as well as for the nation. Battered by court-packing proposals and chastened by a wholesale change in personnel, the Court eventually abandoned the business of reviewing state and federal regulation of economic activity. Indeed, the reaction to the Court's early excesses was so strong that many supposed for a time that limits on the commerce power had become non-existent. And the *Lochner* specter of result-oriented activism still haunts the Court's debates today.[20]

While the reputation of the Warren Court-Early Burger Court is

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13. *Id.* at 890-91.

14. *Id.* at 892.

15. *See id.* at 890-92.

16. *Id.* at 890 (quoting ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 164 (1941)).

17. *See Brzonkala*, 169 F.3d at 890 (*citing*, Adkins v. Children's Hosp., 261 U.S. 525, 562 (1923) (Taft, C.J., dissenting)).

18. *Brzonkala*, 169 F.3d at 890-91.

19. *Id.* at 891.

20. *Id.* (citation omitted).

much better than that of the *Lochner* court, scholars have also strongly criticized certain features of that time, and the excesses of that period guaranteed a "cyclical correction"—the new judicial activism.[21] Judge Wilkinson observed that "[s]ome decisions overextended the institutional capacity of the federal courts, installing judges as long-term supervisors of basic state functions."[22] He added that "[o]ther constitutional rulings were simply ridden too far, and the Court eventually had to rein them in."[23] He concluded that

> [a]lthough many of its individual decisions were overdue and salutary, when the era is considered as a whole, the states were relegated to second-class constitutional status. As states themselves began to respect the civil rights of all their citizens, however, the justification for additional restrictions began to wear thin.[24]

Judge Wilkinson asserted that the new judicial activism does not suffer from the same problems as the other two periods of judicial activism. He wrote:

> [y]et upon closer scrutiny, the current wave of judicial decisions bears little relation to those which crested early in this century. If one remains attentive to the pitfalls of the past, the present jurisprudence holds the promise to be an enduring and constructive one, for its aims and means differ significantly from those of prior eras.[25]

First, unlike the two earlier periods of judicial activism, the new judicial activism is substantively neutral: "the cases of the present era cannot be seen as single-mindedly promoting the interests of a particular constituency."[26] Judge Wilkinson noted that "[a]s a matter of oxen, the

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21. *See id.* at 892.

22. *Id.*

23. *Id.*

24. *Id.* Justice Thomas has written concerning the Court's decisions before the reaction began, "[o]ur construction of the scope of congressional authority has the additional problem of coming close to turning the Tenth Amendment on its head. Our case law could be read to reserve to the United States all powers not expressly *prohibited* by the Constitution." *Lopez*, 514 U.S. at 589 (Thomas, J., concurring).

25. *Brzonkala*, 169 F.3d at 893.

26. *Id.* Erwin Chemerinsky has labelled the new activism a "conservative judicial activism." Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 602 (1998) [hereinafter Chemerinsky,

gored are determined by infringements upon our federal system, not by judicial disdain for enacted policies."[27] Consequently, "[i]n the present period, preservation of federalism values—not the maintenance of *laissez faire*—is the binding principle."[28]

Second, the cases in the current period arise out of many factual contexts; they do not involve constant clashes between business and labor interests, as most of the cases in the *Lochner* era did.[29] As Judge Wilkinson observed, even though many interest groups are involved in these decisions, "the identity and alignment of those groups varies, foreclosing the possibility that the judiciary will be seen as politically choosing sides in a single epic struggle."[30]

Third, the new judicial activism treats textual interpretation differently than the other two periods.[31] In the first era, the Court adopted a very narrow meaning of "commerce," significantly restricting congressional power, while, in the second era, it gave Congress broad authority under the same clause.[32] In the third era, "[c]ourts are not motivated by a desire that a *particular* substantive meaning be given to a constitutional term such as commerce, but instead by the duty to find that *some* meaning must exist."[33] Judge Wilkinson asserted:

> [t]he Supreme Court affirmed in *Lopez* the notion that "commerce" must mean something short of everything .... This is not a radical principle. Rather than lashing out to greatly confine national power, the judiciary is proceeding, cautiously, to find a limiting principle at the margin. The *Lopez* limit on

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RFRA]. The new activism is certainly not conservative in the sense that the first period of judicial activism was. That period protected conservative "interests," in particular, big business, while the current period does not appear to play favorites among interest groups. Still, the new activism does emphasize values often associated with conservatism—federalism and respecting the constitutions structural lines, so one might label it conservative in that sense. However, as noted throughout this paper, the new judicial activism, when properly applied, does not otherwise favor one set of values over another, but rather allocates the authority to make value choices to the proper democratic body. That democratic body may well choose to further liberal values. If I were forced to put a label on the new judicial activism, I would classify it as moderate because it is not intended to favor either a conservative or liberal extreme.

27. *Brzonkala*, 169 F.3d at 893.
28. *Id.* at 894.
29. *See id.*
30. *Id.*
31. *See id.*
32. *See id.* at 894-95.
33. *Id.* at 894.

Congressional power is not a strict one, but it is a limit.[34]

Finally, the courts' role in the new judicial activism "is not as substantive adjudicators, but as structural referees."[35] Judge Wilkinson asserted that "[i]nstead of aggressively pursuing substantive preferences, this court validates a structural principle [federalism] found throughout the Constitution . . . , [which is] essential to the continued vitality of our federal system."[36] Unlike the two earlier periods of judicial activism which "attempted to remove the subject matter of those cases from political debate altogether.... [T]he present jurisprudence of federalism is purely allocative, standing for the simple proposition that the Constitution does not cast states as mere marionettes of the central government."[37] In doing so, "[t]his jurisprudence removes no substantive decision from the stage of political debate."[38] Thus,

> [s]tates remain free after *New York* to reach regional solutions to their hazardous waste problems, after *Lopez* to criminalize the act of bringing a firearm within a school zone, after *Printz* voluntarily to cooperate with federal law enforcement efforts, and after today's decision to provide civil remedies to women who are battered or raped. No court blocks the path of legislative initiative in any of these substantive areas.[39]

Judge Wilkinson noted that courts have often policed the structural lines in the Constitution in areas such as separation of powers, abstention, the primacy of state law, the doctrine of adequate and independent state grounds, the jurisprudence of pre-emption, and rules governing habeas jurisprudence.[40] Accordingly, he declared:

> [t]he judiciary rightly resolves structural disputes. Just as the relationship of the Bill of Rights to the Fourteenth Amendment was a legitimate structural question for the Court, so too is the debate over the relationship of Article I, Section 8 to the Tenth Amendment. It is just as important for the federal government

34. *Id.* at 895 (citations omitted).
35. *Id.*
36. *Id.* (citations omitted).
37. *Id.*
38. *Id.*
39. *Id.*
40. *See id.* at 895-96.

> to live within its enumerated powers as it is for state governments to respect the Bill of Rights. Insisting on both sets the state-federal balance right.[41]

In this paper, I will examine the new judicial activism in theory and in practice and evaluate its validity in the areas in which the Court has used it to limit Congressional power. I will also identify other areas where the new judicial activism may be emerging, such as limits upon a state's power over the individual and the relationship of the states. I will conclude that the new judicial activism provides a promising method of handling the diversity that exists in modern society, but that the Court has ignored some of its basic principles in certain cases, producing results in those cases that are unprincipled and even ideologically biased. I will argue that, to make the new judicial activism a legitimate means of constitutional analysis, the Court should adhere to the structural principles contained in the Constitution's clear text, rather than employing general notions of federalism that are not anchored in the Constitution's words.

In Part II of this paper, I will set forth the criteria by which I will judge the new judicial activism's decisions. In Part III, I will evaluate those cases that have limited Congress's power to pass statutes that infringe upon state sovereignty under Congress's authority under the Commerce Clause or Section 5 of the Fourteenth Amendment. In Part IV, I will study the decisions that have enforced the "etiquette of federalism," by forbidding Congress from "commandeering the legislative process of the states" or "commanding the state officers . . . to administer or enforce a federal regulatory program." In Part V, I will criticize those cases that have limited Congress's ability to abrogate state sovereign immunity. Finally, in Part VI, I will examine other areas in which the new judicial activism may have an influence.

II. CRITERIA FOR EVALUATING NEW JUDICIAL ACTIVISM DECISIONS

The two most important criteria for judging a new judicial activism case are (1) whether it respects the judicial role in our tri-partite government and (2) whether it enforces the structural lines set forth in the Constitution, especially those that regulate the relationship of the federal government and the states—federalism.

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41. *Id.* at 896.

A. The Role of the Judge: Judicial Activism v. Judicial Restraint

The first question in evaluating a new judicial activism decision concerns the role of judges in our constitutional system. Our government consists of three independent branches—the executive, the legislative, and the judiciary, and the constitutional requirement of separation of powers mandates that one branch may not intrude upon another's domain. Within this scheme, the legislature makes the laws, and the judiciary interprets those laws and applies them to legal disputes. The judiciary is not supposed to "make law," at least not in those areas in which the legislature has acted. Judges, of course, can invalidate laws when they are unconstitutional.

Progressive scholars and judges in the first third of the twentieth century harshly criticized the first period of judicial activism because it struck down economic and social welfare laws on due process grounds.[42] These thinkers thought that the courts, rather than following sound legal principles, were applying their own notions of what the law should be. For example, in his famous *Lochner* dissent, Justice Holmes wrote:

> [A] constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *Laissez faire.* It is made for people of fundamentally differing views and the accident of... [judges] finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.[43]

These scholars and judges advocated judicial restraint—that courts should not invalidate legislation, but, rather, should allow reasonable exercises of legislative power.[44]

One of the justifications for judicial restraint is that when judges invalidate legislatively-enacted laws, they are interfering with democracy[45]—the so-called "anti-majoritarian" difficulty.[46] But, as many

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42. *See supra* notes 16-17 and accompanying text. *See also* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 3-7, 33-35, 156-59 (1992); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909).

43. Lochner v. New York, 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting).

44. *See* G. EDWARD WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 155 (1988) [hereinafter WHITE, THE AMERICAN JUDICIAL TRADITION].

45. For example, Professor Horwitz has written concerning Justice Holmes: "If law is

modern scholars recognize, part of the courts' role is antimajoritarian—to protect minorities from overreaching by the majority.[47] Obviously, the legislative and executive branches cannot effectively police themselves.[48] Thus, despite the doubts mentioned above, courts have the duty of judicial review—the power to invalidate unconstitutional government action.[49]

For example, Justice Kennedy has written concerning the importance of judicial review:

> Although it is the obligation of all officers of the government to respect the constitutional design... the federal balance is too essential a part of our constitutional structure and plays too vital a role in securing freedom for us to admit inability to intervene when one or the other level of the Government has tipped the scales too far.[50]

Similarly, Professor Redish has asserted that "the Supreme Court must intensify its enforcement of the constitutional provisions dealing with political structure, for the simple reason that the Constitution's text unambiguously dictates the existence of a specific governmental form."[51]

Many scholars, however, believe that, to avoid subverting the democratic principles set forth in the Constitution, the courts must limit

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merely politics, then the legislature should in fact decide." HORWITZ, *supra* note 42, at 142. Judge Hand went as far as to question the legitimacy of judicial review on the basis that judicial review was incompatible with the separation of powers. LEARNED HAND, THE BILL OF RIGHTS 10-11 (1958).

46. *See* G. EDWARD WHITE, INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 7-10 (1994) [hereinafter, WHITE, INTERVENTION AND DETACHMENT]; *see also*, LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 10-12, 61-66 (1988).

47. *See, e.g.*, WHITE, INTERVENTION AND DETACHMENT, *supra* note 46, at 9-10; MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 5, 7-9 (1995).

48. *See* REDISH, *supra* note 47, at 8 (1995).

49. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176-80 (1803); *see also* REDISH, *supra* note 47, at 8; *see also*, WHITE, THE AMERICAN JUDICIAL TRADITION, *supra* note 44, at 460; A. E. Dick Howard, *Garcia and the Values of Federalism: On the Need for a Recurrence to Fundamental Principles*, 19 GA. L. REV. 789, 791 (1985) ("[I]t is hard to escape the conclusion that the Founders assumed that limiting national power in order to protect the states would be as much a part of the judicial function as any other issue.").

50. *Lopez*, 514 U.S. at 578 (citation omitted) (Kennedy, J., concurring); *see also* John C. Yoo, *Sounds of Sovereignty: Defining Federalism in the 1990s*, 32 IND. L. REV. 27, 33 (1998) [hereinafter Yoo, *Sounds of Sovereignty*].

51. REDISH, *supra* note 47, at 6. He later added that "[t]he long-term values embodied in the constitutional provisions establishing political structure are both too important and too vulnerable to justify judicial failure to enforce them." *Id.* at 164.

judicial review to the Constitution's clear language.[52] As Professor Redish has asserted:

> [i]t is only when the text of the countermajoritarian governing document provides a rule of behavior or structure that is contravened by majoritarian action that the unaccountable judiciary has license to invalidate that action. Hence, in a democracy the only justification for judicial review by a nonrepresentative governmental organ is the desire to insure that the majoritarian branches adhere to the countermajoritarian limitations imposed by the Constitution.[53]

In sum, judicial activism that is not grounded in the constitutional text is improper. Equally improper is when the Court ignores a constitutional violation on the basis that courts should defer to the legislative will.[54] The Court's appropriate role lies between these extremes: The Court should invalidate Congress's actions when they clearly violate the Constitution's structural limitations, but not expand the structural limitations beyond the text based on a sense of what the Court thinks those limitations should be.

B. Federalism

The key feature of the new judicial activism is that its proponents want the Supreme Court to give as much attention to the Constitution's

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52. *See* REDISH, *supra* note 47, at 8. I am not advocating that courts adopt a rigid formalism. One can respect the Constitution's formal structures without being mechanical. As Professor Redish has pointed out:

> a commitment to adherence to text in constitutional interpretation does not necessarily imply acceptance of a kind of static originalism. One can reasonably believe that the outer limits of constitutional text constrain judicial interpretation, yet find that within those limits the interpreter has freedom to adapt and apply concepts to changing conditions.... The mode of interpretation I employ throughout my analysis of the Constitution's structural provisions is a type of "pragmatic formalism"—one that rejects the constraints that flow from an all-or-nothing approach to constitutional interpretation.

Id. at 9. In addition a great deal of constitutional history does not "translate" well. Lynn Baker, *The Revival of States' Rights: A Progress Report and a Proposal*, 22 HARV. J.L. & PUB. POL'Y 95, 104 (1998).

