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## The Roberts Court and Penumbral Federalism

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## The Roberts Court and Penumbral Federalism

### Cover Page Footnote

Associate Professor, University of Missouri-Kansas City School of Law. I would like to thank Richard Posner, my recent personal correspondence with whom largely inspired this project. I would also like to thank Professors Allen Rostron, Doug Linder, Nancy Levit, Barbara Glesner-Fines, Evan Caminker, and Gary Lawson for their helpful comments on drafts.

# THE ROBERTS COURT AND PENUMBRAL FEDERALISM

*Edward Cantu*<sup>+</sup>

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The Supreme Court’s 2012 term produced two decisions driven by odd federalism analyses. First, in *Shelby County v. Holder*,<sup>1</sup> the Court struck down a key provision of the Voting Rights Act (VRA), partially on the basis of “the fundamental principle of equal sovereignty”<sup>2</sup>—that is, the idea that equal treatment of the states is, at some level, constitutionally required. Second, the

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1. 133 S. Ct. 2612 (2013).  
2. *Id.* at 2624.

Court in *United States v. Windsor*,<sup>3</sup> using a strange explication of equal protection doctrine infused with federalism concerns, struck down a provision of the Defense of Marriage Act (DOMA) that denied same-sex married couples various tax benefits under federal law.<sup>4</sup>

Scholars have labored to make sense of both decisions by superimposing over them well-worn doctrinal and theoretical templates.<sup>5</sup> Such efforts seem forced, as the decisions do not fit neatly into readily available conceptual boxes. One plausible reason for the less-than-persuasive nature of early academic responses is a general inattention to how these decisions may be specimens of a prudential approach to federalism qualitatively different from that to which scholars are accustomed. The Court's *Windsor* and *Shelby County* decisions arguably represent a wholesale, even if incipient and slow-motion, transition in the Court's federalism approach away from a focus on state regulatory power and toward what is termed herein "penumbral federalism." This approach is characterized by an emphasis on the states as deserving of respect and prestige, with the ultimate goal of sustaining the states as worthy competitors for citizens' loyalty.

The 2012 term is thus a tentative invitation for scholars to recalibrate the scopes through which they detect and interpret incremental changes in structural doctrine. This recalibration is necessary to prepare scholars for the Court's increasing invocation of ethereal concepts such as "state dignity" and others that are in the "spirit" of the Tenth Amendment responses to the Roberts Court's Federalism jurisprudence though not textually manifest in it. A crucial part of that preparation is understanding *why* the Court employs these penumbral conceptualisms. As such, this Article focuses heavily not only on explaining what penumbral federalism is and how it has manifested in case law, but also on teasing out the likely reasons for its prudential appeal.

This Article does not seek to defend either the Court's recent federalism explications or penumbral federalism more generally. Indeed, the author is persuaded neither as to the historical importance of "state dignity" nor as to the correctness of the decisions in which the Court invokes it. However, by discussing penumbral federalism's prudential appeal, the Article urges scholars to intellectually empathize with those who appear to adopt this approach, if not for any other reason than to enable us to foresee possible changes in federalism doctrine's trajectory in the coming years, and to adequately explain those changes to our students using more than glib references to "law as raw politics."<sup>6</sup>

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3. 133 S. Ct. 2675 (2013).

4. *Id.* at 2695–96.

5. See, e.g., Ernest A. Young, *United States v. Windsor and the Role of State Law in Defining Rights Claims*, 99 VA. L. REV. ONLINE 39, 46 (2013) [hereinafter Young, *Defining Rights*]. See also *infra* notes 178–81.

6. Richard H. Fallon, Jr., *The Ideologies of Federal Courts Law*, 74 VA. L. REV. 1141, 1147 (1988) ("[I]t would be a reductionist mistake to view federal courts arguments as nearly always

The Article proceeds as follows. Part I introduces penumbral federalism by briefly contrasting it with more traditional approaches to federalism analyses, expounding on its conceptual bases, and highlighting the likely reasons for its prudential appeal. Part I's ultimate task is to illustrate why the penumbral approach to federalism is a realistic, descriptive account for how federalism concerns may play on the judicial mind, and thus manifest in Court decisions. After contextualizing penumbral federalism on a more abstract level in Part I, Part II describes penumbral federalism's jurisprudential trajectory over the past several decades. Part III ultimately focuses on how 2012 decisions help further reveal this trajectory as one headed toward a general shift in—or permutation of—federalism doctrine.

#### I. PENUMBRAL FEDERALISM: AN ATTITUDINAL CONTEXTUALIZATION

When the Rehnquist Court ostensibly sought to reinvigorate federalism through decisions such as *United States v. Lopez*<sup>7</sup> and *United States v. Morrison*,<sup>8</sup> it faced charges of conservative judicial activism. For example, in 2000, Professor Larry Kramer declared that “conservative judicial activism is the order of the day” because, among other things, the Court had “cast aside nearly 70 years of precedent in the area of federalism.”<sup>9</sup> Hindsight, however, reveals that the “dual federalism” into which the Rehnquist Court allegedly sought to breathe life—that is, the traditional notion that states enjoy an exclusive sphere of regulatory turf—has gone, and is going, nowhere. Thus, scholars such as Ernie Young have declared that “[d]ual federalism remains hardly less dead than it was the day after the Court decided *Wickard v. Filburn*.”<sup>10</sup>

Nevertheless, the conservative justices on the Roberts Court are assumed, correctly, to want to keep the federalism flame burning. But in what form? Nine years into John Roberts' term as Chief Justice his Court has arguably not handed down one decision meaningfully curtailing Congress' regulatory reach under its most oft-invoked source of power, the Commerce Clause.<sup>11</sup> Therefore, most

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being crudely political ones in which judges and theorists claim for their predilections the status of the law.”).

7. 514 U.S. 549 (1995).

8. 528 U.S. 598 (2000).

9. Larry D. Kramer, *No Surprise. It's an Activist Court.*, N.Y. TIMES, Dec. 12, 2000, at A33. See also Jack M. Balkin & Sanford Levinson, *Legal Historicism and Legal Academics: The Roles of Law Professors in the Wake of Bush v. Gore*, 90 GEO. L.J. 173, 185 (2001) (labeling as “conservative judicial activism” the Rehnquist Court's “recent line of federalism decisions,” and describing them as “lawless and indefensible from the standpoint of pre-1987 jurisprudence”).

10. Ernest A. Young, *The Puzzling Persistence of Dual Federalism*, in FEDERALISM AND SUBSIDIARITY 34, 34 (2014) [hereinafter Young, *Puzzling*], available at [http://scholarship.law.duke.edu/faculty\\_scholarship/2689/](http://scholarship.law.duke.edu/faculty_scholarship/2689/).

11. The contrarian might pounce with *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012), wherein the Court declared that Congress did not have the power under the Commerce

agree that decisions such as *Lopez* and *Morrison* have enjoyed little doctrinal momentum.<sup>12</sup> The upshot is that these dual federalism decisions have proven to be of decreasing importance in understanding how federalism concerns influence modern case outcomes.<sup>13</sup>

More relevant to understanding what is perhaps a slow-motion revolution in federalism jurisprudence is a focus on the vague and ethereal conceptualizing of federalism principles, such as “state dignity,” conspicuous in recent decisions. While the Court’s explications of federalism in these cases seem unconvincing when viewed through traditional theoretical prisms, they make greater sense if viewed as products of a “penumbral” view of federalism. This Article employs the phrase “penumbral federalism” because it best reflects the attitudinal preconception of the Tenth Amendment that allows one to take notions such as “equal sovereignty” and “state dignity” seriously. In this sense, it is similar to the substantive due process reasoning in decisions such as *Griswold v. Connecticut*,<sup>14</sup> in that it has tenuous textual roots, but nevertheless is plausible under an interpretive approach that views the amendments as not only declaring express mandates but also providing formal recognition of fundamental values of political morality and constitutional idealism. To those who either consciously, or at least viscerally, approach federalism this way, state dignity plausibly yields from the “penumbras and emanations”<sup>15</sup> of the Tenth Amendment.

Current intellectual fashion detrimentally fails to appreciate the importance of concepts such as state dignity in the minds of those most likely to embrace them, even if coyly or experimentally—judges, who are charged with the practical task of paying due respect to all aspects of the Constitution while issuing decisions that do not stifle pragmatic governance with an unacceptable degree of doctrinal rigidity. In light of the need to negotiate these various pressures, and the increasing obviousness that dual federalism is going nowhere due to the ever-increasing nationalization of criminal law and other areas of traditional state concern, it is likely that penumbral concepts will increasingly animate much of the Court’s federalism jurisprudence—either expressly or through a fair reconstruction of the Court’s opinions. To appreciate the distinction between

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Clause to require citizens to purchase health insurance. This holding, however, is of extremely limited consequence given the unique context of compelled commerce, a mechanism unusual in federal law. *See id.* at 2648. Indeed, this holding was even inconsequential in the case itself, as the Court ultimately concluded that the so-called “individual mandate” was nevertheless a valid exercise of Congress’ power to tax. *Id.* at 2601.

12. *See, e.g.,* Young, *Puzzling*, *supra* note 10, at 34 (“I would think that by now the Court has made clear that it does not mean to impose particularly significant limits on the Commerce Clause, much less to bring back the entire dual federalist regime.”).

13. *See id.* at 55–56.

14. 381 U.S. 479 (1965).

15. *Id.* at 484 (noting that “specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance,” and thus yield a right to privacy in certain contexts).

traditional approaches to federalism analysis and the penumbral approach, an explanation of each, and a comparison between them, is in order.

#### A. *Federalism: The Usual Suspects*

Debates over the legitimacy of decisions such as *Shelby County* and *Windsor*—debates that are rightly impassioned given the significant individual rights and social justice implications of the decisions—reflect the decades-old tension in case law and legal scholarship between two opposing starting points for federalism analysis. These analytical points of departure are perhaps best characterized not so much as federalism “theories” or “paradigms,” but rather as attitudinal federalism priors.