53. REDISH, *supra* note 47, at 8.

54. Professor Redish has asserted that not enforcing the structural clauses is an improper form of judicial activism when done because of disagreement with their substantive impact. *Id.* at 164.

structural aspects, as it does to its individual liberty provisions.[55] Martin Redish noted that the Constitution "was primarily devoted to the implementation of an intricate and innovative political theory—a constitutionally limited, federally structured, representative democracy."[56] Similarly, Justice O'Connor declared in *New York*:

> Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear "formalistic" in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day.[57]

The structural elements of the Constitution place significant limitations on the federal government's powers. For example, Judge Niemeyer declared in his *Brzonkala* concurrence:

> Over 200 years ago, issues regarding the scope of the new national government's powers dominated the debates surrounding the ratification of the Constitution. What had emerged from Philadelphia in 1787 was a legal text creating a government constructed upon principles of federalism. The Constitution accomplishes this result by limiting the power of the national government, and giving it only enumerated powers.[58]

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55. *See, e.g.*, Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 14 (1998) ("The text of the Constitution is about structure—about form." *Id.* at 18); *see also*, John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311 (1997) [hereinafter, Yoo, *Judicial Safeguards*]; Calebresi, *supra* note 2, at 811-26; REDISH, *supra* note 48, at 3-6, *passim* ("[o]ne of the primary elements of my thesis is that because the political structure envisioned in the Constitution is so central to the values that inhere in the concept of limited government (namely, the avoidance of tyranny and the preservation of individual liberty), the provisions that dictate that structure need to be enforced by the Supreme Court with considerably more consistency and enthusiasm than they generally have been to date." *Id.* at 4-5); *but see* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's Lopez and Seminole Tribe Decisions*, 96 COLUM. L. REV. 2213, 2219-20 (1996); Edward L. Rubin and Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

56. REDISH, *supra* note 47, at 3.

57. *New York*, 505 U.S. at 187.

58. *Brzonkala*, 169 F.3d at 903 (Niemeyer, J., concurring) (citing *Marbury*, 5 U.S. (1

Similarly, James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."[59] Thus, "the local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority, than the general authority is subject to them, within its own sphere."[60] As Justice Kennedy has noted, "federalism was the unique contribution of the Framers to political science and political theory."[61]

Under our federal system, the federal government asserts its authority over individuals, not states.[62] As Justice Scalia has observed, "the Framers rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the state and federal governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"[63] Under this scheme, "[t]he Constitution thus contemplates a State's government will represent and remain accountable to its own citizens."[64]

Federalism protects individual liberty.[65] The Court in *New York* proclaimed the purpose of the Constitution's federalism provisions:

> The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the

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Cranch) at 176).

59. THE FEDERALIST No. 45, at 328 (James Madison) (Benjamin Fletcher Wright ed., 1961).

60. THE FEDERALIST No. 39, at 25 (James Madison) (Benjamin Fletcher Wright ed., 1961).

61. *Lopez*, 514 U.S. at 575 (Kennedy, J., concurring); *see also* REDISH, *supra* note 47, at 3-6.

62. *Printz*, 521 U.S. at 919-20.

63. *Id.* (quoting THE FEDERALIST No. 15, at 159 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961)).

64. *Printz*, 521 U.S. at 919-20.

65. Professor Redish has observed that "[e]ven a casual review of the essence of American constitutional theory reveals that any purported dichotomy between constitutional structure and constitutional rights is a dangerous and false one." REDISH, *supra* note 47, at 4.

> diffusion of sovereign power . . . . 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."[66]

Likewise, James Madison wrote:

> 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.[67]

These structures are mainly intended to protect the people, not the states, as confirmed by the fact that the states cannot "consent" when Congress exceeds its authority under these structures.[68] As Professor Yoo has written, "[s]overeignty is not maintained for sovereignty's sake, but instead is necessary to check those driven by power for power's sake."[69]

Federalism not only protects minorities, it also protects the majority from federal government overreaching. As Professor Redish has declared, "the structural portions of the Constitution .... may also be seen as propholytic insurance of the rights of the majority—in other words, as protection against usurpation of sovereign power by those in authority from those whom they represent."[70]

For federalism's protections to be effective, there must be two "lines of political accountability: one between the citizens and the federal government; the second between the citizens and the States."[71] For this

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66. *New York*, 505 U.S. at 181 (citations omitted); *see also Lopez*, 514 U.S. at 552. The *Lopez* Court stated that "[th]is constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.'" *Id.* (quoting *Gregory*, 501 U.S. at 458); *see also* REDISH, *supra* note 47, at 4.

67. THE FEDERALIST PAPERS No. 51, at 357 (James Madison) (Benjamin Fletcher Wright ed., 1961).

68. United States v. New York, 505 U.S. at 182.

69. Yoo, *Sounds of Sovereignty*, *supra* note 50, at 32.

70. REDISH, *supra* note 47, at 5.

71. *Lopez*, 514 U.S. at 576 (Kennedy, J., concurring). Professor Yoo has declared: "[if] the states cannot act as *political* entities with some degree of independence, their ability to define and enforce individual rights will be damaged." Yoo, *Judicial Safeguards*, *supra* note

scheme to work, the people must be able to ascertain which of the two governments to hold accountable.[72] As Justice Kennedy has declared, "[w]ere the Federal Government to take over the regulation of entire areas of traditional state concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of federal and state authority would blur and political responsibility would become illusory."[73] Or, as Justice O'Connor has noted, "[t]hese twin powers will act as mutual restraints only if both are credible."[74]

One might ask whether in the modern world the people need this two-tiered layer of protection.[75] The simple (and correct) answer is that this protection is mandated by the Constitution, and it can only be changed by amendment. Equally important, observation of federalism principles is one way of dealing with the diversity of our modern society.[76] Justice Kennedy has declared that "[i]n this circumstance, the theory and utility of our federalism are revealed, for the States may perform their role as laboratories for experimentation to devise various solutions where the best solution is far from clear."[77]

More fundamentally, federalism permits people to choose the type of society in which they wish to live.[78] Professor Krotoszynski has asserted, "pluralism is conducive to liberty because it facilitates choice, which in turn leads to diverse laws reflecting the sensibilities of local communities."[79] For example, one state may wish to permit same-sex

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55, at 1314.

72. *See Lopez*, 514 U.S. at 575-76.

73. *Id.* at 577 (citing *New York*, 505 U.S. at 155-69).

74. Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

75. Some critics have argued that federalism is not suitable for our modern world because we need national, rather than piecemeal, solutions and because change is too slow on the state level. *See, e.g.*, Alpheus Thomas Mason, *Judicial Activism: Old and New*, 55 VA. L. REV. 385, 391 (1969); Harold J. Laski, *The Obsolescence of Federalism*, 98 NEW REPUBLIC 367 (1939).

76. Daniel Elazar has declared: "An increasing number of people have found federalism ... to be an extraordinarily important element in both the maintenance and the containment of pluralism." DANIEL J. ELAZAR, EXPLORING FEDERALISM 99 (1987). Similarly, Professor Redish has noted, "a reinvigoration of the Constitution's structural provisions is called for, not simply because the Framers intended that these provisions play an important role, but because their vigorous enforcement today remains essential to the attainment of the goals of our political system." REDISH, *supra* note 47, at 6.

77. *Lopez*, 514 U.S. at 581 (Kennedy, J., concurring); *see also* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

78. Professor Hart has called this "an enrichment of equipment for successful social life." Henry M. Hart, Jr., *The Relations between State and Federal Law*, 54 COLUM. L. REV. 489, 490 (1954).

79. Krotoszynski, *supra* note 2, at 21.

marriage, while another may not. Similarly, a mostly urban state may want gun control, while a largely rural state may not. Why should all states have to make the same choice? As Professor Kreimer has declared:

> [o]ne of the virtues of a territorial federalism is precisely that it allows conflicting communities of commitment to coexist within a single national polity, while allowing individuals to move fluidly among them. On issues of fundamental life choices, America has often been a house divided, with the individual citizens entitled to decide the rooms in which they wish to live.[80]

Professor Hart has similarly noted, "[t]he resulting disparities in the formal law of different states are notable chiefly as reflections of a necessary independence and even competition in the wise guidance of social affairs, entailing in most cases no sacrifice of any comparably important social value."[81] In addition, different states have different needs; California's problems are not the same as Alaska's.

Daniel Elazar has argued that our nation includes three distinct subcultures: 1) the "traditionalist," 2) the "moralistic," and 3) the "individualistic."[82] The traditionalist stresses continuity and hierarchy and is centered in the South. The moralistic emphasizes social and civic virtues and is centered in New England. The individualistic stresses libertarian concepts of privation and views the states as serving a minimalistic role and is located in the middle states and the West.[83] While immigration patterns have diluted these subcultures, there is "considerable evidence of their continued existence,"[84] and recent foreign immigration has created additional subcultures in American society. Law should allow these subcultures to flourish.

If local decisions are made on the federal level, the ability to allow

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80. Seth F. Kreimer, *Territoriality and Moral Dissensus: Thoughts on Abortion, Slavery, Gay Marriage and Family Values*, 16 QUINNIPIAC L. REV. 161, 163 (1996); *see also* DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 95-96 (1995); REDISH, *supra* note 47, at 25 ("[I]f the inferior governmental level attempts to impose tyrannical rule, its citizens have available the safety valve of interstate mobility."); Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (arguing that if the number of localities were infinite, individuals would migrate to jurisdictions where the combination of services and taxes match their preferences).

81. Hart, *supra* note 78, at 491.

82. DANIEL J. ELAZAR, AMERICAN FEDERALISM: A VIEW FROM THE STATES 85-116 (1966).

83. *See id.*; *see also* SHAPIRO, *supra* note 80, at 86-87.

84. SHAPIRO, *supra* note 80, at 86-87.

individuals more freedom to structure their lives will be impeded. As Professor Redish has declared: "it is quite conceivable that a *majority* of states may favor a policy that negatively affects the remaining states. The majority could control the decisions of Congress, leaving the minority unprotected."[85]

Or, as Professor Stewart has observed, "[u]niform national regulations have undermined decentralized diversity and self-determination."[86] He has further pointed out that modern battles between factions are fought not in Congress, but in federal court.[87] He has declared:

> This system of policy making circumvents many of the political safeguards of federalism that are supposed to make national policies sensitive to state and local concerns. The rhetoric of rights has reinforced and given a form of respectability to this system, which has helped stymie the emergence of a politics of the national good while simultaneously undermining federalism values.[88]

Moreover, when Congress legislates on matters of local concern, it requires the federal courts to adjudicate the minutia of local problems. As Professor BeVier has observed:

> *Boerne* does more than assert judicial supremacy vis-à-vis Congress on matters of constitutional interpretation. Its vital federalism dimension also takes the federal courts out of the resolution of close and important issues and places trust in the overall decency and religiously-accommodating instincts of local political institutions across the country.[89]

Finally, democracy is served by having local problems solved on the local level. As Justice O'Connor has observed, "federalism enhances the opportunity of all citizens to participate in representative government."[90] While dissatisfied persons have political redress through

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85. REDISH, *supra* note 47, at 18.

86. Richard B. Stewart, *Federalism and Rights*, 19 GA. L. REV. 917, 920 (1985).

87. *Id.* at 963.

88. *Id.* at 963-64.

89. Lillian R. BeVier, *Religion in Congress and The Courts: Issues of Institutional Competence*, 22 HARV. J.L. & PUB. POL'Y 62, 65 (1998).

90. FERC v. Mississippi, 456 U.S. 742, 789 (1982) (O'Connor, J., dissenting).

the electoral process when Congress has acted, political redress is diluted when Congress makes a decision that should be made on the local level. One person has a greater voice when the government unit is smaller, and local governments are more accountable to their citizens.[91] Moreover, state governments have a better perspective on problems that have a unique impact at their level, and they have greater time to devote to such matters. Thus, local governments are better able to mediate between local interests than is the federal government.

III. LIMITATIONS ON CONGRESS'S POWER TO PASS STATUTES

One of the major tenets of the new judicial activism is that Congress's power to pass statutes is limited to its enumerated powers set forth in the Constitution. The Supreme Court and lower courts have invalidated statutes when Congress has exceeded its authority under Article I's Commerce Clause or the Enforcement Clause (Section 5) of the Fourteenth Amendment.[92]

A. Limitations on Congress's Power under the Commerce Clause

Brzonkala held that Congress lacked the power to enact Subtitle C of the Violence against Woman Act, 42 U.S.C. § 13981 ("VAWA") under its commerce powers.[93] Congress passed the VAWA "[i]n response to the problems of domestic violence, sexual assault, and other forms of violent crime against woman.... "[94] Among its numerous provisions, § 13981 (b) created a federal substantive right in "[a]ll persons within the United States... to be free from crimes of violence motivated by gender."[95] Section 13981 (c) provided a private right against any "person... who commits a crime of violence motivated by gender," which permitted an injured party to recover compensatory damages, punitive damages, and injunctive, declaratory, and other appropriate relief.[96]

The plaintiff, Christy Brzonkala, brought the action against two football players at Virginia Polytechnic Institute, claiming that they had

91. *See* SHAPIRO, *supra* note 80, at 91-92.

92. *See Boerne*, 521 U.S. at 536; *Lopez*, 514 U.S. at 549; *Brzonkala*, 169 F.3d at 820.

93. 169 F.3d at 826. The court also rejected appellant's contention that Congress had the power to pass the statute under Section 5 of the Fourteenth Amendment. I will discuss Congress's power to pass legislation under Section 5 of the Fourteenth Amendment in the next subsection.

94. *Id.* at 827.

95. 42 U.S.C. § 13981(b) (1995).

96. 42 U.S.C. § 13981(c) (1995).

raped her.[97] The defendants filed a motion to dismiss on the grounds that the complaint failed to state a claim under § 13981 and that Congress lacked the authority to pass that section. The trial court dismissed the case on the second ground.

The Fourth Circuit began its opinion by articulating its philosophy:

> We the People, distrustful of power, and believing that government limited and dispersed protects freedom best, provided that our federal government would be one of enumerated powers, and that all power unenumerated would be reserved to the several States and to ourselves. Thus, though the authority conferred upon the federal government be broad, it is an authority constrained by no less a power than that of the People themselves. "[T]hat these limits may not be mistaken, or forgotten, the constitution is written." These simple truths of power bestowed and power withheld under the Constitution have never been more relevant than in this day, when accretion, if not actual accession, of power to the federal government seems not only unavoidable, but even expedient.[98]

After having decided that the facts were sufficient to satisfy § 13981 for the purpose of a motion to dismiss, the court considered whether Congress had the power to enact § 13981 under the Commerce Clause.[99] The court first established the extent of Congress's authority under the Commerce Clause as set forth in *Lopez*. The court declared that

> [i]n demarcating the limits of congressional power to regulate activities that do not themselves constitute interstate commerce, the Court in *Lopez* made clear that such power does not extend to the regulation of activities that merely have some relationship with or effect upon interstate commerce, but, rather, extends only, as is relevant here, to those activities "having a *substantial* relation to interstate commerce, . . . [that is], those activities that substantially affect interstate commerce."[100]

Two types of laws can satisfy *Lopez*'s substantially affects requirement: (1) "'regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the

97. *See Brzonkala*, 169 F.3d at 827-28.

98. *Id.* at 825-26, (quoting Marbury v. Madison, 5 U.S. (1 Cranch) at 176).

99. *Brzonkala*, 169 F.3d at 829-30.

100. *Id.* at 830-31 (quoting *Lopez*, 514 U.S. at 558-59).

aggregate, substantially affects interstate commerce,'" and (2) "regulations that include a jurisdictional element to ensure, 'through case-by-case inquiry,' that each specific application of the regulation involves activity that in fact affects interstate commerce."[101] In addition, *Lopez* emphasized the difference between regulating commercial or economic activities and regulating those activities that are of a noncommercial nature.[102] The court also thought that deciding whether a statute "'substantially affects' interstate commerce" is a question for courts, not Congress, to decide.[103]

The Fourth Circuit concluded that the statute did not substantially affect interstate commerce because it regulated noncommercial activity.[104] The court declared:

> [t]he statute does not regulate the manufacture, transport, or sale of goods, the provision of services, or any other sort of commercial transaction. Rather, it regulates violent crime motivated by gender animus. Not only is such conduct clearly not commercial, it is not even economic in any meaningful sense.[105]

The court added, "[t]hat section 13981 may, on occasion, reach activity that arises in part from economic motives does not transform it into a statute regulating economic activity."[106] The statute also lacked an "express jurisdictional element" that might limit its reach and make it a valid exercise of Congress's commerce power.[107] Consequently, the court concluded that "[b]ecause section 13981 neither regulates an economic activity nor includes a jurisdictional element, it cannot be upheld on the authority of *Lopez* or any other Supreme Court holding demarcating the outer limits of Congress' power under the substantially affects test."[108]

The court felt that declaring the statute constitutional would violate federalism principles: "A contrary holding would violate the 'first principles' of a Constitution that establishes a federal government of

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101. *Brzonkala*, 169 F.3d at 831 (quoting *Lopez*, 514 U.S. at 561).
102. *See Brzonkala*, 169 F.3d at 832.
103. *Id.* at 831.
104. *See id.* at 834.
105. *Id.*
106. *Id.*
107. *Id.* at 836.
108. *Id.*

enumerated powers...."[109] The court observed that "our federal system of government exists not as a mere matter of legislative grace, as the dissent (and ultimately appellants) would have, but rather as a matter of constitutional design."[110] Quoting *Lopez*, the court declared:

> [T]he scope of the interstate commerce power, "must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government."[111]

The court thought that upholding the VAWA would allow Congress to intrude on an area in which states historically have been sovereign, remove all limits on federal authority, and convert Congress's power to regulate interstate commerce into a general federal police power.[112]

The appellants argued that the relationship between the regulated activity and interstate commerce was documented by congressional findings to which the court was obligated to defer.[113] However, the court asserted that its deference to a Congressional finding is not absolute and that it must undertake its own independent evaluation.[114] The court declared that, if it did otherwise, "the Supreme Court's definitive invocation [in *Lopez*] of the first principles of federalism as limitations on congressional power would have to be consigned to platitude, for legislative formalities are at most a more procedural limit on

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109. *Id.* at 837 (quoting *Lopez*, 514 U.S. at 552).

110. *Id.* at 861.

111. *Id.* at 837 (quoting *Lopez*, 514 U.S. at 557 (quoting NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937))).

112. *See id.* at 838-40. In his concurrence, Judge Niemeyer added that "the redress of sexual assaults and rape is a police power that the States, including Virginia, have traditionally exercised." *Id.* at 904 (Niemeyer, J., concurring).

113. *See id.* at 844.

114. *See id.* at 845. One might wonder how this ruling affects the rational basis test for the due process and equal protection clauses. However, there is a significant difference between the commerce clause and the due process and equal protection clauses in that the commerce clause involves the extent of Congress's power, while the other two clauses concern how Congress exercises its power. This author believes that the Court should give greater attention to whether Congress has the power to act than to how it exercises its power—that is, once the Court determines that Congress has the power to act, it should generally defer to Congress's judgement. Consequently, *Brzonkala*'s ruling on this issue may not have any effect on the rational basis test for the due process and equal protection clauses.

congressional power."[115] The court concluded that, based on its independent evaluation, the congressional findings did not establish that § 13981 substantially affected interstate commerce.[116]

The appellants also asserted that, since the statute regulated conduct implicating civil rights—"an area of manifest federal concern"—the statute did not offend first principles of federalism, despite its noneconomic nature.[117] In rejecting this argument, the court pointed out that, "Congress has never asserted a general authority, untethered to any specific constitutional power, to enact such legislation."[118] The court thought that section 13981 was untethered to any enumerated power.[119]

The court concluded:

> At the end of the day, it is apparent that, for objectives unquestionably laudable, Congress has sought, through its powers to enforce the Constitution's prohibitions against state deprivations of equal protection and to regulate commerce among the several States, to direct private individuals in their activities wholly local and noneconomic. It has sought to reach conduct quintessentially within the exclusive purview of the States through legislation that neither conditions the federal intervention upon proof of misconduct imputable to a State or upon a nexus to interstate commerce, nor is tailored so as to address activity closely connected with constitutional failures of the States or with interstate commerce. This Congress may not do, even in pursuit of the most noble of causes, lest be ceded to the Legislature a plenary power over every aspect of human affairs—no matter how private, no matter how local, no matter how remote from commerce.[120]

Judge Wilkinson noted in his concurrence:

> [s]ome will doubtless be amazed that a federal court could find section 13981 unconstitutional when every American of good will abhors violence against women .... Still, the structural dictates of dual sovereignty must not ebb and flow with the tides of

115. *Id.* at 848.
116. *See id.* at 849.
117. *Id.* at 844.
118. *Id.* at 852.
119. *See id.*
120. *Id.* at 889.

popular support.[121]

Judge Wilkinson also asserted that the statute invaded "the last redoubt of state government—the regulation of domestic relations."[122]

Judge Wilkinson defended the decision's "activism" on the ground that it lacked the discrediting features of the two previous periods of judicial activism.[123] First, the decision involves different subject matter than other cases that have applied similar principles, such as *Lopez* and *Printz*, and, thus, it cannot be considered part of "any substantive judicial agenda."[124] Second, it "vindicates the structural values of government by reaffirming the concept of enumerated powers," and it reaffirms the judicial role "in maintaining the structural balance."[125] Finally, "it vindicates the textual values of the Constitution by refusing to assign a meaning to 'commerce' that is nowhere comprehended by the term."[126]

Judge Wilkinson accused the dissent of trying to rewrite the Constitution to suit its own taste.[127] He asserted, "[u]nder this view, two pillars of our government will crumble: The courts would have almost no role in structural disputes and the states would play no more than a bit part in our federal system."[128]

Judge Wilkinson also argued that the new judicial activism, as applied in this case, would not cause statutes to "topple like falling dominoes."[129] He advocated that "the values of federalism must be tempered by the maxims of prudence and restraint," and he noted that the courts have not taken *Lopez* too far.[130] He observed that "[i]f modern activism accelerates to a gallop, then this era will go the way of

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121. *Id.* at 896 (Wilkinson, J., concurring).

122. *Id.*

123. *See id.* at 897.

124. *Id.*

125. *Id.*

126. *Id.*

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* Judge Easterbrook has similarly stated: "Only when Congress oversteps the formal limits on its power, as in *Lopez* and *City of Boerne* and the line-item veto case, does a court intervene and even then only to require observance to forms, not to prescribe the distribution or use of governmental power." Easterbrook, *supra* note 55, at 18. Likewise, Professor Redish has noted, "[t]he Constitution's text and structure leave sufficient room for the courts to take into account modern social and economic realities without requiring abandonment of its directives." REDISH, *supra* note 47, at 165.

its discredited forebear."[131]

In her dissent in *Brzonkala*, Judge Motz criticized the majority for ignoring fundamentals of democracy:

> Even more disturbingly, the majority's ruling undermines the fundamental principle of the government under which the federal courts were created: that the people, through the mechanisms and within the limits described in the Constitution, have the ultimate authority to determine how they are to be governed. The majority today does not act to protect the rights of people underrepresented by the mechanisms of government. Rather, the majority seeks, in the name of "the People," to defend the states. Both the states and the people, however, are represented in the federal legislative process. Moreover, they are represented through mechanisms that, both practically and constitutionally, are far better designed than is the judiciary to protect their interests in preventing an improper distribution of power between the national government and the states.[132]

This author agrees with the majority and thinks that Judge Motz's dissent is based on an incomplete view of our governmental structure. Our government is not a pure democracy, but one in which democracy is combined with checks and balances to limit the tyranny of those in power. One of those checks and balances is that there are two sovereigns, each with their own sphere of authority. In this case, Congress invaded the state's authority. In striking down the VAWA, the Court did not interfere with democracy; rather, it allocated authority pursuant to the Constitution to the appropriate democratic body—the states. Moreover, the Court performed its proper judicial role—enforcing the Constitution's structural provisions.

The legal basis of this case is simple. Congress overstepped its powers under the Commerce Clause in passing the VAWA. Nothing the Act regulated had any significant effect on commerce. While

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131. *Brzonkala*, 169 F.3d at 897.

132. *Id.* at 933 (Motz, J., dissenting). Professor Choper has similarly argued that judicial protection of federalism is not needed because states can protect themselves through the political process. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175-84 (1980); *see also* Larry D. Kramer, *But When Exactly Was Judicially Enforced Federalism "Born" in the First Place*, 22 HARV. J.L. & PUB. POL'Y 123 (1998); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954). For a while, the Supreme Court adopted Choper's position. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 551 n.11 (1985).

violence against women may be a serious national problem, this fact did not give Congress the authority to enact the VAWA because Congress has limited powers. Since Congress lacked the authority to pass the Act, this area of law falls under state sovereignty under the Tenth Amendment.[133]

There is no way to legitimately interpret the Commerce Clause to apply to the VAWA. To extend the Act to this statute would give Congress the authority to regulate in almost any area, which would destroy the delicate balance between federal and state sovereignty. Nor, does the Necessary and Proper Clause expand the Commerce Clause to give Congress authority to pass the statute. As Professor Amar has pointed out, the Necessary and Proper Clause is one of the Constitution's redundant/clarifying clauses—the clause was "designed to *remove all doubts.*"[134] Professor Amar has declared:

> The words of the clause of course do not purport to be an independent, stand-alone grant of power. Rather, they are explicitly tied to "the foregoing Powers" enumerated earlier in Article I, Section 8. Nor is it so clear that the words of the clause add anything at all to the scope of the earlier enumerations. If we think of each of the earlier enumerations as an island of explicit textual power ringed by some suitably-defined territorial sea of implicit ancillary power, we need not read the words of the Necessary and Proper Clause as widening the width of the appropriate territorial sea.[135]

If Congress has powers as broad under the Commerce Clause and the Necessary and Proper Clause as some scholars have stated, one must wonder why the Framers bothered to list Congress's enumerated powers in Article I.

The fact that some might believe that this Act is needed is not enough to give Congress the power to enact the statute. As Judge Easterbrook has observed, "[t]he Constitution *is* form; an appeal to 'function' is a claim that something else would be *better* than the Constitution, which may be true but nevertheless isn't an admissible

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133. The full text of the Tenth Amendment appears *infra* note 168 and accompanying text.

134. Akhil Reed Amar, *Constitutional Redundancies and Clarifying Clauses*, 33 VAL. U. L. REV. 1, 7-10 (1998).

135. *Id.* at 7.

argument about interpretation of the structure we have."[136] If the Constitution is not working, the way to fix it is not to ignore it. The only proper way to change the Constitution is to amend it under the amendment procedure of Article V.[137] Any other method is illegitimate. As Justice Scalia has stated, the democratic "system is destroyed if the smug assurances of each age are removed from the democratic processes and written into the Constitution."[138]

That Congress found that the statute regulated interstate commerce is irrelevant. If Congress can declare its actions constitutional, the separation of powers is destroyed.[139] The Constitution is not a sham.

The fact that the court struck down the VAWA does not mean that the proper sovereign—the states—cannot enact similar provisions. As stated above, the regulation of crime is traditionally a state concern. All states have extensive laws that protect women against crime and violence. If these laws are inadequate in a particular state, that state can enact additional laws. This determination is best made by the states themselves, rather than a body that is far away from the local problem and that is subject to national lobbyists that may not be concerned about a particular state's problems.[140] In addition, as stated above, the states should have the power to experiment in local matters.

Brzonkala is not a case in which the Court exceeded its judicial role. It did not strike down the statute because it disagreed with the statute's wisdom. Rather, it invalidated the Act because it violated the Constitution's structural limitations. That some may feel strongly about the VAWA's importance does not make the Court's decision substantive.[141]

The case on which the Fourth Circuit based its reasoning—*Lopez*—presents another instance in which Congress exceeded its Commerce

136. Easterbrook, *supra* note 55, at 15.

137. U.S. CONST. art. V.

138. United States v. Virginia, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting).

139. Concerning this type of argument, Professor Redish has stated, "the Court's abdication of review of federalism issues unjustifiably ignores textual language—in this case, by turning it into a guide for Congress's conscience rather than construing it as an enforceable, countermajoritarian constraint on federal power." REDISH, *supra* note 47, at 24.

140. Professor Marshall has observed that lobbyists prefer to work on the national level because transaction costs are lower. *See* William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139, 146 (1998).