For example, when the *Shelby County* Court invoked “equal sovereignty” in striking down a part of the VRA, even conservative scholars were incredulous. Michael McConnell, for example, charged that Justice Roberts simply “made up” the doctrine of “equal sovereignty.”<sup>16</sup> The legitimacy of the concept was even less plausible to those more liberal leaning; according to one scholar on the left, the Court’s prudential conjuring is part of a larger war the conservative justices are waging on progressive legislation and goals.<sup>17</sup>

Though federalism-sympathetic and federalism-ambivalent thinkers made strange bedfellows with regard to *Shelby County*, both approaches are generally framed by differing characterizations of states’ and Congress’ respective regulatory subject-matter provinces. This makes sense given that the allocation of regulatory territory traditionally has been the central issue in federalism disputes.<sup>18</sup> Understanding these two framings of federalism, then, is necessary to appreciating federalism.

##### 1. *The Residual Federalism Approach*

The first general approach to federalism is to view state power as nothing but what remains once positive grants of federal power reach their logical ends. Thus, once we define “interstate commerce”<sup>19</sup> and couple it with a reasonable formulation of “necessary and proper,”<sup>20</sup> any exercise of power that does not fit under this conceptual umbrella is, by default, within the regulatory province of the states. Herein, this is termed “residual federalism.” This approach is not

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16. See Nina Totenberg, *Whose Term Was It? A Look Back At The Supreme Court*, NPR (July 5, 2013, 3:35 AM), <http://www.npr.org/2013/07/05/198708325/whose-term-was-it-a-look-back-at-the-supreme-court> (former Tenth Circuit judge, appointed by George W. Bush, declaring that “equal sovereignty” was “made up” rather than constitutionally mandated).

17. See, e.g., Richard L. Hasen, *The Chief Justice’s Long Game*, N.Y. TIMES, June 25, 2013, at A25 (describing *Shelby County* as part of Roberts’ “long game” of “tee[ing] up major constitutional issues for dramatic reversal”).

18. *Id.*

19. U.S. CONST. art I, § 8 (using the phrase “[c]ommerce . . . among the several states”).

20. *Id.*

usually framed in these terms, or referred to with this label, but examples of it abound; the most famous is probably Justice Stone's characterization of the Tenth Amendment as "but a truism" in *United States v. Darby*.<sup>21</sup> Scholars who do not adopt the dual federalism model discussed below effectively default to this residual approach, which is perhaps best exemplified by Professor Aviam Soifer's assertion that "there exists no interpretation based upon constitutional structure to establish workable limitations on Congress' authority to act for what Congress believes to be the public good, except for limitations premised on the rights of individuals protected elsewhere in the Constitution."<sup>22</sup>

Another good example of residual federalism is Justice Stevens' dissent in *Printz v. United States*,<sup>23</sup> discussed in further detail below. Important for present purposes is that the federal law at issue required state officials to effectuate federal law; that is, the federal law "commandeered" state officials for federal use.<sup>24</sup> The Court ruled the relevant law unconstitutional on federalism grounds.<sup>25</sup> In dissent Justice Stevens argued:

Unlike the First Amendment, which prohibits the enactment of a category of laws that would otherwise be authorized by Article I, the Tenth Amendment imposes no restriction on the exercise of delegated powers. . . . [Thus, t]he [Tenth] Amendment confirms the principle that the powers of the Federal Government are limited to those affirmatively granted by the Constitution, but it does not purport to limit the scope or the effectiveness of the exercise of powers that are delegated to Congress.<sup>26</sup>

Stevens' background premise was that state sovereignty is defined solely by the logical corollaries of Article I's language read in a vacuum (except for being

21. 312 U.S. 100, 124 (1941). The *Darby* Court asserted:

The [Tenth A]mendment states but a truism that all is retained which has not been surrendered. . . . From the beginning and for many years the amendment has been construed as not depriving the national government of authority to resort to all means for the exercise of a granted power which are appropriate and plainly adapted to the permitted end.

*Id.* at 124.

22. Aviam Soifer, *Truisms that Never Will Be True: The Tenth Amendment and the Spending Power*, 57 U. COLO. L. REV. 793, 811–12 (1986). See also *id.* at 795 n.7 (referring to the alternative dual federalist approach as an "anachronistic battlement").

23. 521 U.S. 898 (1997).

24. *Id.* at 925–33. See also *id.* at 941 (Stevens, J., dissenting).

25. *Id.* at 935.

26. *Id.* at 941–42 (Stevens, J., dissenting). The majority rejected this reasoning, employing the dual federalism approach discussed below, responding:

When a [l]aw . . . for carrying into [e]xecution the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . it is not . . . proper for carrying into [e]xecution the Commerce Clause, and is thus . . . merely an act of usurpation which deserves to be treated as such.

*Id.* at 923–24 (internal citation and quotations marks omitted).



limited by individual rights provisions).<sup>27</sup> Unlike in the First Amendment context, that logic is not constrained by conceptions of state sovereignty extrinsic to Article I.

Residual federalism also played prominently in post-*Shelby County* reactions by scholars such as Sandy Levinson. The Court ruled that the challenged provision of the VRA exceeded Congress' power under the Fifteenth Amendment's enforcement provision. According to Levinson, "the Constitution expressly . . . grant[s] Congress the power to engage in all appropriate legislation to enforce the [Fifteenth] Amendment's guarantee that the right to vote will not be denied because of race. So[,] the [Tenth] Amendment has nothing whatsoever to do with the [*Shelby County*] case."<sup>28</sup> Levinson's implicit premise is seemingly that because the remedial provision of the Fifteenth Amendment, combined with the Necessary and Proper Clause, can easily be read to conceptually legitimize the relevant aspects of the VRA, the Tenth Amendment by definition never comes into play. Under this view, the Tenth Amendment is almost condescendingly descriptive, rather than profoundly prescriptive. That is, Levinson treats the Tenth Amendment in this context as merely asserting that federal regulatory overreach means federal conduct that cannot be reconciled with language of Article I positively defining the breadth of congressional powers granted. Such a reading of the Tenth Amendment as merely a recognition that federal overreach conceptually *exists* is in contrast to viewing the Tenth Amendment as helping to *define* what federal overreach is.

## 2. The Dual Federalism Approach

The second general approach to federalism—often termed “dual federalism”<sup>29</sup> or “enclave federalism”<sup>30</sup>—takes the view that the Tenth Amendment defines state sovereignty not simply as the “left overs” from unsuccessful federal grasps at power, but rather as a recognition that there exist “spheres” or “enclaves” of affairs that, by their nature, are of “traditional state concern,” and therefore fall within states' exclusive regulatory province.<sup>31</sup> The firm boundaries of the given

27. *Id.* at 941–42 (Stevens, J., dissenting).

28. Sandy Levinson, *Tendentious, Mendacious or Audacious? John Roberts Rewrites the 10th Amendment*, BALKINIZATION (June 30, 2013), <http://balkin.blogspot.com/2013/06/tendentious-mendacious-or-audacious.html>.

29. See generally Young, *Puzzling*, *supra* note 10, at 36.

30. See Robert A. Schapiro, *Justice Stevens's Theory of Interactive Federalism*, 74 FORDHAM L. REV. 2133, 2133 (2006) (“Dual federalism [is] the idea that the national government and the states enjoy exclusive and nonoverlapping spheres of authority . . . .”); Soifer, *supra* note 22, at 794–95 (referring to this approach as embodying a belief that the “[T]enth [A]mendment creates an enclave for state authority”).

31. See, e.g., *United States v. Lopez*, 514 U.S. 549, 577 (1995) (striking down the Gun-Free School Zones Act of 1990, which criminalized the possession of firearms in school zones, because it infringed on “areas of traditional state concern” and blurred the “boundaries between the spheres of federal and state authority”).

state-power enclave<sup>32</sup> hold fast against Article I grants of federal power that might otherwise run arrogantly into logical infinity through the inertia of the Necessary and Proper Clause, a clause Justice Scalia characteristically termed the “last, best hope of those who defend ultra vires congressional action.”<sup>33</sup>

The logic driving this framing is similar to that uncontroversially applied to, say, the First Amendment with regard to free speech. In determining whether a law violates the Speech Clause, courts do not—and, most agree, should not—begin and end with the question of whether the given law can reasonably be deemed “necessary and proper”—that is, “rationally related”<sup>34</sup>—to effectuating a valid federal goal. Rather, while no right is absolute, in the First Amendment context most scholars generally find implicit therein the natural-rights notion of the inherent inalienability of the right to expression.<sup>35</sup> This results in approaches like that of Justice Stevens in *Printz*, discussed above, which treats individual rights provisions as more legally dynamic than the Tenth Amendment. Likewise, the dual federalist reads the Tenth Amendment as a recognition that certain spheres of life, though unenumerated in the Tenth Amendment, are only of state concern. Therefore, regardless of their logical relationship to a power enumerated in Article I, allowing federal regulation of such matters is to employ an interpretive approach that proves too much.

These two major approaches to federalism are palatable to those—mostly academics—not responsible for enforcing them with real-world consequences. Residual federalism presents the specter of making federalism virtually meaningless through the forgiving logic of current Necessary and Proper jurisprudence, thereby compromising the judiciary’s institutional legitimacy, a presumably real concern for most judges. Conversely, the dual federalism approach is simply too unpragmatic for even generally pro-federalism scholars to stomach.<sup>36</sup> The pressures of real-world judging give rise to a federalism approach that academics have largely failed to digest. This failure, as rooted as it may be in the dubious pedigree or normative non-persuasiveness of penumbral

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32. Or as Justice Holmes mockingly put it, the “invisible radiation[s] from the Tenth Amendment.” *Missouri v. Holland*, 252 U.S. 416, 434 (1920).

33. *Printz v. United States*, 521 U.S. 898, 923 (1997).

34. See *United States v. Comstock*, 560 U.S. 126, 133 (2010) (citing *Sabri v. United States*, 541 U.S. 600, 605 (2004)) (“[I]n determining whether the Necessary and Proper Clause grants Congress the legislative authority to enact a particular federal statute, we look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”).