141. Those who take cynical views of the new federalism include Rosalie Berger Levinson, *First Monday—The Dark Side of Federalism in the Nineties: Restricting Rights of Religious Minorities*, 33 VAL. U. L. REV. 47, 50 (1998); Norman Redlich and David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273 (1997).

Clause powers.[142] In that case, a twelfth-grade student was convicted of possessing a firearm in a school zone in violation of the Gun-Free Zone Act of 1990, 18 U.S.C. § 922(q)(1)(A), which prohibited any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone. The Court overturned the conviction on the ground that Congress lacked the power to pass the statute under the Commerce Clause.[143]

While violence at schools, like violence against women, may be a national problem, it is not an interstate commerce problem. Violence at schools does not affect interstate commerce. That Congress sees a problem that it thinks requires federal regulation is not enough to give Congress the power to regulate in that area. Because Congress's powers are limited, it needs a specific constitutional provision to enact a law, and that constitutional provision cannot be stretched beyond its reasonable meaning to give Congress authority it was never intended to have.

While this article was in production, the Supreme Court granted certiorari for *Brzonkala*, and one of the questions the Court will consider is whether Congress exceeded its authority under the Commerce Clause in passing the Act.[144] Because this article is using the Fourth Circuit's opinion in *Brzonkala* as an illustration of the new judicial activism rather than as an indication of the state of the law, the Supreme Court's decision will not affect this article's conclusions. However, this author thinks that the Supreme Court will affirm the Fourth Circuit's holding on this issue for the reasons given above.[145] In particular, as noted above, violence based on gender animus does not have a significant effect on interstate commerce.[146] Moreover, the Fourth Circuit's opinion closely tracks *Lopez*,[147] and the Court is unlikely to overrule this recent decision, especially considering that the Court has gone even further in protecting states' rights since *Lopez*.[148] Specifically, as detailed in Part V, in recent years, the Court has not only enforced the structural provisions of federalism contained in the Constitution, such as not allowing Congress to exceed its powers under the Commerce Clause, it has developed a broader conception of

142. 514 U.S. at 549.
143. *See id.*
144. *See supra* note 2.
145. *See supra* notes 133-41 and accompanying text.
146. *See supra* note 133 and accompanying text.
147. *See supra* notes 99-112 and accompanying text.
148. *See infra* Part V.

federalism based on the spirit expressed by the Constitution's federalism clauses.[149] If the Court retains this broad conception of federalism, and there is no reason to assume it will not considering that it strongly asserted this conception in three cases in June 1999,[150] it should hold the VAWA unconstitutional.

B. Limitations on Congress's Power under the Enforcement Clause of the Fourteenth Amendment

Boerne held that Congress lacked the authority to pass the Religious Freedom Restoration Act of 1993 ("RFRA") under the Fourteenth Amendment's Enforcement Clause (Section 5).[151] Congress enacted RFRA in reaction to a Supreme Court decision that had rejected a free exercise claim under the First Amendment brought by members of the Native American Church who had been denied unemployment benefits when they were fired because they had used peyote (an illegal drug) for sacramental purposes.[152]

RFRA provided:

> Free exercise of religion protected
>
> (a) In general
>
> Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.
>
> (b) Exception
>
> Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.[153]

In *Boerne*, a Texas church wanted to enlarge its building, which

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149. For this author's criticism of the Court's extension of federalism beyond the explicit text of the Constitution, see Part V *infra*.

150. *See infra* note 237.

151. *See Boerne*, 521 U.S. at 536; *see also* Saenz v. Roe, 119 S. Ct. 1518, 1528 (1999) "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation." *Id.* at 1529.

152. *See Boerne*, 521 U.S. at 512.

153. 42 U.S.C. § 2000bb-1 (1994).

replicated the "mission" style of the area's early history.[154] The Boerne city council had passed an ordinance authorizing its Historic Landmarks Commission to prepare a preservation plan regarding historic landmarks and districts, and which required the Commission to pre-approve any alterations to historic buildings in the district. City officials denied the church's application for a building permit, and the church challenged this denial on several grounds, including RFRA.

Justice Kennedy declared that RFRA was unconstitutional because Congress lacked the authority to pass it.[155] In enacting RFRA, Congress had employed the enforcement clause of the Fourteenth Amendment, which states that "[t]he Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."[156] Justice Kennedy asserted that "[u]nder our Constitution, the Federal Government is one of enumerated powers."[157] He declared that Congress's powers under the clause were remedial, not plenary.[158] He observed that "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause. Congress does not enforce a constitutional right by changing what the right is."[159] He added, "[i]f Congress could define its own powers by altering the Fourteenth Amendment's meaning, no longer would the Constitution be 'superior paramount law, unchangeable by ordinary means.'"[160] Thus, "[s]hifting legislative majorities could change the Constitution and effectively circumvent the difficult and detailed amendment process contained in Article V."[161]

Justice Kennedy concluded:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior.

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154. 521 U.S. at 512. RFRA is applicable to all levels of government. *See also* 2000b(3)(a).

155. *See Boerne*, 521 U.S. at 536.

156. *Id.* at 517.

157. *Id.* at 516 (citing McCulloch v. Maryland, 4 Wheat. 316, 405(1819)).

158. *See id.* at 522.

159. *Id.* at 519; *see also Saenz*, 119 S. Ct. at 1529 (quoting Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 732-33 (1982) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966))). ("'Congress's power under § 5 . . . grants Congress no power to restrict, abrogate, or dilute these guarantees.'")

160. *Boerne*, 521 U.S. at 529.

161. *Id.*

> It appears, instead, to attempt a substantive change in constitutional protections.[162]

This author agrees with the Court's decision in *Boerne*.[163] In passing RFRA, Congress overstepped its power under § 5 of the Fourteenth Amendment. RFRA did not enforce the provisions of the Fourteenth Amendment; rather, it redefined the meaning of the First Amendment's Free Exercise Clause to overrule an unpopular Supreme Court decision. It is for the Supreme Court, not Congress, to decide the meaning of constitutional provisions. When Congress dislikes the Court's interpretation of a statute that Congress has passed, Congress can amend the statute to make its meaning clearer because it has the power to enact statutes. However, when it dislikes the Court's interpretation of a constitutional provision, all Congress can do is start the difficult amendment process. Right or wrong, the Court is the Constitution's final arbiter.

The Court's decision in *Boerne* respected the structural lines of federalism—it allowed the proper sovereign to make the decision. Land use and historic preservation are traditionally local concerns. The federal government should not intrude into these areas, absent a clear constitutional violation. A local government should be able to decide how to preserve buildings in its historic districts, as long as that government does not single out religion or a particular religious group. Although the church in *Boerne* could not enlarge its building, it was not treated differently than any other entity that is affected by local land use laws.[164]

If the church was displeased with the decision, they had political

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162. *Id.* at 532.

163. For opposing opinions, see Chemerinsky, *RFRA*, *supra* note 26, at 601; Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743 (1998).

164. "[W]hen the exercise of religion has been burdened in an incidental way by a law of general application, it does not follow that the persons affected have been burdened any more than other citizens, let alone burdened because of their religious beliefs." *Boerne*, 521 U.S. at 535.

Not all scholars agree with this contention, however. For example, Professor Laycock has argued, "[i]t is often said that local government is closer to the people and thus more politically responsive.... But it is rarely true for minority religions or small religious organizations." Douglas Laycock, *Federalism as a Structural Threat to Liberty*," 22 HARV. J.L. & PUB. POL'Y 67, 81 (1998); *see also* Levinson, *supra* note 141, at 58-59. However, it should be noted that the church still was protected by the First Amendment's Free Exercise Clause if the city had gone too far. That Congress's view of religious liberty is different than the Court's is not a justification to restrict state sovereignty. The Supreme Court is the final arbiter of the First Amendment.

redress. They could have organized their members to petition the local government, or they could have made the denial an issue in the next election. In contrast, if the decision had gone the other way, the local government would have lost control of land use and historic preservation. We should not create enclaves that are immune from state regulation. As Professor Sager declared, if such enclaves are allowed to exist, "liberty . . . is selectively distributed—the religious soup kitchen, the religious landlord, the religious artists, and the religious parent all have rights to defy legal rules that their secular equivalents must obey."[165]

In sum, this author believes that the courts acted properly in striking down the statutes in *Brzonkala*, *Lopez*, and *Boerne* on the ground that Congress lacked the power to enact the statues involved in those decisions. The contrasting subject matter in those cases—an act to protect women against violence, a gun control law, and a statute extending protection to religion beyond that mandated by the Supreme Court's interpretation of the First Amendment—demonstrates that the courts are not acting substantively. Instead, they are performing its proper constitutional role by enforcing the Constitution's structural lines. They are allocating authority to the proper sovereign.

IV. CONGRESS'S POWER TO COERCE STATE LEGISLATURES TO ENACT STATUTES OR TO REQUIRE STATE OFFICIALS TO ENFORCE FEDERAL SCHEMES

The second area in which the Court has invalidated federal statutes is when Congress has coerced legislatures to enact statutes or required local officials to enforce federal schemes. This author believes that, while Congress has sometimes exceeded its power in this area, the Court has used the wrong principles to make this determination.

In *New York*, the Court invalidated Congress's attempt to force New York and other states to pass legislation concerning the disposal of radioactive waste.[166] Although Congress had passed an earlier statute to deal with the problem, by 1985, it was obvious that this statute was not working. Thus, Congress enacted the Low-Level Radioactive Waste Policy Amendments Act of 1985. The Act dealt with the problem of radioactive waste in three ways: (1) with monetary incentives, (2) with access incentives, and (3) with a take-title provision, which was the main

165. Lawrence G. Sager, *Congress as Partner/Congress as Adversary*, 22 HARV. J.L. & PUB. POL'Y 86, 88 (1998); *see also Boerne*, 521 U.S. at 536-37 (Stevens, J., concurring).

166. *New York v. United States*, 505 U.S. 144 (1992).

part of the Act New York challenged. This provision provided:

> If . . . a State in which low-level radioactive waste is generated is unable to provide for disposal of all such waste generated within such State . . . . [B]y January 1, 1996, each State in which such waste is generated, upon the request of the generator or owner of the waste, shall take title to the waste, be obligated to take possession of the waste, and shall be liable for all damages directly or indirectly incurred by such generator or owner as a consequence of the failure of the State to take possession of the waste as soon after January 1, 1996, as the generator or owner notifies the State that the waste is available for shipment.[167]

New York and two counties filed a declaratory judgment action, claiming that the Act violated the Tenth and Eleventh Amendments, the Due Process Clause of the Fifth Amendment, and the Guarantee Clause of Article V. The district court dismissed the complaint. The petitioners only asserted the Tenth Amendment and Guarantee Clause arguments before the Supreme Court.

The Court declared:

> [w]hile no one disputes the proposition that "[t]he Constitution created a Federal Government of limited powers," and while the Tenth Amendment makes explicit that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"; the task of ascertaining the constitutional line between federal and state power has given rise to many of the Court's most difficult and celebrated cases.[168]

The Court thought that if the Constitution delegated a power to Congress, "the Tenth Amendment expressly disclaime[d] any reservation of that power to the States. While if a power was reserved to the states by the Tenth Amendment, it was a power that the Constitution had not bestowed upon Congress."[169] Thus, the Court must determine whether Article I conferred a power upon Congress, or whether the Tenth Amendment placed a limitation on Congress's

167. 42 U.S.C. § 2021e(d)(2)(C) (1995).

168. *New York v. United States*, 505 U.S. at 155 (citations omitted).

169. *See id.* at 156.

authority.[170] In making this determination, the key is "'not what power the Federal Government ought to have but what powers in fact have been given by the people.'"[171] The Court also thought that, although the scope of the federal government's power over the states had changed over time, the constitutional lines governing this relationship had remained the same.[172]

In challenging the Act's constitutionally, the petitioners did not argue that "Congress lack[ed] the power to regulate the disposal of low-level radioactive waste."[173] Rather, they contended that Congress could not regulate in the way it did—directing the states to regulate in this area.[174]

The Court agreed that "Congress may not simply 'commandee[r] the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'"[175] The people, through the Constitution, created a national government that acted directly on its citizens, in place of a limited confederate government that acted only upon the states.[176] Accordingly, under the Commerce Clause, Congress can regulate interstate commerce directly, but it cannot "regulate state governments' regulation of interstate commerce."[177] Moreover, when Congress acts in this way, it diminishes the accountability of both state and federal officials. As the Court pointed out, "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."[178]

While the Court believed that the first two incentives under the Act did not cross the constitutional line, the Court thought that the take-title provision did.[179] This provision gave states "a 'choice' of either accepting ownership of waste or regulating according to the instructions of Congress."[180] Congress could not constitutionally require a state to

170. *See id.* at 157.

171. *Id.* (citation omitted) (quoting United States v. Butler, 297 U.S. 1, 63 (1936)).

172. *See id.* at 159.

174. *Id.*

174. *See id.* at 159-60.

175. *Id.* at 161 (quoting Hodell v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981)).

176. *See id.* at 162.

177. *Id.* at 166.

178. *Id.* at 169.

179. *See id.* at 174-77.

180. *Id.* at 175.

take title to the waste, nor could it make that state liable for the generators' damages.[181] Similarly, Congress cannot command the states to pass a regulatory scheme.[182] Consequently, Congress could not force a state to make a choice between the two.[183]

The Court spent little time on the Guarantee Clause argument. It declared:

> Because we have found that the take title provision of the Act [is] irreconcilable with the powers delegated to Congress by the Constitution and hence with the Tenth Amendment's reservation to the States of those powers not delegated to the Federal Government, we need only address the applicability of the Guarantee Clause to the Act's other two challenged provisions.[184]

The Court then held that these provisions did not violate the Guarantee Clause, stating "neither the monetary incentives provided by the Act nor the possibility that a State's waste producers may find themselves excluded from the disposal sites of another State can reasonably be said to deny any State a republican form of government."[185]

The Court's reasoning in *New York* was inconsistent. The Court declared that, if a power was given to Congress, it was not given to the states under the Tenth Amendment.[186] Yet, the commerce power was given to Congress. How, then, can the Tenth Amendment limit Congress's power to pass the challenged provision? In other words, if Congress has the power to pass the provision, then there are no limits on this power unless the Court can find another Constitutional provision that forbids Congress from exercising its powers in the way it did.

In making its decision, the Court looked to its general conception of federalism, rather than employing a specific constitutional provision.[187] This author agrees with the Court's notion that forcing a state to pass legislation upsets the balance inherent in the first principle of

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181. *See id.*

182. *See id.* at 175-76.

183. *See id.* at 176.

184. *Id.* at 183-84.

185. *Id.* at 185.

186. *See id.*

187. Justice O'Connor declared: "The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead... [t]he Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power." *Id.* at 156-57.

federalism. Such a power strips the state of its sovereignty and increases Congress's power beyond what the framers seem to have intended. This author also agrees that the Constitution was intended to apply to the people and not use the states as intermediaries. However, grounding *New York* in the general concept of federalism is making the same mistake that liberal judges have often been accused of making—failing to cite to a specific constitutional provision on which the decision is properly based.[188]

Such a provision exists in the Constitution's Guarantee Clause, which requires the United States to "guarantee to every State in this Union a Republican Form of Government...."[189] "[A] republican government is 'one in which the people control their rulers... through majoritarian processes.'"[190] As the Supreme Court has stated, "the distinguishing feature [of a republican form of government] is the right of the people to choose their own officers for governmental administration, and pass their own laws...."[191] Stated similarly, in a republic "the power to enact laws and control public servants lies with the great body of the people."[192] The Guarantee Clause both precludes a state from adopting a nonrepublican form of government and prohibits the federal government from interfering with the republican basis of a state government.[193] As Professor Merritt has noted, "both advocates and foes of the new constitution recognized the guarantee clause as an attempt to mark the boundary between federal power and state sovereignty."[194]

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188. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 484 (1968).

189. U.S. CONST. art. IV, § 4. Professor Tribe has declared that "[i]f courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guarant clause [sic] might well provide the most felicitous textual home for that enterprise." TRIBE, *supra* note 46, at 398. Similarly, Professor Merritt has suggested that the guarantee clause places "a modest restraint on federal power to interfere with state autonomy." Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism For a Third Century*, 88 COLUM. L. REV. 1, 2 (1988) [hereinafter Merritt, *The Guarantee Clause*]. She later declared, "[t]he clause allows Congress full scope to address national problems, while defending only the attributes of state government necessary to preserve independent functioning governments in the states." Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 832 (1994) [hereinafter, Merritt, *Republican Governments*]. For an opposing view, see Robert F. Nagel, *Terminator 2*, 65 U. COLO. L. REV. 843 (1994).

190. Merritt, *The Guarantee Clause, supra* note 189, at 23.

191. In re Duncan, 139 U.S. 449, 461 (1891); *see also* VanSickle v. Shanahan, 511 P.2d 223, 243 (Kan. 1973).

192. 16B AM. JUR. 2D *Constitutional Law* § 636 (1998).

193. *See* Merritt, *The Guarantee Clause, supra* note 189, at 25.

194. *Id.* at 35.

The Court, however, has rarely used this clause. For the most part, the Court has thought that questions under the clause were nonjusticable political questions.[195] Although one case suggested that not all claims under this clause are nonjusticable,[196] the Court has failed to put any substance into the clause. However, the Court's failure to give any substance to this clause violates the notion of the new judicial activism that one clause of the Constitution should not be given a great deal of meaning and another clause none.[197] If the Supreme Court cannot decide whether the Guarantee Clause has been violated, what branch of government will?

I believe that the Court could have relied on the Guarantee Clause in *New York* to hold the take-title provision unconstitutional.[198] If a sovereign can force another sovereign's legislature to enact a regulatory scheme, the other sovereign lacks a republican form of government. In a republican form of government, the people elect a legislature that enacts laws.[199] Any significant interference with this structure destroys the republican nature of that government, as occurred in *New York.*

Printz suffers from the same problem as *New York*; the Court mainly based its decision on the wrong principles.[200] In *Printz*, the Court held that Congress could not impose duties on local officials. Under the interim provisions of the Brady Act (a gun control statute), if a state lacked certain alternatives concerning background checks before the purchase of a handgun, the chief law enforcement officer of the transferee's residence ("CLEO") (such as sheriffs) must "make a reasonable effort to ascertain within 5 business days whether receipt or

195. *See New York*, 505 U.S. at 184.

196. *See* Reynolds v. Sims, 377 U.S. 533, 582 (1964).

197. I will discuss the new judicial activism's notion that the Court should not be textually selective in its constitutional interpretation in depth in Part VI *infra*. Professor Chemerinsky has noted that the Guarantee Clause "is the only instance in which nonjusticability has the effect of rendering a constitutional provision a nullity." Erwin Chemerinsky, *Cases under the Guarantee Clause Should Be Justicable,*" 65 U. COLO. L. REV. 849, 851 (1994). Professor Merritt has asserted, "neither Supreme Court precedents holding the guarantee clause nonjusticable nor deference to the political process bars judicial review of claims that Congress has offended the guarantee clause by invading state autonomy. A proper understanding of the Supreme Court's guarantee clause decisions, together with a careful application of the criteria in *Baker v. Carr*, demonstrates that such claims are fully enforceable in the courts." Merritt, *Guarantee Clause*, *supra* note 189, at 78 (citing Baker v. Carr, 369 U.S. 186 (1962)).

198. Professor Merritt has come to the same conclusion. Merritt, *A New Role*, *supra* note 189, at 818-19 ("[T]he unconstitutional provision in *New York* violated the core notion of state sovereignty protected by the Guarantee Clause." *Id.* at 826).

199. *See supra* notes 189- 92 and accompanying text.

200. *Printz*, 521 U.S. at 898.

possession would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General."[201] Two CLEOs challenged the Act's constitutionality as it applied to them. Two district courts concluded that the challenged portion of the Act was unconstitutional but that the unconstitutional portions were severable. The Ninth Circuit reversed.

The Supreme Court agreed with the trial court that the portion of the Brady Act that placed duties on local officers violated the "constitutional system of dual sovereignty."[202] Justice Scalia analyzed the controversy from three perspectives: (1) "historical understanding and practice," (2) the Constitution's structure, and (3) the Court's jurisprudence.[203] Justice Scalia thought that the "historical understanding and practice," although not conclusive, suggested that the federal government could not place duties on state and local officers.[204]

Justice Scalia argued that federalism considerations made the provision unconstitutional.[205] He thought that the Constitution gave Congress the power to regulate individuals rather than states.[206] He declared that "[t]he power of the Federal Government would be augmented immeasurably if it were able to impress into its service—and at no cost to itself—the police officers of the 50 States."[207] He also felt that the provision upset the separation of powers on the federal level—local officials were undertaking duties that should have been performed by the executive branch of the federal government.[208] He declared:

> The insistence of the Framers upon unity in the Federal Executive—to assure both vigor and accountability—is well-known .... That unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws.[209]

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201. 18 U.S.C. § 922(s)(2) (1999).

202. *Printz*, 521 U.S. at 935.

203. *See id.* at 905.

204. *Id.* at 905-19.

205. *See id.* at 917-25.

206. *See id.* at 919-20.

207. *Id.* at 922.

208. *See id.* at 922-23. For a competing view, see Roderick M. Hills, Jr., *Federalism in Constitutional Context*, 22 HARV. J.L. & PUB. POL'Y 181 (1998).

209. *Printz*, 521 U.S. at 922-23 (citations omitted).

Justice Scalia rejected the dissent's argument that Congress's exercise of power was valid under the Necessary and Proper Clause.[210] He asserted that

> [w]hen a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, it is not a "La[w] . . . *proper* for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such."[211]

Thus, "'[e]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts . . . .'"[212]

Finally, Justice Scalia examined the Court's prior jurisprudence, finding that "we sustained statutes against constitutional challenge only after assuring ourselves that they did not require the States to enforce federal law."[213] He also rejected the government's contention that *New York* was distinguishable.[214] Although the government argued that the background check provisions did not require local officials to make policy decisions, Justice Scalia concluded that "[e]xecutive action that has utterly no policymaking component is rare . . . ."[215] Even assuming the government's argument was true, Justice Scalia thought that the provision interfered with state sovereignty:

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous within their proper sphere of authority. It is no more compatible with this independence and autonomy that their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and autonomy of the United States that its officers be impressed into service for the execution of state laws.[216]

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210. *See id.* at 923.
211. *Id.* at 923-24.
212. *Id.* (quoting *New York*, 505 U.S. at 166).
213. *Printz*, 521 U.S. at 925.
214. *See id.* at 926-31.
215. *Id.* at 927.
216. *Id.* at 928 (citations omitted).

Justice Scalia also disagreed with the government's contention that requiring state officials to perform ministerial duties under the provision did not diminish the accountability of state or federal officials, as was forbidden by *New York*.[217] He declared:

> [u]nder the present law, . . . it will be the CLEO and not some federal official who stands between the gun purchaser and immediate possession of his gun. And it will likely be the CLEO, not some federal official, who will be blamed for any error . . . that causes a purchaser to be mistakingly rejected.[218]

Justice Scalia also rejected the dissent's attempt to distinguish *New York* on the ground that the provision was directed at individuals, not states, because it was directed to individuals in their official capacities as state officers.[219] He also dismissed the government's arguments that the Act served important purposes, that it was most efficiently administered by CLEOs, and that it imposed only a temporary and minimal burden on state officials on the ground that balancing is not proper when the structural framework of dual sovereignty is involved.[220]

I agree with Justice Scalia that using local officials to perform federal duties violates the notion of dual sovereignty in federalism. However, I reject the justifications in his opinion (except for the one concerning the separation of powers), on the same grounds I rejected the reasoning in *New York*.[221] A general notion of federalism is not enough to base a constitutional violation on, and the other bases of Justice Scalia's decision—history and the Court's jurisprudence—only reinforce this ground.

If the statute had involved state, rather than local, officials, I would again have based the outcome on the Guarantee Clause. An official of a republican government is not subject to another sovereign's authority. A state legislature could require a state official to perform such duties, but, when Congress does so, it interferes with the Guarantee Clause. However, only local officials were involved in this case, and the

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217. *See id.* at 929-31.

218. *Id.* at 930.

219. *Id.* at 930-31.

220. *See id.* at 931-33.

221. Other scholars who have criticized the reasoning of Justice Scalia's opinion include: Evan H. Caminker, *Printz, State Sovereignty, and the Limits of Formalism*, 1997 SUP. CT. REV. 199 (1997); Roderick M. Hills, Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH L. REV. 813, 824 (1998).

Guarantee Clause protects only state governments.[222]

I do agree with Justice Scalia that the outcome is mandated by the separation of powers set forth in the Constitution. When Congress gave local officials, rather than the federal executive, the duty to enforce the statute, it violated Article II, which states: "The executive Power shall be vested in a President of the United States of America."[223]

In sum, when Congress passes a law under its enumerated powers, it has full authority in determining the content of the law and how the law is to be carried out, unless the law contravenes a specific constitutional provision. An opinion that the law contravenes a general conception of federalism is not enough to invalidate a law; the Court must point to a specific constitutional provision that has been violated. In the case of *New York*, such a provision existed in the guarantee clause.[224] In *Printz*, the outcome was firmly grounded in the separation of powers under Article II.

V. CONGRESSIONAL ABROGATION OF STATE SOVEREIGN IMMUNITY

The first question concerning congressional abrogation of state sovereign immunity is whether Congress can abolish a state's Eleventh Amendment right not to be sued in federal court. *Seminole Tribe of Florida v. Florida* placed strong limits on Congress's ability to do so.[225]

Congress passed the Indian Gaming Regulatory Act, which provided that an Indian tribe may conduct certain gaming activities, such as casino gambling, only in compliance with a compact between the tribe and the relevant state.[226] The Act required a state to negotiate in good faith with the tribe to develop a compact, and it authorized the tribe to file suit in federal court if a state breached that duty.[227] The Court held the Indian Commerce Clause did not grant Congress the power to abrogate a state's Eleventh Amendment immunity against suits in federal court and, thus, did not grant jurisdiction over a state that had not consented to be sued in federal court.[228]

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222. The Guarantee Clause does not apply to local governments. *See* Johnson v. Genesee County, 232 F. Supp. 567, 570 (E.D. Mich. 1964); State *ex rel.* Porterie v. Smith, 166 So. 72, 82 (La. 1936).

223. U.S. CONST. art. II, § 1, cl. 1.

224. As stated above, the same clause would have applied to *Printz*, if state, rather than local, officials had been involved.

225. 517 U.S. 44 (1996).

226. *See* 25 U.S.C. § 2710(d)(1) (West Supp. 1999).

227. *See* 25 U.S.C. § 2710(d)(3); *see also* 25 U.S.C. § 2710(d)(7) (West Supp. 1999).

228. *See Seminole Tribe*, 517 U.S. at 47.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.[229]

The Court asks two questions in evaluating whether Congress has abrogated a state's Eleventh Amendment immunity: (1) has Congress "'unequivocally expresse[d] its intent to abrogate the immunity'" and (2) has Congress "acted 'pursuant to a valid exercise of that power.'"[230] The Court thought that Congress had unequivocally expressed its intention to abrogate state sovereign immunity in the statute.[231]

The main issue, therefore, was whether Congress had the power to abrogate the states' Eleventh Amendment immunity under the statute.[232] The key question in this inquiry was "[w]as the Act in question passed pursuant to a constitutional provision granting Congress the power to abrogate?"[233] The Court had previously found only two constitutional provisions that allowed such abrogation: (1) Section 5 of the Fourteenth Amendment and (2) the Commerce Clause.[234] The Court thought that, if Congress had the power to abrogate sovereign immunity under the Commerce Clause, it had a similar power under the Indian Commerce Clause.[235]

The Court, however, held that Congress did not have the power to abrogate a state's Eleventh Amendment immunity under the Commerce Clause, overruling the plurality opinion in *Pennsylvania v. Union Gas Co.*[236] The Court felt that *Union Gas* had departed sharply from the Court's federalism jurisprudence, declaring "[i]t was well established in 1989 when *Union Gas* was decided that the Eleventh Amendment stood for the constitutional principle that state sovereign immunity limited the federal courts' jurisdiction under Article III."[237] The Court stated that *Union Gas's* conclusion "that Congress could under Article I expand the

229. U.S. CONST. amend. XI.
230. *Seminole Tribe*, 517 U.S. at 55 (quoting Green V. Mansour, 474 U.S. 64, 68 (1985)).
231. *See id.* at 56-57.
232. *See id.* at 58.
233. *Id.* at 59.
234. *See id.*
235. *See id.* at 63.
236. *Id.* at 66 (*overruling*, Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989)).
237. *Seminole*, 517 U.S. at 64.

scope of the federal courts' jurisdiction under Article III—'contradict[s] our unvarying approach to Article III as setting forth the *exclusive* catalog of permissible federal-court jurisdiction.'"[238] The Court added that "[e]ven when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."[239]

While this author feels that allowing states immunity from suit in federal court upsets the balance between the federal and state governments, I agree with the Court's decision that Congress cannot force a nonconsenting state to be sued in federal court. The language of the Eleventh Amendment seems absolute. The only possible exception is Section 5 of the Fourteenth Amendment. This is a later amendment, and in the proper context, it is necessary to allow Congress to abrogate a state's Eleventh Amendment immunity to give the Fourteenth Amendment its full breadth. The same reasoning, however, does not apply to Congress's Article I powers. There is no reason to think that Article I carves out a broad exception to the Eleventh Amendment.