35. See, e.g., Steven J. Heyman, *Righting the Balance: An Inquiry Into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1279 (1999) (noting that “eighteenth-century Americans understood freedom of speech within the framework of natural rights theory,” and advocating viewing free-speech rights in natural rights terms).

36. See, e.g., Young, *Puzzling*, *supra* note 10, at 64 (demonstrating one federalism-sympathetic scholar’s assertion that dual federalism “must fail” because “exclusive spheres of authority simply cannot be defined and maintained in a principled way”).

federalism, needlessly delays scholars' eventual coming to terms with it as one increasingly lurking between the lines in court opinions.

### *B. Penumbral Federalism*

Understanding the penumbral approach to federalism requires not only a conceptual unpacking of the attitude itself but also an examination of why the Court—or perhaps more specifically, federalism-vigilant personalities on it—would feel compelled in recent decades to gravitate away from the Tenth Amendment's core and toward the Amendment's more peripheral and pragmatic aura. This section is thus devoted to, first, expounding on the theoretical and attitudinal bases for penumbral federalism, and, second, highlighting the likely reasons for its prudential appeal. These two discussions at once help one to intellectually empathize with a judge who takes the penumbral approach, and also sets the groundwork for justifying the characterization herein of various lines of jurisprudence as indeed representing penumbral federalism's doctrinal fruition.

#### *1. The Penumbral Tenth Amendment: Federalism as a Fundamental Value*

One who takes the penumbral view of federalism does not merely grudgingly accept federalism as an anachronistic but nevertheless extant mandate deserving of an occasional ceremonial nod. Rather, in its purest form, the penumbral view treats federalism as a first principle of political morality<sup>37</sup> and an indispensable part of constitutional idealism. It is thus a cognitive petri dish for sentiments such as “state dignity.” Justice Kennedy's view of federalism best exemplifies this relatively purist penumbral framing; he has described federalism as reflecting an

underlying, fundamental, essential, ethical, moral value . . . that it is wrong, legally wrong, morally wrong, for a person to delegate authority over his or her own life to an entity which is so far removed from his or her ability to control it that he or she parts with the essential freedom that inheres in every human personality.<sup>38</sup>

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37. This phrase generally refers to the values and moral premises implicit in constitutional text, but which must be brought into relief through interpretation. This is akin to Professor Ronald Dworkin's use of the phrase, see generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977), as well as Professor Robin West's implicit definition when she states “[o]ur adjudicated Constitution . . . is not only a font of law, it is also our Code of Political Morality,” in that adjudication teases out the morality inspiring the various textual provisions, Robin West, *Ennobling Politics*, in *LAW AND DEMOCRACY IN THE EMPIRE OF FORCE* 58, 73 (H. Jefferson Powell & James Boyd White eds., 2009). See also Micah Schwartzman, *What if Religion is Not Special?*, 79 U. CHI. L. REV. 1351, 1355 (2012) (discussing “reconcil[ing] the Religion Clauses with political morality by expanding the definition of religion to include secular ethical and moral doctrines”).

38. Helen J. Knowles, *Taking Justice Kennedy Seriously: Why Windsor Was Decided* “*Quite Apart from Principles of Federalism*”, ROGER WILLIAMS U. L. REV. (forthcoming 2014) (internal quotation marks omitted).

This sentimentalized or moralized approach can, of course, easily foster the reasoning that sometimes federal conduct can be so “offensive” as to be obviously in violation of a sacred constitutional premise, even if reaching this conclusion requires a judge to work backwards to substantiate a conclusion the correctness of which is intuitively “obvious.”

However, a judge need not—and usually does not—view federalism as literally a moral imperative to think it a “fundamental value” of healthy constitutionalism. Indeed, taking Justice Kennedy’s words on their face, they do seem oddly zealous relative to the views of others sympathetic to federalism. Thus, viewing federalism as a fundamental value, even if it does not inspire transcendental exaltation, can inspire a judge to feel a professional responsibility to latch on to state dignity to invigorate federalism as much as is practicable. For at base, underlying the penumbral view are simply the conclusions that: (1) federalism is a constitutional mandate; (2) it is a good mandate; (3) the courts must enforce it; and (4) if it is infeasible to realize dual federalism through adjudication, a meaningful diffusion of power can only be maintained by recognizing states as worthy of respect and prestige, and thus worthy contenders for citizens’ loyalty. In this sense, penumbral federalism can be easily understood as a consequentialist and pragmatic approach primarily concerned with the benefits that a structural diffusion of power yields. It is analogous to the modern approach to individual rights provisions, which are often framed by the Court not only in natural-rights terms, but also in utilitarian terms; the “marketplace of ideas” in the First Amendment context comes to mind.<sup>39</sup>

Indeed, as noted above, the penumbral approach takes center-stage most often in individual rights contexts. Even to many of those who recognize that, say, substantive due process is a contradiction in terms—like “green pastel redness” as John Hart Ely quipped<sup>40</sup>—are comfortable with substantive due process *decisions* because they are consistent with the decisions’ idealized relationship between the state and individuals that the Constitution is fairly read to envisage.<sup>41</sup> In other words, many generally have little problem accepting a

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39. See, e.g., *United States v. Alvarez*, 132 S. Ct. 2537, 2560 (2012) (“Time and again, this Court has recognized that as a general matter false factual statements possess no intrinsic First Amendment value[]” because “they interfere with the truth-seeking function of the marketplace of ideas.”) (internal quotation marks omitted).

40. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 18 (1980) (“Familiarity breeds inattention, and we apparently need periodic reminding that ‘substantive due process’ is a contradiction in terms—sort of like green pastel redness.”).

41. This is especially understandable given tenable arguments that the Privileges and Immunities Clause in the Fourteenth Amendment was originally intended to serve as a conduit for unenumerated “fundamental” rights. See, e.g., Michael Anthony Lawrence, *The Potentially Expansive Reach of McDonald v. Chicago: Enabling the Privileges or Immunities Clause* 2010 *CARDOZO L. REV. DE NOVO* 139, 140 (arguing that “the Privileges or Immunities Clause . . . was expressly intended by its framers to incorporate the entire Bill of Rights (including the Ninth Amendment, protecting unenumerated rights”).

fiction such as substantive due process because it is used to advance what are arguably very real constitutional values. This invariably begs the question: why can't the same approach be taken with federalism?

To one who takes a penumbral view of the Tenth Amendment, critics of federalism-vigilant decisions have an idiosyncratic perspective on the relative importance and meaning of the Amendments in the Bill of Rights—among which, it must be remembered, is the Tenth Amendment. Many of the very same scholars who take exception to the Court's reliance on equal sovereignty in *Shelby County* would likely applaud, say, the Court's reliance on the notion of "fundamental" rights in their "more transcendent dimensions" in striking down Texas' anti-sodomy law.<sup>42</sup>

For better or for worse, the Tenth Amendment is treated by most modern scholars as qualitatively different than the rest of the Bill of Rights, demoted to a dry logistical rule at best, and a "truism" at worst, one that, according to some commenters, has produced a "national neurosis."<sup>43</sup> To one who believes that structural values should be enforced only when doing so will quite apparently protect individual rights, this makes sense: if a particular structural arrangement does not immediately threaten individual rights, pragmatic approval of it is in the spirit of the Constitution, while formalistic disapproval would be an example of failing to see the forest through the trees.<sup>44</sup>

By contrast, the Free Speech Clause in the First Amendment, for example, represents to many an intuitively obvious statement about the morally correct allocation of power in adjudging the propriety of speech—in this case, between the individual and the state. Provisions such as these are thought of to embody "first principles," aspirational provisions meant to ensure continued recognition

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42. See *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

43. Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 904 (lamenting that "[a] mere six years after its brave declaration that it had sworn off federalism for good, the Supreme Court suffered a relapse" and returned to paying federalism some due in *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

44. See, e.g., Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1525 (1990). Brown believes that, to the formalist school, . . . the "forest" of individual liberty is often lost in the "trees" of absolute fealty to the Framers' words. To insist upon the maintenance of an absolute separation [of powers] merely for the sake of doctrinal purity could severely hinder the quest for a workable government with no appreciable gain for the cause of liberty or efficiency.

*Id.* (internal quotation marks omitted).

of transcendental truths.<sup>45</sup> The Tenth Amendment, on the other hand, does not occupy such an exalted status in the minds of most modern scholars.<sup>46</sup>

Some scholars have expressed frustration with the disproportionate focus in modern scholarship on individual rights, which is arguably the product of scholars arbitrarily playing favorites with the Bill of Rights. Over thirty years ago, Professor Robert Nagel disapprovingly contrasted Justice Brennan, the “respected and unapologetic practitioner of judicial power and imaginative constitutional analysis when the issues involve individuals’ rights,”<sup>47</sup> with the Justice Brennan who labeled the Tenth Amendment reasoning in *National League of Cities v. Usery*<sup>48</sup> “an abstraction without substance”<sup>49</sup> and a “patent usurpation.”<sup>50</sup>

In *Usery*, the Court held that while Congress had the general authority under the Commerce Clause to regulate the employee-employer relationship under the Fair Labor Standards Act, it could not so regulate when the employer was a state, as such regulation of “[s]tates as [s]tates” interfered with state autonomy.<sup>51</sup> Arguing in favor of viewing federalism as a “fundamental value” rather than a technical mandate to perfunctorily acknowledge, Nagel noted that “[t]he harsh reaction to *Usery* is one aspect of a widespread pattern that inverts the priorities of the framers: an obsessive concern for using the Constitution to protect individuals’ rights.”<sup>52</sup> Nagel’s point was “not to insist that *Usery* was ultimately

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45. Substantive due process probably best reflects this notion, given that it, more than any other doctrine, is rooted in abstract natural rights. As Justice Blackmun argued, dissenting in a case later overruled using his reasoning:

We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual’s life. . . . We protect the decision whether to have a child because parenthood alters so dramatically an individual’s self-definition, not because of demographic considerations or the Bible’s command to be fruitful and multiply. And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households.