I do not believe that allowing a state to be sued in federal court interferes with state sovereignty. As I discuss in more detail below, if Congress has the power to enact a law, then the states lack sovereignty in that area. Moreover, when a federal statute is enforced in state, rather than federal court, the litigant faces the danger of local prejudice. However, the Constitution has spoken, and one should not ignore the Constitution's clear mandates on normative grounds.

In 1999, the Court severely limited Congress's ability to abrogate state sovereign immunity in any court.[240] In *Alden*, the most extensive of the cases, the Court held that Congress could not provide for suits against states under the Fair Labor Standards Act of 1938 ("FLSA").[241] Maine probation officers had filed suit against Maine, alleging that the state had violated the FLSA's overtime provisions.[242] The Maine trial court dismissed based on sovereign immunity, and the Maine Supreme Court affirmed. The decision created doubt concerning FLSA's provision authorizing original actions against states in their own courts

238. *Id.* at 65 (quoting *Union Gas*, U.S. 491 at 39).

239. *Seminole Tribe*, 517 U.S. at 72.

240. *See,* Alden v. Maine, 119 S. Ct. 2240 (1999); Florida Prepaid Post Secondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999); College Sav. Bank v. Florida Prepaid Post Secondary Educ. Expense Bd., 119 S. Ct. 2219 (1999).

241. 119 S. Ct. at 2246.

242. *See* 29 U.S.C. § 201 (1998).

without their consent.[243]

The Court held that "the powers delegated to Congress under Article I of the United States Constitution do not include the power to subject nonconsenting States to private suits for damages in state courts."[244] While the Eleventh Amendment explicitly refers to the states' immunity from suits

> "commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State . . . the States" immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the Convention or certain constitutional Amendments.[245]

Justice Kennedy declared:

> Any doubt regarding the constitutional role of the States as sovereign entities is removed by the Tenth Amendment, which, like the other provisions of the Bill of Rights, was enacted to allay lingering concerns about the extent of national power. The Amendment confirms the promise implicit in the original document: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[246]

Justice Kennedy thought the states retained the "dignity and essential attributes" of sovereignty and that the Framers considered sovereign immunity central to sovereign dignity.[247] Justice Kennedy cited numerous examples in which the Framers and members of the ratifying conventions assured doubters that Article III of the Constitution would not permit suits against states in federal court.[248] For example, John Marshall declared, "'I hope no Gentleman will think that a state will be called at the bar of the federal court . . . . It is not rational

243. *Alden*, 119 S. Ct. at 2247; *see also* 29 U.S.C. § 216(b) (1998).
244. *Alden*, 119 S. Ct. at 2246.
245. *Id.* at 2246-47 (quoting U.S. CONST. amend. XI).
246. *Id.* at 2247 (quoting U.S. CONST. amend. X).
247. *Id.*
248. *See id.* at 2248-49.

to suppose, that the sovereign power shall be dragged before a court.'"[249]

Justice Kennedy responded to the petitioner's argument that the ratification debates centered on the states' immunity from suit in federal court, rather than sovereign immunity in general, by declaring:

> We believe, however, that the founders' silence is best explained by the simple fact that no one, not even the Constitution's most ardent opponents, suggested the document might strip the States of the immunity. In light of the overriding concern regarding the States' war-time debts, together with the well known creativity, foresight, and vivid imagination of the Constitution's opponents, the silence is most instructive. It suggests the sovereign's right to assert immunity from suit in its own courts was a principle so well established that no one conceived it would be altered by the new Constitution.[250]

Despite these reassurances and the well-established principle, in 1793, the Court held that a private citizen of another state could sue Georgia without its consent under Article III on the ground that the case fell under Article III's literal language.[251] The Eleventh Amendment was quickly proposed and adopted thereafter.[252] However, Justice Kennedy felt that the Eleventh Amendment merely restored Article III's original meaning.[253] In addition, "Congress chose not to enact language codifying the traditional understanding of sovereign immunity but rather to address the specific provisions of the Constitution that had raised concerns during the ratification debates and formed the basis of the *Chisholm* decision."[254] In other words,

> [t]he more natural inference is that the Constitution was understood, in light of its history and structure, to preserve the States' traditional immunity from private suits. As the Amendment clarified the only provisions of the Constitution that anyone had suggested might support a contrary understanding,

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249. *Id.* at 2249 (quoting 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 555 (2d ed. 1854)).

250. *Alden*, 119 S. Ct. at 2260.

251. Chisholm v. Georgia, (2 Dall.) 419 (1793).

252. *See Alden*, 119 S. Ct. at 2250.

253. *See id.* at 2250-51 ("[T]he majority [in *Chisholm*] failed to address either the practice or the understanding that prevailed in the States at the time the Constitution was adopted." *Id.* at 2250).

254. *Id.* at 2251.

there was no reason to draft with a broader brush.[255]

In addition, Justice Kennedy thought that the Constitution would not have been ratified if it had deprived the states of sovereign immunity.[256]

Justice Kennedy also argued that the Court's jurisprudence confirmed that the Constitution did not strip the states of sovereign immunity.[257] He declared that "[t]he Eleventh Amendment confirmed rather than established sovereign immunity as a constitutional principle; it follows that the scope of the States' immunity from suit is demarcated not by the text of the Amendment alone but by the fundamental postulates implicit in the constitutional design."[258]

Accordingly, in determining whether Congress has the power to abrogate a nonconsenting state's sovereign immunity under Article I, the Court should not rely on the amendment alone because to do so "would be to engage in the type of a historical literalism we have rejected in interpreting the scope of States' sovereign immunity since the discredited decision in Chisholm."[259] Justice Kennedy concluded that "[i]n exercising its Article I powers Congress may subject the States to private suits in their own courts only if there is 'compelling evidence' that the States were required to surrender this power to Congress pursuant to the constitutional design."[260]

This author believes that *Alden* is a case in which the Court went too far in protecting states' rights on ideological grounds and violated the principles of the new judicial activism.[261] In other words, in *Alden*,

255. *Id.* at 2252.

256. *See id.* at 2253.

257. *See id.* at 2253-54.

258. *Id.* at 2254.

259. *Id.*

260. *Id.* at 2255 (citation omitted).

261. On the other hand, Professor Lessig has argued that "federalism requires... the Court to craft, to construct, to make-up, limits on regulative authority, both state and federal, so as to check the growth in the commerce power, to the extent that growth has set the original balance askew." Lawrence Lessig, *Translating Federalism: United States v. Lopez*, 1995 SUP. CT. REV. 125, 192 (1995); *see also* Lawrence Lessig, *Understanding Federalism's Text*, 66 GEO. WASH. L. REV. 1218 (1998). I disagree with Professor Lessig's approach because it is unprincipled and ignores the limitations on the judge's role. As Professor Tribe has noted, "[c]reating states' rights out of whole cloth in order to readdress a perceivable shift in power to central government is an arrogation of authority as illegitimate as conjuring rights of privacy or minimum income out of thin air or transforming the Constitution into a source of inviolable protection for contract and property regardless of public need." TRIBE, *supra* note 46, at 399. When courts allow substantive views to govern the outcome of constitutional adjudication, there is the risk of having legitimate constitutional values suppressed when they are held by a minority. If, on the other hand, the courts enforce the structural protections in

"modern activism [has] accelerate[d] to a gallop."[262] Textualist judges, who in other cases advocate strictly following the constitutional text, are now ignoring that text, in favor of reading ambiguous historical practice into the Constitution.

First, there is no specific passage in the Constitution that limits Congress's powers to abrogate state sovereign immunity under Article I except for the Eleventh Amendment, and the explicit text of the Eleventh Amendment applies only to judicial power under Article III, not to Article I.[263] Moreover, it is questionable to rely on a general understanding at the time of the Constitution's ratification to strike down otherwise valid constitutional enactments. As Professor Redish has declared, "[u]nless the Framers actually embodied their goal in the Constitutional text, that goal has no constitutional status, because it has not been subjected to the ratification process . . . ."[264]

As for Justice Kennedy's reliance on the general notion of federalism, it should be pointed out that other new judicial activism opinions have rejected similar arguments, as in *Brzonkala*, where the court required that Congress's power be anchored in the text, rather than in some general power to enact civil rights legislation.[265] Moreover, these judges have rejected the use of "penumbra" of constitutional provisions as the basis of constitutional rights,[266] and Justice Kennedy's general notion of federalism sounds suspiciously like "penumbra." Likewise, these judges have rejected similar approaches to textual interpretation. For example, in a case concerning statutory analysis,

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the Constitution, all constitutional values will exist in moderation. For more detailed analyses of Professor Lessig's thesis, see Bradford R. Clark, *Translating Federalism: A Structural Approach*, 66 GEO. WASH. L. REV. 1161 (1998); Gregory E. Maggs, *Translating Federalism: A Textualist Reaction*, 66 GEO. WASH. L. REV. 1198 (1998); Deborah Jones Merritt, *The Third Translation of the Commerce Clause: Congressional Power to Regulate Social Problems*, 66 GEO. WASH. L. REV. 1206 (1998).

262. Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820, 898 (4th Cir. 1999).

263. For the text of the Eleventh Amendment, see *supra* note 229 and accompanying text. Justice Scalia has pointed out that "[i]n textual interpretation, context is everything, and the context of the Constitution tells us not to expect nit-picking detail, and to give words and phrases an expansive rather than narrow interpretation though not an interpretation that the language will not bear." ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 37 (1997). While I agree with this proposition, I believe that the Court has given the Eleventh Amendment "an interpretation that the language will not bear." It stretches all reasonable methods of textual interpretation to derive a blanket right of sovereign immunity from a text that only refers to immunity from suit in federal court.

264. REDISH, *supra* note 47, at 46.

265. *See Brzonkala*, 169 F.3d at 852.

266. Burnham v. Superior Court of California, 495 U.S. 604, 627, n.5 (1990); *see also Virginia*, 518 U.S. at 568-69 (Scalia, J., dissenting).

Justice Kennedy wrote, "[t]he problem with spirits is that they tend to reflect less the views of the world whence they come than the views of those who seek their advice."[267] Or, as Justice Scalia has declared, "it is simply incompatible with democratic government, or indeed with fair government, to have the meaning of the law determined by what the lawmaker meant, rather than by what the lawmaker promulgated."[268] Similarly, Justice Scalia has generally rejected the use of legislative history in statutory analysis because he rejects legislative intent as a proper criterion for textual analysis.[269] He has declared: "Government by unexpressed intent is similarly tyrannical."[270]

Moreover, the judges that are relying on the Framer's silence as a fundamental part of their decision in *Alden* have elsewhere clearly rejected the use of silence in textual interpretation.[271] The danger in the above, as Justice Scalia has pointed out, is that

> [w]hen you are told to decide, not on the basis of what the legislature said, but on the basis of what it *meant*, and are assured that there is no necessary connection between the two, your best shot at figuring out what the legislature meant is to ask yourself what a wise and intelligent person *should* have meant; and that will surely bring you to the conclusion that the law means what you think it *ought* to mean—which is precisely how judges decide things under the common law.[272]

In other words, in *Alden*, the Court is "pil[ing] inference upon inference," a technique of constitutional interpretation it vehemently rejected in *Lopez*.[273] For example, Justice Kennedy declared concerning

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267. Public Citizen V. United States Department of Justice, 491 U.S. 440, 473 (1989) (Kennedy, J., concurring).

268. SCALIA, *supra* note 263, at 17; *see also* Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 GEO. WASH. L. REV. 1119, 1120 (1998) ("[T]he judicial branch serves best by enforcing enacted words rather than unenacted (more likely, imagined) intents, purposes, and wills.").

269. *See* SCALIA , *supra* note 263, at 29-30 ("What I look for in the Constitution is precisely what I look for in a statute: The original meaning of the text, not what the original draftsman intended." *Id.* at 38.).

270. *Id.* at 17.

271. *See, e.g.*, Chisom v. Roemer, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting) (statutory interpretation); *see also* Sedima S.P.L.R. v. Imrex Co., 473 U.S. 479, 496 n.13 (1985) ("[C]ongressional silence, no matter how 'clanging' cannot override the words of the statute.").

272. SCALIA, *supra* note 263, at 18.

273. *Lopez*, 514 U.S. at 567.

the swift adoption of the Eleventh Amendment:

> The more reasonable interpretation, of course, is that regardless of the views of the four Justices in *Chisholm*, the country as a whole—which had adopted the Constitution just five years earlier—had not understood the document to strip the States of their immunity from private suits.[274]

This author, however, believes that a later amendment to a text has no relevance to the interpretation of the original text. First, it is the text of the Constitution that is being interpreted, not ambiguous enactment history. Second, the bodies that enacted the Eleventh Amendment were not the same bodies that established the Constitution. Finally, the "country" might simply have changed its mind. The same principle against piling inference upon inference also applies to the framers' silence mentioned above.

Looking at the constitutional text demonstrates that Congress had the power to abrogate state sovereign immunity without interfering with federalism. The Constitution gave Congress the power to pass the FLSA under its Article I Commerce Clause powers. As the Court wrote in *Lopez*, "'[t]his power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.'"[275] Consequently, the Constitution gave Congress, not the states, complete sovereignty to regulate interstate commerce. In other words, in regulating the states through the FSLA under its interstate commerce powers, Congress is not interfering with the states' sovereign immunity because they have no sovereignty in this area. The Tenth Amendment does not change this because it merely confirms that powers not expressly given to Congress are reserved to the states; it does not give the states additional sovereignty.[276] Residuary sovereignty[277] does not

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274. *Alden*, 119 S. Ct. at 2252.

275. *Lopez*, 514 U.S. at 553 (quoting Gibbons v. Ogden, 22 U.S. 1, 196 (1824)).

276. Justice Roberts declared, "[t]he Tenth Amendment was intended to confirm the understanding of the people at the time the Constitution was adopted, that powers not granted to the United States were reserved to the States or to the people." United States v. Sprague, 282 U.S. 716, 733 (1931). *See also New York*, 505 U.S. at 156-57; Amar, *supra* note 134, at 20-21; Yoo, *Judicial Safeguards*, *supra* note 55, at 1393; REDISH, *supra* note 47, at 43 ("If a particular power has been given to the federal government, in Article I or elsewhere in the Constitution, that power is tautologically not reserved to the states by the Tenth Amendment.").

277. *See e.g.*, *Alden*, 119 S. Ct. at 2263.

mean absolute sovereignty. In addition, one must wonder why the Eleventh Amendment was necessary if the Tenth Amendment or other constitutional provisions gave the states *total* immunity.

The Court's decision destroys the idea of accountability that is the essence of the rule of law. A state would be above the law because it could ignore the law of the legitimate sovereign that enacted that law. A state, for example, could dump toxic waste anywhere it wanted without liability. Or, as Professor Malloy has observed, the states might be exempt from certain federal civil rights laws.[278] Allowing states to deal with its obligations in other ways is not enough. In the same way that Congress should not be permitted to determine which of its enactments is constitutional,[279] the states should not be allowed to decide when they will comply with constitutional federal law.

The Court's holding also infringes upon the federal government's sovereignty. Since the federal government is sovereign in the area of interstate commerce, allowing the states "immunity" from that sovereignty destroys the balance between federal and state sovereignty. While the balance before the 1990s was too heavily in favor of the federal government, the Court should not overreact and give the states more sovereignty than the Constitution authorizes.

One might argue that applying federal law to the states can overburden the states, thus, interfering with their sovereignty. In fact, Justice Kennedy averred in *Alden* that

> [n]ot only must a State defend or default but also it must face the prospect of being thrust, by federal fiat and against its will, into the disfavored status of a debtor, subject to the power of private citizens to levy on its treasury or perhaps even government buildings or property which the State administers on the public's behalf.[280]

However, this author sees nothing in the Constitution that requires Congress to treat states any differently than individuals concerning the laws it passes under its enumerated powers. As Justice Souter's dissent pointed out,

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278. *See* S. Elizabeth Wilborn Malloy, *Whose Federalism?* 32 IND L. REV. 45, 46 (1998). Professor Malloy's critique would not be applicable to my version of the new judicial activism because, if Congress has the power to enact a law, its sovereignty is absolute and it can apply that law to the states (as long as it does not violate another constitutional provision).

279. *See supra* notes 113-16 and accompanying text.

280. *Alden*, 119 S. Ct. at 2264.

> [s]o long as the citizens' will, expressed through state legislation, does not violate valid federal law, the strain will not be felt; and to the extent that state action does violate federal law, the will of the citizens of the United States already trumps that of the citizens of that State: the strain then is not only expected, but necessarily intended.[281]

Some of the assumptions underlying the majority opinion are also questionable. As stated above, the Court relied on several quotations for the proposition that the Framers and the ratifying conventions thought that the Constitution would not interfere with state sovereign immunity.[282] However, with the possible exception of the Hamilton quote, the quotations are referring to the possibility of the states being sued in federal court, not a broader conception that states cannot be sued at all. In addition, as Justice Souter observed in his dissent, the universal conception of sovereign immunity that the majority painted in *Alden* may not be accurate.[283] Justice Souter declared:

> Around the time of the Constitutional Convention, then, there existed among the States some diversity of practice with respect to sovereign immunity; but despite a tendency among the state constitutions to announce and declare certain inalienable and natural rights of men and even of the collective people of a State ... no State declared that sovereign immunity was one of those rights.[284]

Thus, Justice Kennedy's statement that the Constitution would not have been ratified if it stripped the states of their sovereign immunity has questionable historical support.

More fundamentally, the usual notion of sovereign immunity does not correspond to the manner the majority applied it in *Alden*. As Justice Holmes has pointed out: "A sovereign is exempt from suit, not because of any formal conception or absolute theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depend[ed]."[285] In other

281. *Id.* at 2289 (Souter, J., dissenting).

282. *See supra* notes 248-49 and accompanying text.

283. *See Alden*, 119 S. Ct. at 2273-75.

284. *Id.* at 2274-75.

285. Kawananakoa v. Polyblank, 205 U.S. 349, 353 (1907) (cited in, *Alden*, 119 S.Ct. at

words, a sovereign is immune only from its laws, not those of another sovereign.

The Supreme Court applied this principle in *Nevada v. Hall*, where the Court held that California could sue Nevada in a California court.[286] Justice Kennedy tried to distinguish *Hall* on the ground that it did not involve Congress's power to subject states to private suits nor a state's immunity from suits in its own courts.[287] While this distinction is valid in isolation, *Nevada* still demonstrates that state sovereign immunity is not absolute.

Another problem with the argument that states cannot be sued in their own courts is that the Supremacy Clause requires state courts to enforce federal law and state court judges to be bound by it.[288] An independent sovereign does not have to open its courts to foreign claims at all, and when it adjudicates foreign claims, it does so by comity, not by any legal requirement.[289] Thus, state courts lack this aspect of absolute sovereignty. In addition, all the state court is doing is performing its normal judicial function. As Justice Souter noted in his dissent:

> But this is to forget that the doctrine of separation of powers prevails in our Republic. When the state judiciary enforces federal law against state officials, as the Supremacy Clause requires it to do, it is not turning against the State's executive any more than we turn against the Federal Executive when we apply federal law to the United States: [I]t is simply upholding the rule of law.[290]

The two related cases decided that same day as *Alden* illustrate further the problems created by not allowing Congress to abrogate state sovereign immunity, especially considering that in these cases the state

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146 (Souter, J., dissenting)).

286. 440 U.S. 410 (1979).

287. *See Alden*, 119 S. Ct. at 2259.

288. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, cl. 2.

289. *See, e.g.*, Republic of Philippines v. Westinghouse Elec. Corp., 821 F. Supp. 292, 299 n.7 (D.N.J. 1993); Fredericks v. Eide-Kirschmann Ford, Mercury, Lincoln, Inc., 462 N.W.2d 164, 167 (N.D. 1990); Gebr. Eickhoff Maschinenfabrik und Eisengieberei mbH v. Starcher, 328 S.E.2d 492, 505 (W. Va. 1985).

290. *Alden*, 119 S. Ct. at 2288-89 n.34 (Souter, J., dissenting).

was acting more like a private business than a government.[291] In *Florida Prepaid*, the Court held that Congress could not abrogate a state's sovereign immunity under the patent laws,[292] while, in *College Savings Bank*, the Court decided that Congress lacked a similar power under the Trademark Remedy Clarification Act, which subjected states to suits under § 43(a) of the Trademark Act of 1946 (the Lanham Act).[293] Both cases involved the same facts. College Savings Bank marketed "College Sure" certificates of deposit to finance a college education, and it held the patent on the method of administrating its certificates. Florida Prepaid, an arm of the Florida government, managed a tuition prepayment program to provide persons with funds to cover future college expenses. The College Savings Bank sued Florida Prepaid for patent infringement and a violation of Section 43(a) of the Lanham Act based on misstatements about its tuition savings plan in its brochures and annual reports.

These two cases vividly illustrate the problems of allowing state sovereign immunity from federal statutes without a clear constitutional basis. The Constitution gives Congress exclusive authority over patents,[294] and Congress is the only lawmaker that can regulate trademarks and unfair competition on a national level. Yet, the Court has given states total immunity from federal regulation in these areas (and by implication in countless other areas). A sovereign is not sovereign if there are major exceptions to its sovereignty in those spheres where it is supposedly supreme.[295]

These two cases also demonstrate a clear violation of the rule of the law. The states are above the law in the areas of patents, trademarks, and unfair competition, even though they did not make that law. A citizen that is injured by a state's violation of these laws has no redress. A clearer violation of the rule of law cannot be found, especially considering that there was no specific constitutional grounding for the Court's decision.

Unlike *New York*, the Guarantee Clause does not apply to this

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291. *Florida Prepaid*, 119 S. Ct. at 2199; *College Sav. Bank*, 119 S. Ct. at 2219.

292. *Florida Prepaid*, 119 S. Ct. at 2202.

293. *College Savings Bank*, 119 S.Ct. at 2233.

294. *See* U.S. CONST. art. I, § 8, cl. 7.

295. In a different context, Justice Kennedy has declared: "[t]hat the states may not invade the sphere of federal sovereignty is as incontestable, in my view, as the collorary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States." U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 841 (1995) (Kennedy, J., concurring) (citation omitted).

situation. Sovereign immunity is not an essential attribute of a republican form of government. Moreover, these are laws of general applicability that only incidentally affect the states.

In sum, this author believes that Congress lacks the power to abrogate a state's Eleventh Amendment immunity not to be sued in federal court without its consent because of the Eleventh Amendment's clear language. However, the Eleventh Amendment does not give a state immunity from suits based on federal law in its own courts. There is nothing in the Constitution to create such an immunity, and general notions of federalism not grounded in a constitutional provision are not sufficient to establish state sovereign immunity.

VI. AREAS FOR EXPANSION FOR THE NEW JUDICIAL ACTIVISM

In his *Brzonkala* concurrence, Judge Wilkinson argued that the Court should not be "textually selective" in its constitutional interpretations.[296] He declared that

> it is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely. Here, appellants suggest that we give a reading that would rob all meaning from the phrase "Commerce... among the several States," giving Congress a blanket power simply "To regulate." It seems patently inconsistent to argue for a Due Process Clause that means a great deal and a Commerce Clause that means nothing. How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution.[297]

Above, I argued that the Court should give greater content to the Guarantee Clause. This section will explore other areas to which the new judicial activism might apply, including (1) regulation of a state's relationship to the individual, (2) limitations on a state's authority to restrict the political process, and (3) regulation of the relation of the

296. *Brzonkala*, 169 F.3d 894; *see also* REDISH, *supra* note 47, at 17-20. ("[S]ince all constitutional provisions, not merely those protecting individual liberty, are subject to Article V's supermajoritarian amendment process, there is no basis in either constitutional text or theory to justify selective judicial abdication." *Id.* at 20.) Similarly, Professor Redish has declared that "authorizing the judiciary to pick and choose among the constitution's provisions for purposes of enforcement on the basis of its own political value system creates the risk that the courts will at some point choose to ignore the very individual liberty provisions that these scholars believe deserve vigorous protection." *Id.* at 164.

297. Brzonkala v. Virginia Polytechnic Institute, 169 F.3d 820, 894-95 (4th Cir. 1999).

states.[298]

The Court breathed new life into the Fourteenth Amendment's Privileges and Immunities Clause in *Saenz v. Roe*.[299] *Saenz* involved a challenge by welfare recipients to a California statute that limited the maximum welfare benefits available to residents who had just moved to the state. California had defended the limitation on the basis that it would save the program approximately $10.9 million dollars annually (out of approximately $2.9 billion for the entire program).

The Court struck down the limitation on the ground that it violated the right to travel under the Privileges and Immunities Clause of the Fourteenth Amendment—that is, the right of newly-arrived persons to enjoy the same privileges and immunities as other citizens of that state.[300] Under this clause:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; . . . .[301]

The Clause provides that a United States citizen can become a citizen of any state by residing there and, thus, obtain the same rights as any other state citizen.[302] In other words, a state lacks the power to limit state citizenship to any persons or classes.[303]

Although the state tried to justify its limitation on the rational basis

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298. Other areas in which the new judicial activism might apply include choice of law in federal courts, federal common law, and Congress's ability to make offers to states on the condition that states accept federal regulation. On choice of law in federal courts, see Scott Fruehwald, *Choice of Law in Federal Courts: A Reevaluation*, 37 BRANDEIS L.J. 39 (1998). On limitations on federal common law, see Larry Kramer, *The Lawmaking Power of the Federal Courts*, 12 PACE L. REV. 263 (1992); MARTIN H. REDISH, THE FEDERAL COURTS IN THE POLITICAL ORDER: JUDICIAL JURISDICTION AND AMERICAN POLITICAL THEORY 29-46 (1991); Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1 (1985). Concerning the argument that Congress's ability to regulate through the Spending Clause is unconstitutional, see Baker, *supra* note 52, at 101-03. ("Congress need merely attach its otherwise unconstitutional regulations to any one of the large sums of federal money that it regularly offers the states." *Id.* at 101); Lynn A. Baker, *Conditional Federal Spending after Lopez*, 95 COLUM. L. REV. 1911 (1995). *See also* Krotoszynski, *supra* note 2, at 14-18; Stewart, *supra* note 86, at 917.

299. 119 S. Ct. at 1518.

300. *See id.* at 1526-28.

301. U.S. CONST., amend. XIV, cl. 1.

302. *See Saenz*, 119 S. Ct. at 1526.

303. *See id.*

of savings to the program, the Court thought that the state could not accomplish this end by the discriminatory means it had employed.[304] It declared that "the Citizenship Clause of the Fourteenth Amendment expressly equates citizenship with residence: '[t]hat Clause does not provide for, and does not allow for, degrees of citizenship based on length of residence.'"[305] Nor, does the Clause allow a state to classify citizens based on their prior residence's location.[306] The court concluded: "In short, the State's legitimate interest in saving money provides no justification for its decision to discriminate among equally eligible citizens."[307]

Saenz demonstrates one consequence of the new judicial activism. If the states are going to have greater power in relation to the federal government, the Court needs to look at state actions that regulate individuals more closely. Moreover, since interstate mobility is one of the justifications for federalism, the Court must scrutinize state actions that affect persons who move into a state under the Fourteenth Amendment's Privileges and Immunities Clause.