*Bowers v. Hardwick*, 478 U.S. 186, 204–05 (1986) (Blackmun, J., dissenting).

46. See, e.g., Robert J. Kaczorowski, *The Tragic Irony of American Federalism: National Sovereignty Versus State Sovereignty in Slavery and in Freedom*, 45 U. KAN. L. REV. 1015, 1043 (1997) (“[W]hen today’s state sovereignty plurality applies its state sovereignty theory of constitutional federalism, it is not enforcing the Founders’ First Principles.”).

47. ROBERT F. NAGEL, *CONSTITUTIONAL CULTURES: THE MENTALITY AND CONSEQUENCES OF JUDICIAL REVIEW* 60 (1989) [hereinafter NAGEL, *CULTURES*].

48. 426 U.S. 833 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531 (1985).

49. *Id.* at 860 (Brennan, J., dissenting).

50. *Id.* at 858.

51. *Id.* at 854 (majority opinion).

52. Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81, 82 (1981) [hereinafter Nagel, *Fundamental Value*]. See also Ernest A. Young, *Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror*, 69 BROOK. L. REV. 1277, 1284–85 (2004) [hereinafter Young, *Dark Side*] (noting

‘correct,’ but to suggest that the inability to understand *Usery* demonstrates the extent to which the capacity to appreciate some important constitutional principles is being lost.”<sup>53</sup>

Nagel observed that “[t]he same scholar who demands specificity in the concept of ‘state sovereignty’” before accepting the validity of a decision purportedly vindicating it “would ground interpretations of individual rights on values such as ‘a meaningful opportunity [for individuals] to realize their humanity.’”<sup>54</sup> One need not be a federalism zealot to notice this contrast and think it, at least upon initial inspection, intellectually problematic. Though Nagel largely devoted his argument to the normative claim that scholars and judges should treat federalism as a “fundamental value,” and spent much energy subtly mocking the abstract conceptualizing—of which this author generally approves—that comprises much of individual rights doctrine, his descriptive point is well taken: the Framers did not view freestanding individual rights as the primary constraints on government.<sup>55</sup> In the minds of the Framers, that role was reserved for federalism and the separation of powers.<sup>56</sup>

Nagel’s observations about the tendencies of legal scholars are not yet stale, a fact that has inspired much more recent calls to treat the Tenth Amendment not as a gratuitous “truism,” but as a “truism with an attitude,”<sup>57</sup> one that should be “read and understood as the full constitutional equivalent of the nine

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that while the Framers were probably wrong in thinking structural arrangements *sufficient* for protection of individual liberty, a “modern preoccupation with rights provisions may have encouraged us to overlook the possibility that structure remains a necessary condition for liberty. Especially in times of terror, rights provisions may become ‘parchment barriers’ to governmental oppression. Sometimes it takes a government to check a government”). Young’s argument is particularly plausible given the historical tendency of the courts to stand down in the face of executive claims that judicial vigilance might harm national security. Regarding the other structural value—the separation of powers—see *Clinton v. New York*, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) (describing as a “grave mistake” the attitude that “a Bill of Rights in Madison’s scheme then or in sound constitutional theory now renders separation of powers of lesser importance”).

53. Nagel, *Fundamental Value*, *supra* note 52, at 83.

54. *Id.* at 87 (quoting Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980)). Or as one scholar has characterized this inconsistency, “[t]o paraphrase John Ely and Bertrand Russell: ‘These are my fundamental postulates; those are your abstract, unanchored, wooly generalities; I have the votes and I win.’” Soifer, *supra* note 22, at 804.

55. See Nagel, *Fundamental Value*, *supra* note 52, at 88.

56. See, e.g., Young, *Dark Side*, *supra* note 52, at 1284 (noting that the “original [Constitution was] built on the assumption that liberty was best secured through a rigorous commitment to federalism and separation of powers”). See also *New York v. United States*, 505 U.S. 144, 181 (1992) (“State sovereignty is not just an end in itself: ‘Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power.’”).

57. Gary Lawson, *A Truism with an Attitude: The Tenth Amendment in Constitutional Context*, 83 NOTRE DAME L. REV. 469, 470 (2008).

simultaneously ratified amendments that accompanied it.”<sup>58</sup> According to Professor Gary Lawson, “[t]he Tenth Amendment should not apologize for invalidating federal laws[,] even though it is ‘but a truism[,]’” because “[o]ther constitutional provisions, such as the First Amendment, do it all of the time without evident embarrassment.”<sup>59</sup>

Importantly, the point here is not the normative one that all upstanding thinkers should exalt federalism as a “fundamental value” equal in “fundamental” status to individual rights; this writer is hardly inspired to do this. The point is that modern scholars’ discounting of the Tenth Amendment, and federalism more generally, can plausibly be viewed as just as arbitrary and ideologically pre-ordained as conservative justices’ emphasis on federalism. The latter, then, is a legitimate competitor in the marketplace of analytical starting points. This, in turn, leads into an inquiry of whether the judicial mind can responsibly go from the “fundamental value” starting point to infusing formal doctrine with creatures such as “state dignity” and the like. Answering this question requires a discussion of why it might be deemed circumstantially prudent to do so.

## 2. *Federalism Genuflecting or Big Picture Pragmatism?*

The effort so far has been to understand the attitudinal priors of the judicial mind inclined to find concepts such as “equal sovereignty” and “state dignity” intuitively appealing. However, just as empathizing with a child who insists on believing in Santa Claus hardly makes the actual existence of Santa Claus more plausible to the adult mind, so too more work is needed to preclude the dismissal of federalism conceptualizing as anti-pragmatic genuflecting, and thus not a realistic account of how a judge might respond to the various prudential pressures that invariably seep into doctrine.

It is doubtful that even the most reverent judge views federalism as a fundamental value in a manner completely unmoored from the instrumental reasons for doing so, notwithstanding assumptions by some that such “state dignity” verbiage reflects non-instrumentalist motivations.<sup>60</sup> For the penumbral approach is very plausibly interpreted to be at once driven by an exaltation of federalism as a first principle, as well as the need for compromise between the

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58. *Id.* at 471.

59. *Id.* at 504.

60. See, e.g., Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 250–51 (2003) [hereinafter Althouse, *Dignity*] (“This insistence on ‘dignity’ for the states sounds like . . . blind deference to ‘States Rights.’ . . . The normative model [that Althouse supports, that is focused on the utility of federalism] would stop to ask what the state deserves and why.”); Scott Dodson, *Dignity: The New Frontier of State Sovereignty*, 56 OKLA. L. REV. 777, 807 (2003) (“Alarming, the Court has proceeded without so much as pausing to determine if its adoption of the dignity rationale [in the Eleventh Amendment context] furthers traditional normative values of federalism.”).



need to meaningfully sustain federalism in constitutional law while attempting to avoid the more dramatic consequences of enforcing a purer form of it.

Some today hold fast—quaintly or wisely—to Madison’s premise that diffused power serves long-term liberty interests; that even though restraining federal power works short-term inconveniences, it nurtures the long-term subsidiarity that is the hallmark of tame and humble government.<sup>61</sup> Federalism decisions from the Rehnquist Court are a quote-miner’s treasure-trove regarding this utilitarian sentiment.<sup>62</sup>

Of course, it is easy to hold fast to such sentiments in the abstract, but when enforcing them means invalidating many federal laws and undermining expectations that are deeply entrenched in the American legal and political landscape—some of which may fall into what has been termed “the Constitution outside the Constitution”<sup>63</sup>—pragmatism invariably wins out. The Court understands that the power of prestige on which it thrives is a far less formidable power compared to the command of the purse and sword by Congress and the executive respectively.<sup>64</sup> This reality not only theoretically relegates it to “least dangerous”<sup>65</sup> branch status, but compels judges to temperamentally internalize that status in the form of their fear of over-enforcing law. In this regard, federalism has proven to be an albatross for the Court, and a review of its history in jurisprudence makes the current penumbral fruition of the concept utterly unsurprising.

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61. THE FEDERALIST NO. 51 (James Madison) (asserting that federalism and the separation of powers serve as “a double security” in that “[t]he different governments will control each other; at the same time that each will be controlled by itself”).

62. See, e.g., *New York v. United States*, 505 U.S. 144, 181 (1992); *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (“This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government . . .”).

63. Ernest A. Young, *The Constitution Outside the Constitution*, 117 YALE L.J. 408, 411 (2007) [hereinafter Young, *Outside*].

64. Justice Frankfurter described this reality in his dissent to *Baker v. Carr*, 369 U.S. 186, 267 (1962). Believing that the majority’s willingness to adjudicate a state malapportionment dispute was imprudent, Justice Frankfurter protested:

The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

*Id.* (Frankfurter, J., dissenting).

65. THE FEDERALIST NO. 78, at 450 (Alexander Hamilton) (predicting that this would be the judiciary because of its institutional limitations).

That history is familiar to a first-year law student. In the nineteenth century, the Court luxuriously indulged in principled enforcement of dual federalism,<sup>66</sup> but economic and social changes brought on by the Industrial Revolution forced dilution of structural rules.<sup>67</sup> By 1937, it became clear that the gig was up on dual federalism; faced with either sticking to its principled guns or bending the rules to give Congress the regulatory breathing room it needed to jump-start the economy, the Court chose the latter option,<sup>68</sup> especially in light of President Roosevelt's "court packing" threat.<sup>69</sup> Of course, the poster-child for this deference is the Court's decision in *Wickard v. Filburn*<sup>70</sup> where the Court reasoned that when a farmer grows wheat on his private land for personal consumption his conduct is sufficiently related to "interstate commerce" such that Congress may prohibit it in an attempt to stabilize the wheat market.<sup>71</sup>

Fast forward to the Rehnquist era and consider: can a judge, determined to take federalism seriously on some level, be faulted for seeking some pragmatic method of paying federalism principles their due? If the answer is no, is it so implausible that taking a penumbral approach to the Tenth Amendment, and thus hanging one's robe on ethereal concepts such as "state dignity," might be a good-faith effort to pragmatically reconcile the nation's reliance on vast federal power with the need to preserve vertical separation-of-powers for at least some of the benefits it yields?

The answer to this question becomes more apparent upon an evaluation of the alternative approaches available to the federalism-vigilant judge. Enforcing dual federalism is, of course, always an option, but for obvious reasons there's no going home. Yes, as the story is often framed in first-year constitutional law courses (until recently anyway), the judicial deference discussed above, which began during the New Deal era, lasted until the Rehnquist Court ostensibly

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66. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 294 (1936); *Hammer v. Dagenhart*, 247 U.S. 251, 273 (1918); *United States v. E.C. Knight Co.*, 156 U.S. 1, 13 (1895). In all of these cases, the Court struck down federal regulations based on conceptualistic determinations that the given regulated economic activities were not sufficiently "commercial" or "national" so as to be fair game for federal regulation under the Commerce Clause power.

67. See Robert S. Peck, *Extending the Constitutional Right to Privacy in the New Technological Age*, 12 HOFSTRA L. REV. 893, 893 (1984). Peck writes:

Major shifts in constitutional doctrine occurred after the industrial revolution transformed the United States from an agrarian society to a manufacturing giant. As a result of that transition, the scope of the Commerce Clause was expanded to permit regulation of a host of activities never before subject to governmental oversight.

*Id.* (citation omitted).

68. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30–31 (1937) (Court reversing course in its Commerce Clause jurisprudence, and thus ushering in the modern era of extreme deference toward Congressional power generally).

69. See generally William E. Leuchtenburg, *The Origins of Franklin D. Roosevelt's "Court-Packing" Plan*, 1966 SUP. CT. REV. 347 (1966).

70. 317 U.S. 111 (1942).

71. *Id.* at 128–29.

sought to reinvigorate dual federalism.<sup>72</sup> But although scholars regularly refer to the Rehnquist Court years as representing a “federalism revolution,”<sup>73</sup> the doctrinal legacy of this “revolution” will not be dual federalism.<sup>74</sup> The nation is long past the point in bureaucratic and social evolution to make the consequences of true dual federalism sufficiently tolerable to even conservative judges who are, at the end of the day, all pragmatists.<sup>75</sup> Thus, due to the obvious pressure of pragmatism in Rehnquist-era decisions, the general sentiment appears to be that the “federalism revolution” was more a revolution in the Court’s *attitude* toward federalism than a meaningful and consistent doctrinal re-invigoration of dual federalism in the Court’s decisions. For example, writing in 1998, Michael C. Dorf wrote that, far from the Rehnquist Court’s federalism being substantively earth-shaking, the Court appeared to be relatively unconcerned with “pursuing decentralization and the other policy goals that federalism serves.”<sup>76</sup>

In light of contextual realities and the various pressures judges face, a focus on conceptualisms that yield from the *spirit* of federalism is plausibly the solution that occurs to the responsible judicial mind seeking to keep federalism alive as a formal matter. Penumbra federalism thus plausibly represents not an ideological fetishizing of federalism, but rather a pragmatically watered-down version of it. Of course, such a possibility is not apparent to many who think federalism is more an artifact of political history than a legal mandate. Thus, when the Rehnquist Court invoked state dignity in expounding on the Eleventh Amendment, and when scholars responded as if the Court was pursuing a purist and absolutist vision of state sovereignty,<sup>77</sup> scholars such as Professor Ann

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72. See, e.g., Kurt T. Lash, *James Madison’s Celebrated Report of 1800: The Transformation of the Tenth Amendment*, 74 GEO. WASH. L. REV. 165, 166 (2006).

73. See, e.g., *id.* at 165.

74. Ernie Young has concluded that “although scholars and sometimes dissenting judges often worry that the Supreme Court is about to revive dual federalism, it has not in fact done so and is extremely unlikely to do so in the future.” Young, *Puzzling*, *supra* note 10, at 25–26. Therefore, he believes dual-federalism is “dead.” *Id.* at 26.

75. See Edward Cantu, *Posner’s Pragmatism and the Turn Toward Fidelity*, 16 LEWIS & CLARK L. REV. 69, 71 (2012) (explaining that “most, if not all, ‘formalist’ methodologies are most plausibly characterized as forms of pragmatism, thereby rendering as a straw man the formalism that pragmatists rail against: a jurisprudence adherent to pre-ordained abstraction or positive law without any regard to social consequences”).

76. Michael C. Dorf, *The Limits of Socratic Deliberation*, 112 HARV. L. REV. 4, 61 (1998). See also Althouse, *Dignity*, *supra* note 60, at 268 (noting that while she “respect[s] the attempt by the Court’s conservative majority to try to design safeguards” for states’ rights, she “think[s] that it is preferable to take the more drastic step of overruling [*Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)]” to demonstrate that “traditional state functions” are off limits to otherwise legitimate exercises of Congress’ Commerce Clause authority).

77. On this note, contrast Michael Dorf’s comment, above, that the Rehnquist Court was not interested in meaningfully restoring dual federalism, *id.*, with Joseph Fishkin’s charge, discussed further below, that the Rehnquist Court’s federalism jurisprudence represented a vision of

Althouse placed the Court's decisions in the greater context of what pro-federalism voices *wanted* the Court to do, and asserted that "[o]pponents of sovereign immunity law ought to consider the possibility that [the relevant decisions] represent[] a moderate compromise, an alternative to" a more purist and consequential approach.<sup>78</sup>

The need to eschew doctrinaire approaches to structural questions is rather apparent, but it does not necessarily follow that the pragmatic judicial mind would necessarily gravitate toward penumbral federalism, specifically, as the approach to meaningfully keep federalism alive while striking a pragmatic balance. So what use is the penumbral approach aside from serving as a source for satisfying exaltation rhetoric?

When the Court began emphasizing state dignity as the basis for state sovereign immunity (discussed further below), Professor Evan Caminker was one of the first scholars to recognize the possibility that such conceptualizing was more than "window dressing," but rather an "alternative approach to constitutional interpretation."<sup>79</sup> Caminker argued that a focus on states' dignity and reputational interests represents a concern for "expressive harms" caused to states by federal laws that "denigrate" or disrespect the states as separate sovereigns deserving of citizen's loyalty and respect.<sup>80</sup>

Caminker emphasized that it is "surely silly" to characterize the Court's emphasis on state dignity as reflective of viewing the states as actually suffering some "psychic injury," as if they are individuals with real emotions.<sup>81</sup> "A far more plausible characterization," Caminker argued, is that the majorities in the relevant cases believed "that disrespectful treatment of states should not be tolerated because it contravenes the proper understanding of our governmental regime[,] and that "constitutional rules governing issues of federalism should conform with and reflect the nation's political identity."<sup>82</sup> Adam Cox framed the Court's anti-commandeering decisions, discussed further below, in similar terms, arguing that a defense of state dignity might be the Court's attempt to keep the marketplace for citizen loyalty a reasonably competitive one,<sup>83</sup> a posture which, if truly that of conservative justices, represents their learning to

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federalism "locked into an antiquated view of the Reconstruction-era long abandoned by scholars," Joseph Fishkin, *The Dignity of the South*, YALE L.J. ONLINE, 175, 188 (quoting Eric Foner, *The Deciding Vote*, NATION, Mar. 29, 2004, <http://www.thenation.com/article/deciding-vote>).

78. See Althouse, *Dignity*, *supra* note 60, at 267.

79. Evan H. Caminker, *Judicial Solicitude for State Dignity*, 574 ANNALS 81, 82 (2001).

80. *Id.* at 82-83.

81. *Id.* at 85.

82. *Id.*

83. See Adam B. Cox, *Expressivism in Federalism: A New Defense of the Anti-Commandeering Rule?*, 33 LOYOLA L.A. L. REV. 1309, 1324 (2000).

live with the “procedural safeguards”<sup>84</sup> of politics as the primary guardian of states’ rights rather than vigilant and assertive jurisprudence.

The point here is not to “defend” a penumbral view of the Tenth Amendment,<sup>85</sup> but rather to highlight why such a view might take hold in the judicial mind eager to keep federalism alive while also pragmatically accepting that the ratchet of federal power can indeed turn in only one direction, at least if significant disruption to the nation is to be avoided. Having an understanding of penumbral federalism conceptually, as well as an appreciation of why some on the Court would indulge this predisposition in approaching federalism issues, we are better positioned to view decisions in recent decades, combined with decisions from the 2012 term, as part of the same trajectory toward penumbral federalism as an increasingly dominant driver of federalism jurisprudence. The discussion thus must now turn to a descriptive account of how penumbral federalism has informed the Court’s jurisprudence.

## II. PENUMBRAL FEDERALISM’S TRAJECTORY BROUGHT INTO RELIEF

The Court’s express or implied invocation of state dignity is nothing new, and neither is scholars’ focus on the implications of it. On a more general level, scholars began in the late Rehnquist Court years to reflect on how, despite the stir the Court was creating with its federalism decisions, those decisions were largely symbolic and have had little doctrinal staying power. For example, Lynn Baker and Ernest Young wrote in 2001 that the Rehnquist Court’s “most prominent federalism cases . . . have involved fairly minor federal regulatory

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84. This is a reference to the Court’s decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 552 (1985), which the Rehnquist Court never overruled, wherein the Court noted that “[s]tate sovereign interests . . . are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.” This decision is often thought to represent the Court’s “giving up” on enforcing federalism altogether until the Rehnquist Court began its “federalism revolution.”

85. Though it does have some pedigree in the writings of the Founders. For example, in *The Federalist No. 17*, Alexander Hamilton framed federalism as a vertical competition for the “affections” and “good will” of the people. THE FEDERALIST NO. 17 (Alexander Hamilton). Hamilton explained:

Upon the same principle that a man is more attached to his family than to his neighborhood, to his neighborhood than to the community at large, the people of each State would be apt to feel a stronger bias towards their local governments than towards the government of the Union; unless the force of that principle should be destroyed by a much better administration of the latter. . . . The separate governments in a confederacy may aptly be compared with the feudal baronies; with this advantage in their favor, that from the reasons already explained, they will generally possess the confidence and goodwill of the people, and with so important a support, will be able effectually to oppose all encroachments of the national government.