Another area in which the Court might give state actions greater scrutiny is state restrictions on the political process. In *Romer v. Evans*, the Court invalidated a Colorado state constitutional amendment that severely limited a group's rights to employ the political process.[308] In this case, an initiative had added the following amendment to the Colorado Constitution:

> "Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination."[309]

Justice Kennedy's majority opinion struck down this amendment as

304. *See id.* at 1528.
305. *Id.* (quoting Zobel v. Williams, 457 U.S. 55, 69 (1982)).
306. *See Saenz*, 119 S. Ct. at 1528.
307. *Id.* at 1529.
308. 517 U.S. 620 (1996).
309. *Id.* at 624 (quoting COLO. CONST. amend. II).

violating the Fourteenth Amendment's Equal Protection Clause under the rational basis test.[310] He declared that

> the amendment imposes a special disability upon ... [gays and lesbians] alone. Homosexuals are forbidden the safeguards that others enjoy or may seek without constraint.... These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.[311]

He later asserted that "[c]entral both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance."[312] He concluded: "A State cannot so deem a class of persons a stranger to its laws."[313]

I agree with Justice Scalia's dissent that a community has the right to protect "traditional sexual mores against the efforts of politically powerful minorit[ies.]"[314] However, I believe that the citizens of Colorado did this in an improper manner in the challenged amendment because they cut off the normal methods of political recourse to a discrete group. A community should be able to prohibit polygamy or same-sex marriage or refuse to extend its anti-discrimination laws to gays and lesbians. However, a community should not be able to cut off the political avenues to change those laws should a majority in the community desire that change. In addition, *Bowers v. Hardwick* has no effect on this argument.[315] *Bowers* held that the Constitution does not provide protection for homosexual conduct; it does not prevent gays and lesbians from seeking legislative protection for those activities. Such political redress is the essence of our governmental system.

Justice Scalia was concerned that "because those who engage in homosexual conduct tend to reside in disproportionate numbers in

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310. *Id.* at 631. The rational basis test is that "if a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Id.*

311. *Id.*

312. *Id.* at 633.

313. *Id.* at 635.

314. *Id.* at 636 (Scalia, J., dissenting).

315. 478 U.S. 186 (1986).

certain communities, and of course care about homosexual-rights issues much more ardently than the public at large, they possess political power much greater than their numbers, both locally and statewide."[316] This author does not view this concern as a reason for upholding the amendment. First, that gays and lesbians feel strongly about their interests does not distinguish them from any other special interest group. Our political system does not put broad restrictions on special interest groups. Second, that gays and lesbians reside in certain areas and thus may be better able to have their views heard in those areas is not a justification for the amendment. It is a central tenet of this paper that the new judicial activism deals well with the diversity in our society because it allows greater decision making on the local level. This author does not see how Coloradans in general are harmed if Aspen has passed an anti-discrimination law that protects homosexuals; Aspen's laws do not extend beyond its political borders. On the other hand, by allowing local diversity, gays and lesbians can find a community in which their views can be heard.

I also agree with Justice Scalia that the Court should not take sides in the culture wars, and he might be right that part of the majority's reasoning takes sides.[317] However, as I noted above, if we concentrate on the part of Justice Kennedy's opinion that discusses the amendment's interference with normal political processes, we can find a basis for the opinion that is grounded in constitutional text, not politics.[318] If the states are to be given greater power in the new judicial activism, the Constitution must protect individuals from misuse of that power.

Another area in which the Court should scrutinize state actions more closely involves the relationship of the states. While the Court usually has examined a state's attempt to regulate interstate commerce closely,[319] in other areas, the Court has placed almost no controls on the relations of the states.

One area in which the Court has abdicated its duties concerning the

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316. *Romer*, 517 U.S. at 645-46 (citations omitted).

317. *See id.* at 652.

318. *Romer*'s meaning has been hotly debated. Compare Louis Michael Seidman, *Romer's Radicalism: The Unexpected Revival of Warren Court Activism*, 1996 S. CT. REV. 67 (1996), with Richard F. Duncan, *"They Call me 'Eight Eyes'": Hardwick's Respectability, Romer's Narrowness, and Same-Sex Marriage*, 32 CREIGHTON L. REV. 241, 244 (1998).

319. *See, e.g.*, Bibb v. Navajo Freight Lines, Inc., 359 U.S. 520 (1959); Southern Pac. Co. v. Arizona *ex rel.* Sullivan, 325 U.S. 761 (1945); *see also* TRIBE, *supra* note 46, at 435 ("[I]n cases of actual conflict, however, the Court has been extremely severe in its scrutiny of state action.").

relationship of the states is in choice of law.[320] The Court's current rule concerning constitutional limitations on state choice of law under the Full Faith and Credit Clause and the Fourteenth Amendment's Due Process Clause is minimal: a "[s]tate must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[321] As this standard has been applied, the Court will uphold a state's choice of law as long as a state has almost *any* connection to the case.

In the above standard, the Court has given almost no content to the Full Faith and Credit Clause and Due Process Clause in relationship to choice of law.[322] For example, the Full Faith and Credit Clause provides,

> Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.[323]

Obviously, the Full Faith and Credit Clause applies to "acts" (state case law and statutes). However, the Court has given a great deal of content to the full faith and credit clause in relation to judicial proceedings (judgments), but almost none in relation to acts (state laws). In other words, the Court is being textually selective.

Not only does the court's minimal constraint on choice of law violate the clear structural requirements of the Full Faith and Credit Clause, it

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320. I have treated this problem in detail elsewhere. *See* Scott Fruehwald, *Constitutional Constraints on State Choice of Law*, 24 U. DAYTON L. REV. 39 (1998) [hereinafter Fruehwald, *Constitutional Constraints*]; *see also* Scott Fruehwald, *Choice of Law and Same-Sex Marriage*, FLA. L. REV., in press (1999). In this paper, I will concentrate on this issue in relation to the new judicial activism.

321. Allstate Ins. Co. v. Hague, 449 U.S. 302, 313 (1981).

322. I will not deal with the Due Process Clause in depth here because it does not relate to the relationship of the states. However, I will note that the relationship of the Due Process Clause to choice of law resembles that of the Privileges and Immunities Clause to the grant of state benefits in *Saenz*; the Due Process Clause is not a limitation on state sovereignty in relation to other states, but a limitation on what law a state can apply to the individual. In other words, this author believes that when the Court places minimal constraints on the law a state can apply to the individual, it is being textually selective. The state gives much greater due process protection to a state's assertion of personal jurisdiction than it does to a state's choice of law that is to be applied to that individual. *See* Fruehwald, *Constitutional Constraints*, *supra* note 320, at 56. Does a litigant have a greater interest in the law to be applied to the case than to the place of the trial? For more on due process constraints on choice of law, see *id.* at 65-72.

323. U.S. CONST., art. IV, § 1.

contravenes general notions of horizontal federalism. As the Supreme Court has recently declared, the Clause's purpose

> "was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin."[324]

Ignoring the Full Faith and Credit Clause's structural mandate and general notions of horizontal federalism creates the danger that a state will exceed its sovereignty—a danger that resembles the one when vertical federalism is not properly balanced. As one court has stated:

> [T]o vest the power of determining the extraterritorial effect of a State's own laws and judgments in the State itself risks the very kind of parochial entrenchment on the interests of other states that it was the purpose of the Full Faith and Credit Clause and other provisions of Art. IV of the Constitution to prevent.[325]

The solution to this problem is to give the Full Faith and Credit Clause substantial meaning, as two scholars, including the present author, have previously advocated.[326] As Douglas Laycock has declared:

> A state does not own some credit, partial credit, or credit where it would be wholly unreasonable to deny credit, which seems to be the Supreme Court's current interpretation. Rather, each state owes *full* faith and credit to the law of sister states. Full faith and credit is what a state accords its own law .... Thus, the Clause is most plausibly read as requiring each state to give the law of every other state the same faith and credit it gives its own law—to treat the law of sister states as equal in authority to its own.[327]

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324. Baker v. General Motors Corp., 522 U.S. 222, 232 (1998) (quoting Milwaukee County v. M. E. White Co., 296 U.S. 268, 277 (1935)).

325. Thomas v. Washington Gas & Light Co., 448 U.S. 261, 272 (1980).

326. *See* Fruehwald, *Constitutional Constraints*, *supra* note 320, at 72-74; Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249, 296 (1992).

327. Laycock, *supra* note 326, at 296.

Professor Laycock's declaration gives the Full Faith and Credit Clause substantial meaning without reading too much into the text.

The Supreme Court has recently given greater attention to the Constitution's structural lines that regulate the relations of the states in a case in which it applied a seemingly heightened substantive due process standard to an Alabama punitive damages award.[328] In *BMW of America, Inc. v. Gore*, the Court invalidated an excessive punitive damages verdict because the state did not have a legitimate interest in imposing such damages and because the award interfered with other states' sovereignty.[329]

The decision involved an automobile distributor's failure to disclose that it had repainted the plaintiff's new car prior to delivery.[330] The distributor had adopted a nationwide policy of not revealing predelivery damage to buyers when the damage was less than three percent of the car's suggested retail price, and it claimed at trial that the plaintiff's automobile was as good as if it had a factory finish. The jury verdict gave the plaintiff $4000 compensatory damages and four million dollars punitive damages.

On a post-trial motion to set aside the punitive damages, the distributor asserted that its nondisclosure policy conformed with the laws of approximately half the states. It argued that because its conduct was legal in those states, Alabama could not use its actions in those jurisdictions to assess punitive damages against it. The trial judge disagreed and denied the motion. Although the Alabama Supreme Court reduced the damages because they had been improperly calculated, it rejected the distributor's argument that the award violated due process.

In holding that the punitive damages violated the Due Process Clause, Justice Stevens observed, "[p]unitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."[331] A state should have flexibility in calculating punitive damages as long as the damages are needed to vindicate a state's legitimate interests of punishment and deterrence.[332] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that

328. *See* BMW of America, Inc. v. Gore, 517 U.S. 559, 575-76 (1996).
329. *Id.* at 569-72.
330. *See id.* at 562-65.
331. *Id.* at 568.
332. *See id.*

violates the Due Process Clause of the Fourteenth Amendment."[333] In addition, as Justice Stevens declared, a state cannot impose its policy on its neighbors.[334] Not only is a state limited by the federal power over interstate commerce, it "is also constrained by the need to respect the interests of other States."[335] Consequently, "it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasor's lawful conduct in other States."[336] Similarly, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also the severity of the penalty that a state may impose."[337]

Based on these principles, Justice Stevens struck down the punitive damages award. He held that (1) the distributor's conduct did "not establish the high degree of culpability that warrant[ed] a substantial punitive damages award," (2) the ratio of compensatory to punitive damages was suspicious, and (3) the award exceeded criminal and civil penalties for similar conduct.[338]

While *Gore* only directly affects a state's ability to assess punitive damages, its notion that states must respect other states' interests provides a basis for further development in the area of horizontal federalism.[339] While previous cases have focused on vertical federalism, there is also a great need to police the relation of the states.

VII. CONCLUSION: THE NEW JUDICIAL ACTIVISM IN PRACTICE

I enthusiastically share Judge Wilkinson's optimism in the new judicial activism. However, as I demonstrated above, the new judicial activism in practice has been inconsistent, and some decisions have violated some of its basic theoretical tenets.[340]

The new judicial activism in theory is a healthy reaction to the

333. *Id.*

334. *See id.* at 570-71.

335. *Id.* at 571.

336. *Id.* at 572.

337. *Id.* at 574.

338. *See id.* at 580.

339. Of course, *Gore* used the wrong clause to do this since "due process has nothing to do with the relations among the states." *See* Fruehwald, *Constitutional Constraints*, *supra* note 320 at 58-59. However, the Court could have grounded that portion of its decision in the Full Faith and Credit Clause.

340. As Professor Krotoszynski has observed, "[a] second condition precedent exists for federalism to work: it must be principled." Krotoszynski, *supra* note 2, at 22.

Court's previous failure to police the structural lines inherent in the Constitution. In practice, the Supreme Court and lower courts have properly applied the tenets of the new judicial activism to strike down statutes that have exceeded Congress's power to enact them in cases such as *Lopez*, *Brzonkala*, and *Boerne*. In other cases in which Congress forced state legislatures to enact statues or commandeered local officials, it made the correct decision, but on the wrong grounds. Finally, in those cases in which the Court has held that Congress cannot abrogate a state's sovereign immunity in state court, the Court has ignored the basic tenet of the new judicial activism that the Court should not invalidate a statute unless that invalidation is based on the clear constitutional text.

As Judge Wilkinson observed, the decisions of the new judicial activism have been substantively neutral, and they have arisen out of a variety of factual contexts. Courts using this philosophy have struck down both liberal and conservative statutes, on subjects ranging from laws relating to violence against woman and the environment to laws protecting religion. There is no indication that any of these decisions have been based on the content of the laws being examined. Moreover, there is nothing in these decisions that prevents the *proper* sovereign from enacting similar laws.

Unlike the earlier periods of judicial activism, the cases of the new judicial activism have tended not to be textually selective. They have given meaning to all provisions of the Constitution, without going to the extreme. For example, the new Commerce Clause jurisprudence gives the Clause broad meaning, but still places limits on Congress's powers under the Clause. However, as pointed out above, the Court did violate the textual limitations of the new judicial activism in *Alden* and the other sovereign immunity cases by giving the Eleventh Amendment a breadth not justified by its clear language.

This author believes that the most important aspect of the new judicial activism is its ability to protect individuals without employing a substantive bias. As Professor Redish has declared, "[t]he concept of a prophylactic is that it prevents the creation of a critical situation, by proceeding on the assumption that it will be impossible to determine, in the individual instance, the existence of a real threat to the values sought to be fostered."[341] Similarly, John Rawls has advocated that the determination of whether something is fair should be made behind a veil of ignorance:

341. REDISH, *supra* note 47, at 115.

> A practice is just if it is in accordance with the principles which all who participate in it might reasonably be expected to propose or acknowledge before one and other when they are similarly circumstanced and required to make a firm commitment in advance without knowledge of what will be the particular conditions.[342]

What would people commit to in advance: (1) a system of determining rights that was substantively biased in an unpredictable way or (2) a system that neutrally enforced the structures that were intended to protect individual rights?

In sum, the new judicial activism holds great promise for American jurisprudence. Because it is allocative, rather than substantive, it allows courts to give meaning to the Constitution without taking sides. It also furthers democracy by permitting the appropriate lawmaker to make political decisions. Hopefully, courts will adhere to its theoretical principles, and ground their decisions in the Constitutional text, rather than making sweeping decisions based on general notions of federalism, like the Court did in the sovereign immunity cases. For if the courts respect these principles, our legal system may have a method to deal with the great diversity that exists in the modern world.

342. John Rawls, *Justice as Fairness in* JUSTICE AND SOCIAL POLICY 80, 98 (Frederick A. Olafson ed., 1961).