*Id.*

efforts with mostly symbolic impact.”<sup>86</sup> Professor Neil Siegel has similarly described some Rehnquist Court decisions as manifestations of “symbolic federalism,”<sup>87</sup> a phrase Orin Kerr shares: “the theme of the Rehnquist Court’s federalism jurisprudence is [s]ymbolic [f]ederalism. If there is a federalism issue that doesn’t have a lot of practical importance, there’s a decent chance five votes exist for the pro-federalism side.”<sup>88</sup>

However, most scholars recognizing that federalism-vigilance has mostly been “symbolic” in nature have not further unpacked the specific manifestation of that symbolism—namely, protection of state dignity—and situated it within a larger narrative of a wholesale doctrinal shift. Those scholars who have focused on the increasing invocation of state dignity have mostly confined recognition of it to those discrete contexts in which such invocation has been quite express, rather than examining how it is also latent in other evolving areas of federalism jurisprudence.<sup>89</sup> This is understandable, given that only very recently have the Court’s opinions provided indications that the penumbral conceptualizing in the relevant discrete contexts might be seeping into others. This section will introduce the Court’s employment of state dignity in recent federalism decisions, and will ultimately highlight how decisions from the 2012 term—*Shelby County* and *Windsor*—are characterized as a part of this trend.<sup>90</sup>

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86. Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 159 (2001).

87. Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1665 (2006). Cf. Anthony Johnstone, *Commandeering Information (and Informing the Commandeered)*, 161 U. PA. L. REV. 205, 217 (2013) (“[J]udicial safeguards of federalism typically have more bite in narrow, symbolic cases . . . than in larger cases that threaten to undermine long-settled national policies . . .”).

88. Orin Kerr, *The Rehnquist Court and Symbolic Federalism*, SCOTUSBLOG (June 6, 2005, 1:52 PM), <http://www.scotusblog.com/2005/06/the-rehnquist-court-and-symbolic-federalism/>. Kerr noted that the Court’s decision in *Lopez*

resulted in very little change in substantive law. Yes, the decision struck down a federal statute, but it indicated that Congress could quickly reenact the statute with a very slight change. Congress did exactly that: It re-passed the statute with the added interstate commerce element shortly after the *Lopez* decision. Lower courts have upheld the amended statute, and the Supreme Court has shown no interest in reviewing their rulings. Because nearly every gun has traveled in or affected interstate commerce, the federal law of possessing guns in school zones is essentially the same today as it was pre-*Lopez*.

*Id.* See also Ann Althouse, *The Vigor of Anti-Commandeering Doctrine in Times of Terror*, 69 BROOK. L. REV. 1231, 1231 (2004) [hereinafter Althouse, *Times of Terror*] (“Although the Rehnquist Court has acquired a reputation for enforcing federalism, in reality its efforts have not been very robust. So far, the Court has crafted its doctrine to show some deference to state and local government, but it has not threatened federal power where it is seriously needed.”).

89. See, e.g., Dodson, *supra* note 60, at 831.

90. See *infra* Part II.A.

### A. Pre-2012 Specimens

Decisions from the 2012 term, discussed below, invite not only the inference that the Court is more open to animating federalism through penumbral concepts such as state dignity, they also invite a retrospective evaluation of how pre-2012 decisions by the Court can be framed as constituting a conceptual ramping-up to decisions such as *Windsor* and *Shelby County*. It helps to examine the early budding of penumbral federalism in Rehnquist Court decisions before delving into more recent manifestations.

#### 1. State Sovereign Immunity

The doctrinal context in which state dignity has the most pedigree in precedent is the Eleventh Amendment state sovereign immunity context.<sup>91</sup> As Professor Scott Dodson has explained, the Court has relied on state dignity, in this context, since the nineteenth century<sup>92</sup> in decisions such as *In re Ayers*.<sup>93</sup> After going dormant for some time, state dignity reemerged in Rehnquist Court decisions such as *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*,<sup>94</sup> where the Court explained that “[t]he very object and purpose of the [Eleventh] Amendment [is] to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the insistence of private parties.”<sup>95</sup>

In state sovereign immunity decisions following *Metcalf & Eddy*, the Court increasingly began making state dignity the central focus of its Eleventh Amendment jurisprudence in the early twenty-first century. In *Hess v. Port Authority Trans-Hudson Corp.*,<sup>96</sup> the Court noted that “current Eleventh Amendment jurisprudence emphasizes the integrity retained by each State in our federal system[.]”<sup>97</sup> and therefore “sovereign immunity . . . accords the States the respect owed them as members of the federation.”<sup>98</sup> By 2002, it was clear that protection of state dignity was, according to the Court, the primary purpose of the Eleventh Amendment: “The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.”<sup>99</sup> The Court in *Federal Maritime* explained it was not “becoming” of sovereign entities to be required to answer the complaints of private persons in court.<sup>100</sup>

91. See Dodson, *supra* note 60, at 806.

92. *Id.*

93. 123 U.S. 443 (1887).

94. 506 U.S. 139 (1993).

95. *Id.* at 146.

96. 513 U.S. 30 (1994).

97. *Id.* at 39. See also *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 268 (1997) (noting the “the dignity and respect afforded a State, which . . . immunity is designed to protect”).

98. *Metcalf & Eddy*, 506 U.S. at 146.

99. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002).

100. *Id.*

Responding to this evident trend in sovereign immunity decisions, in 2000 Ann Althouse lamented what she termed the “new federalism” represented by abstract and non-functionalist concepts such as state dignity.<sup>101</sup> According to Althouse, beginning with the era of Chief Justice Berger, the Court “began what has become a continuing search for ways to enforce federalism” following the Warren Court’s disinclination to do so.”<sup>102</sup> It began with the relatively normative and functionalist framing of federalism in decisions such as *Younger v. Harris*,<sup>103</sup> of which Althouse approves, and devolved into the increasing invocation of “abstract concepts of the state and its attendant dignities or the abstraction of sovereignty.”<sup>104</sup>

Penumbral dignity language in the Eleventh Amendment context has only grown more bald and unequivocal in the Roberts Court, which is no surprise given the momentum created by the Rehnquist Court, the succession of Chief Justice Roberts, and the continuing influence of Justice Kennedy.<sup>105</sup> A concern for state dignity clearly drove both the majority opinion and Justice Roberts’ dissent (which Justice Alito joined) in the recent decision in *Virginia Office for Protection and Advocacy v. Stewart*.<sup>106</sup> That offensiveness toward state dignity was constitutionally dispositive was uncontroversial; the majority and dissent merely disagreed about how offended state dignity must be before the constitutional line is crossed.<sup>107</sup>

At issue in *Stewart* was the Developmental Disabilities Assistance and Bill of Rights Act of 2000,<sup>108</sup> which offered states federal funds for the improvement of services for citizens with certain disabilities.<sup>109</sup> The Act required states to establish an independent entity, either private or as part of the state government,

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101. Althouse, *Dignity*, *supra* note 60, at 262.

102. *Id.* at 246.

103. 401 U.S. 37 (1971) (establishing that federal courts should abstain from hearing constitutional claims when the remedy is to enjoin state court criminal proceedings). In discussing the federalism implications of the case, Justice Black, presenting the value of federalism in utilitarian terms, asserted that “the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” *Id.* at 44.

104. Althouse, *Dignity*, *supra* note 60, at 249. Althouse further discussed how this dignity rhetoric has spread to doctrine regarding Congress’ power to abrogate state sovereign immunity. *See id.* at 250. *See also* *Alden v. Maine*, 527 U.S. 706, 715 (1999) (“[States] are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty.”); *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996) (noting the “indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties”) (quoting *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (internal quotation marks omitted).

105. Althouse, *Dignity*, *supra* note 60, at 250–52 (discussing Chief Justice Rehnquist’s opinion of sovereign immunity and Justice Kennedy’s reasoning about federalism).

106. 131 S. Ct. 1632 (2011).

107. *Id.* at 1640–41.

108. *See* 42 U.S.C. § 15001 (2012).

109. *Stewart*, 131 S. Ct. at 1635–36.



to advocate for the rights of persons with developmental disabilities.<sup>110</sup> Virginia chose to establish its advocacy office as a state office, the Virginia Office for Protection and Advocacy (VOPA), but with the requisite independence to sue the state should doing so be necessary to combat relevant rights violations.<sup>111</sup> VOPA did just that when the state refused to release the records of patients injured in state-run mental health hospitals.<sup>112</sup>

The Fourth Circuit ruled that the suit was a violation of the Eleventh Amendment because the dispute was an undignified “intramural contest,” that is, one between two state offices.<sup>113</sup> Because of this, federal court adjudication would implicate the “dignity and sovereignty of the states” to a degree sovereign immunity does not allow.<sup>114</sup> This, in turn, precluded the availability of the *Ex Parte Young*<sup>115</sup> doctrine, which allows plaintiffs to circumvent sovereign immunity by naming not the states as defendants but rather state officers in their individual capacities.<sup>116</sup>

The Supreme Court reversed, concluding that the *Ex Parte Young* doctrine was available.<sup>117</sup> According to the majority, the doctrine’s availability did not turn on whether the plaintiff was a private party as opposed to another state entity.<sup>118</sup> Notwithstanding the outcome, the majority implicitly agreed with the notion that dispositive was the degree to which the nature of the suit offended state “stature” and imposed an “indignity” on the states,<sup>119</sup> not the diminution of state coffers or the degree to which suits might *practically* interfere with states’ ability to manage their affairs free from federal interference.<sup>120</sup>

Justices Roberts and Alito, in dissent, characterized states’ dignity as being much more fragile than did Justices Scalia and Kennedy, who joined the majority.<sup>121</sup> Justice Roberts made little effort in explaining how precisely federal court entertainment of “intramural” suits manifestly undermines state

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110. *Id.* at 1636.

111. *Id.*

112. *Id.* at 1637.

113. *Id.*

114. *Id.*

115. 209 U.S. 123 (1908).

116. *See id.* at 167–68.

117. *Stewart*, 131 S. Ct. at 1642.

118. *Id.* at 1639.

119. *Id.* at 1640. The court wrote that,

[t]he . . . indignity against which sovereign immunity protects is the insult to a State of being haled into court without its consent. . . . We fail to perceive what Eleventh Amendment indignity is visited on the Commonwealth when, by operation of its own laws, VOPA is admitted to federal court as a plaintiff.

*Id.*

120. *Id.*

121. *Id.* at 1648–49 (Roberts, C.J., dissenting).

“sovereignty” is some less-than-transcendental sense.”<sup>122</sup> Rather, Roberts employed phraseology suggesting that the offensiveness of the suit to Virginia’s sovereignty was intuitively obvious: “private entities are different from public ones: They are private. When private litigants are involved, the State is not turned against itself.”<sup>123</sup> Immediately following were Roberts’ attempts to highlight the “real difference” between state-state suits and private-state suits with analogies to the distinction between

eating and cannibalism; between murder and patricide. While the ultimate results may be the same—a full stomach and a dead body—it is the means of getting there that attracts notice. I would think it more an affront to someone’s dignity to be sued by a brother than to be sued by a stranger.<sup>124</sup>

Important here is not the outcome of the case, or even the fact that notions of state dignity at times drive application of federalism principles in the Roberts Court, but rather how relatively willing Justices Roberts and Alito were to so stridently allege the doctrinal centrality and importance of state dignity relative to Justices Scalia and Kennedy, who were themselves federalism-vigilant justices during the Rehnquist Court years and remain so. Notably, the former pair are much younger justices than the latter,<sup>125</sup> a fact suggesting that scholars must get accustomed to notions of state dignity animating Court doctrine. They should get less accustomed to assuming that merely because notions such as state dignity and equal sovereignty have little pedigree in precedent, they will not be serious points of discussion in first-year constitutional law classes in the coming decades.

## 2. *Anti-Commandeering*

State dignity is not as obvious of a go-to descriptive rubric in the anti-commandeering context as it is with state sovereign immunity; anti-commandeering jurisprudence is located one or two notches down on the obviousness continuum. But the penumbral framing still fits without much finagling. While an extended discussion of anti-commandeering cases is not warranted here, a brief mention of them, and scholarly reactions, helps to flesh out the gradual fruition of doctrinal penumbral federalism in this context.

In *Printz*, the Court declared unconstitutional on federalism grounds Congress’ attempt via the Brady Handgun Violence Act to force state officials to perform background checks on citizens seeking to purchase firearms.<sup>126</sup> The

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122. *Id.* at 1648, 1651.

123. *Id.* at 1649.

124. *Id.*

125. See *Biographies of Current Justices of the Supreme Court*, SUP. CT. U.S., <http://www.supremecourt.gov/about/biographies.aspx> (Feb. 27, 2015).

126. *Printz v. United States*, 521 U.S. 898, 934–35 (1997).

very language the Court used to characterize what such federal laws “do” to states suggests an attitude of instinctive protectiveness of state dignity and “sovereignty” as an abstract matter. The Court described such federal laws as “commandeering”—that is, taking control by force<sup>127</sup>—state governments and/or officials, and “impress[ion of] state [officials] into . . . service”<sup>128</sup> for federal purposes. Conspicuous was the relative de-emphasis of the material burdens such federal laws place on states, such as diverting state resources to comply with federal law, though certainly such burdens were mentioned.<sup>129</sup> Rather, the Court, focusing on “essential postulates”<sup>130</sup> of the Constitution, employed language suggesting a focus not on the burdens imposed but rather on the disrespect of the States that the Brady Act expressed: Congress was guilty of “reducing them to puppets of a ventriloquist Congress.”<sup>131</sup>

The Court also explained the constitutional problem in terms of political accountability, a line of reasoning pregnant with concerns for the reputational interests of the states, and thus their ability to remain meaningful competitors for voters’ respect:

By forcing state governments to absorb the financial burden of implementing a federal regulatory program, members of Congress can take credit for “solving” problems without having to ask their constituents to pay for the solutions with higher federal taxes. And even when the States are not forced to absorb the costs of implementing a federal program, they are still put in the position of taking the blame for its burdensomeness and for its defects.<sup>132</sup>

The Court employed the same reasoning in *New York v. United States*,<sup>133</sup> the other major anti-commandeering decision from the Rehnquist Court. There, the State of New York challenged a federal law that, among other things, imposed on states the obligation to take title to radioactive waste generated by private generators within their borders, or alternatively to assume the financial liability of those generators should the state fail to take title.<sup>134</sup> The Court characterized this as Congress circumventing direct regulation of private entities by commandeering state governments and, in turn, requiring them to regulate in

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127. MERRIAM-WEBSTER COLLEGIATE DICTIONARY 248 (11th ed. 2003) (defining “commandeer” as “to take arbitrary or forcible possession of”).

128. *Printz*, 521 U.S. at 907.

129. *See id.* at 908–10.

130. *Id.* at 918.

131. *Id.* at 928.

132. *Id.* at 930.

133. 505 U.S. 144 (1992).

134. *See id.* at 153–54 (discussing “the take title provision” of the relevant federal act).

furtherance of Congressional goals.<sup>135</sup> The Court emphasized the accountability—and thus reputational—problem with such arrangements.<sup>136</sup> Specifically, it emphasized that when Congress invokes its powers under the Supremacy Clause and directly regulates private parties—which it could likely do in this context given its power to regulate interstate commerce—it suffers the brunt of future public dissatisfaction with such laws.<sup>137</sup> But, “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.”<sup>138</sup>

Cox was one of few scholars who framed these anti-commandeering decisions as turning on “expressive” concerns; he proposed that “the anti-commandeering rule might serve the important function of representing and reinforcing social understandings of state ‘autonomy’ that are crucial to the production of some of the public goods secured by federalism.”<sup>139</sup> Cox elaborated:

The maintenance of vibrant states that can act as political counterweights to the federal government thus plausibly depends on public perceptions of state autonomy. . . . My tentative claim is that it does so by invalidating certain government action that threatens seriously to undermine these public perceptions. In invalidating such actions, the Court does two related things: it prevents congressional legislation from expressing a particular message that might erode the social understanding of state autonomy, and it simultaneously reinforces that social understanding by expressing due regard for the importance of state autonomy.<sup>140</sup>

Cox’s qualifier of tentativeness made perfect sense at the time, as the Court was far from clear in the above decisions that central to its reasoning was a conscious concern for the expressive aspects of the federal laws in question. But at times during a doctrine’s development, or in the Court’s attitudinal unfolding, legal scholarship must generally focus on what the Court might be *doing* rather than what it is *saying*, as focusing on the latter perhaps insults the intelligence of the justices who should charitably not be deemed to always take their own rhetoric at face value.

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135. See *id.* at 175–76. For example, the Court reasoned that, by requiring states to take title to privately generated waste, Congress effectively required the states to pass laws subsidizing private generators. *Id.*

136. See *id.* at 168–69.

137. *Id.*

138. *Id.*

139. Cox, *supra* note 83, at 1316.

140. *Id.* at 1329.

### 3. Additional Miscellaneous Roberts Court Specimens

This inclination to abandon tentativeness is further stoked by miscellaneous decisions by the Roberts Court that reveal penumbral federalism's increasing tendency to wander the docket like some conceptual strongman ready to pounce where deference to states' special status is most needed to tilt the outcome of a case. The following discussion focuses on a few examples that reveal how penumbral federalism is currently reaching beyond the doctrinal contexts to which it was previously confined by the Rehnquist Court.

#### a. Standing Doctrine: *Massachusetts v. EPA*

A good example is the Court's 2007 standing decision in *Massachusetts v. EPA*,<sup>141</sup> where Massachusetts sued claiming that the EPA was abdicating its statutory duties to regulate greenhouse gases.<sup>142</sup> The EPA argued that Massachusetts did not have standing, as its interest in EPA regulation of greenhouse gases was not greater than the interest generalized to every other state, or, for that matter, every individual citizen interested in living in a reasonably clean environment.<sup>143</sup> Nevertheless, the Court found Massachusetts had standing due to the "special solicitude" states are entitled to in standing analysis given their "quasi-sovereign interests."<sup>144</sup>

The majority's reasoning was predictably rebuked by Chief Justice Roberts in his dissent: "Relaxing Article III standing requirements because asserted injuries are pressed by a State . . . has no basis in our jurisprudence, and support for any such 'special solicitude' is conspicuously absent from the Court's opinion."<sup>145</sup> Roberts went on to discuss how the single case the Court relied upon as precedential support for the "special solicitude" states purportedly receive had nothing to do with standing.<sup>146</sup> To Roberts, the decision was driven by no more than the notion that, even under Article III standing analysis—an analysis the Court theoretically does not have the authority to alter for prudential purposes—states are "special," and courts should treat them as such for reasons detached from traditional federalism constraints.<sup>147</sup>

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141. 549 U.S. 497 (2007).

142. *Id.* at 505.

143. *Id.* at 505–06.

144. *Id.* at 520.

145. *Id.* at 536 (Roberts, C.J., dissenting).

146. *Id.* at 537. Roberts explained:

The Court has to go back a full century in an attempt to justify its novel standing rule, but even there it comes up short. The Court's analysis hinges on *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907)—a case that did indeed draw a distinction between a State and private litigants, but solely with respect to available remedies. The case had nothing to do with Article III standing.

*Id.*

147. *Id.* at 520 (majority opinion).

*b. Personal Jurisdiction: J. McIntyre Machinery, Ltd. v. NiCastro*

Another miscellaneous example of this penumbral federalism popping up to fill analytical gaps is the Court's 2011 personal jurisdiction decision in *J. McIntyre Machinery v. NiCastro*.<sup>148</sup> Great detail is not needed here; the issue was simply whether a federal Court in New Jersey could exercise personal jurisdiction over an out-of-state defendant under the Court's "specific jurisdiction" analysis. It has long been obvious—and is usually recognized as obvious—that specific jurisdiction analysis is a corollary of due process; it simply is not fair for a court to adjudicate the rights and duties of a defendant who has no meaningful contact with the forum state.<sup>149</sup>

Throughout the doctrine's evolution, the Court has suggested that federalism concerns have also driven the Court's insistence on "minimum contacts" between defendants and forum states.<sup>150</sup> But the Court has never made clear—and scholars have never quite figured out—how specific jurisdiction meaningfully implicates federalism. This elephant in the room inspired the Court, in a prior decision, to eventually disclaim a federalism basis for personal jurisdiction:

The restriction on state sovereign power [in the personal jurisdiction context] . . . must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause. That Clause is the only source of the personal jurisdiction requirement and the Clause itself makes no mention of federalism concerns. Furthermore, if the federalism concept operated as an independent restriction on the sovereign power of the court, it would not be possible to waive the personal jurisdiction requirement: Individual actions cannot change the powers of sovereignty, although the individual can subject himself to powers from which he may otherwise be protected.<sup>151</sup>

Despite this attempt to shake the tenacious federalism verbiage in personal jurisdiction analysis, it reappeared again in *NiCastro*, wherein Justice Kennedy, writing for the majority, declared that the limitations imposed by specific

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148. 131 S. Ct. 2780 (2011).

149. See *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) ("A court may subject a defendant to judgment only when the defendant has sufficient contacts with the sovereign such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'") (citation omitted).

150. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291–92 (1980).

The concept of minimum contacts . . . protects the defendant against the burdens of litigating in a distant or inconvenient forum . . . [a]nd it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.

*Id.*

151. *Ins. Corp. of Ir., Ltd. v. Compagnie Des Bauxites De Guinee*, 456 U.S. 694, 703 n.10 (1982).

jurisdiction analysis protects the “federal balance, which posits that each State has a sovereignty that is not subject to unlawful intrusion by other States.”<sup>152</sup>

Just as before, the Court did not elucidate how exactly ensuring “minimum contacts” between defendants and fora advances federalism. Rather, it left readers to conclude that the Court uses federalism in this context as a moral place holder of sorts, one inspired by an intuitive uneasiness, rooted in horizontal federalism, about adjudication absent minimum contacts. Such “disrespectful” behavior by one state toward another is thus similar to the problem that arises when one mows a neighbor’s lawn without permission: in theory it ought to be appreciated, but in practice there is something offensive about it. The problem with this is, of course, that states are not normally heard complaining about the lessening of their judicial workloads due to neighboring states exercising personal jurisdiction over defendants absent “minimum contacts.”

*c. Spending Clause Doctrine: National Federation of Independent Business v. Sebelius*

The Roberts Court’s decision in *National Federation of Independent Business v. Sebelius*,<sup>153</sup> in which the Court struck down a provision of the Affordable Care Act (ACA) (but, as mentioned above, upheld the more controversial “individual mandate”), is likely the most discussed and controversial specimen of Roberts Court federalism.<sup>154</sup> What scholars have generally failed to recognize, however, is that the Court struck that provision by way of a Spending Power analysis that appears to have been driven by a concern for the electoral competitiveness of states—simply put, by a concern that the federal government was making the states look bad.

One aspect of the ACA at issue in *Sebelius* was the so-called “Medicaid expansion.”<sup>155</sup> The law required states to expand Medicaid services to many people who would not qualify under the old Medicaid program.<sup>156</sup> For example, while states traditionally offered Medicaid benefits to those with incomes of about 50% of the federal poverty level, the ACA required states to cover all persons under sixty-five who earned well *over* the poverty level: specifically, 133% of the poverty level.<sup>157</sup> Under the ACA, the federal government would not completely fund this expansion, leaving it to the states to partially fund it.<sup>158</sup> The crux for the states was, if they refused to fund the expansion, the ACA allowed the Department of Health and Human Services to withdraw all Medicaid

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152. *NiCastro*, 131 S. Ct. at 2789.

153. 132 S. Ct. 2566 (2012).

154. *Id.* at 2600–04.

155. *Id.* at 2581. *See also* 42 U.S.C. § 1396a(a)(10) (2012).

156. *Sebelius*, 132 S. Ct. at 2581.

157. *Id.* 2581–82.

158. *Id.* at 2601.

funding the states had been regularly receiving from the federal government under the old program.<sup>159</sup>

The expansion was challenged as beyond Congress' power under the Spending Clause of Article I.<sup>160</sup> Specifically, the petitioners argued that, per the Court's jurisprudence, the threat of complete Medicaid defunding was so financially threatening to the states such that the expansion provision amounted to unconstitutional coercion of state governments.<sup>161</sup> The Court agreed, emphasizing that the states had acted in reliance on prior funding by Congress, developing "intricate statutory and administrative regimes over the course of many decades."<sup>162</sup> Thus, the Court asserted that "the financial 'inducement' Congress has chosen is much more than 'relatively mild encouragement'—it is a gun to the head" of the states.<sup>163</sup>

Importantly for present purposes, Chief Justice Roberts, before addressing the above mentioned practical burdens faced by the states under the Medicaid expansion, took care to explain why such coercion was constitutionally significant beyond satisfying the abstract coerciveness test itself.<sup>164</sup> Roberts emphasized the problems of political accountability that coercion created: "Permitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system."<sup>165</sup> Roberts explained that, under coercive spending conditions, "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."<sup>166</sup> Roberts continued:

Spending Clause programs do not pose this danger when a State has a legitimate choice whether to accept the federal conditions in exchange for federal funds. In such a situation, state officials can fairly be held politically accountable for choosing to accept or refuse the federal offer. But when the State has no choice, the Federal Government can achieve its objectives without accountability . . . .<sup>167</sup>

Roberts then expressly invoked the accountability reasoning in *New York* and *Printz*, as explicated in the Dormant Commerce Clause context, as just as applicable in this context.

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159. *Id.* at 2572 ("[I]f a State does not comply with the Act's new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds.").

160. *Id.* at 2601. The Spending Clause empowers Congress "to pay the Debts and provide for the . . . general Welfare of the United States . . ." U.S. CONST. art. I, § 8, cl. 1.

161. *Sebelius*, 132 S. Ct. at 2581–82.

162. *Id.* at 2604.

163. *Id.*

164. *See id.* at 2602–03.

165. *Id.* at 2602.

166. *Id.*

167. *Id.* at 2602–03.



The Court's most recent Spending Clause decision, then, reveals the Roberts Court's willingness to inject into this area of doctrine a concern for state status: specifically, for its democratic viability in competing for citizen loyalty and approval. The Court thus made operative for purposes of federalism analysis a problem wholly distinct from considerations of material state sovereignty or regulatory autonomy.

The implicit penumbral federalism stubbornly present in civil procedure decisions, as well as all of the other specimens discussed above, lead into the 2012 term and beg the question: in light of recent history, to what extent do Roberts Court decisions of that term further suggest a wholesale, even if gradual, transition in the Court's federalism doctrine toward Tenth Amendment penumbral conceptualizing? Tentativeness is still wise, though perhaps less necessary than during the Rehnquist era; a discussion of *Windsor* and *Shelby County* illustrates why.

### B. The 2012 Term: *Windsor* and *Shelby County*

The 2012 term provides evidence that, aside from a willingness to emphasize dignity in the sovereign immunity context with an unprecedented degree of straight-faced conviction, the penumbral approach to animating the Tenth Amendment's requirements is spreading to other doctrinal contexts. The best examples of this are the Court's decisions in *Windsor* and *Shelby County*.

#### I. *Windsor* v. United States

*Windsor* involved the constitutionality of section 3 of the Defense of Marriage Act (DOMA), which provided that same-sex married couples—that is, legally married couples under the laws of their respective states—could not qualify for, among other things, various federal tax benefits available to opposite-sex married couples.<sup>168</sup> Many suspected the Court would declare the DOMA provision invalid on traditional federalism grounds because the provision allegedly “usurped” the states’ traditional role of regulating marriage within their borders.<sup>169</sup> As this reasoning goes, by rejecting the state definition of marriage for federal law purposes, Congress interfered with New York’s sovereign authority to define marriage as it sees fit.<sup>170</sup> This is the more traditional freestanding form of the federalism argument: states have the right to regulate within their borders certain matters of traditionally local concern, and Congress cannot stop them from doing so.<sup>171</sup> Alternatively—and, frankly, as the

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168. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

169. See, e.g., Randy Barnett, *Federalism Marries Liberty in the DOMA Decision*, SCOTUSBLOG (June 26, 2013, 3:37 PM), <http://www.scotusblog.com/2013/06/federalism-marries-liberty-in-the-doma-decision/>.

170. *Id.*

171. See *id.*

much stronger argument—the Court could have declared the provision a violation of equal protection principles as traditionally explicated, due to the discriminatory provision having no basis other than animus toward a politically unpopular group, thereby failing rational basis review under established equal protection reasoning.<sup>172</sup>

The Court took neither approach. Rather, its reasoning is best characterized as focused on the *offensiveness* of the federal law to state sovereignty as a highly abstract matter. To understand why this is the case, it is necessary to discuss both how the Court explained itself and the facial problems with that explanation.

Justice Kennedy, in ramping up the majority's analysis, preliminarily noted that it was “unnecessary to decide whether this *federal intrusion on state power* is a violation of the Constitution because it disrupts the federal balance[.]” and immediately declared that the “[s]tate's power in defining the marital relation is of central relevance in this case *quite apart from principles of federalism*.”<sup>173</sup> These lines, which the Court provided in quick succession, speak volumes in their failure to facially communicate anything coherent.

The glaring problem is that the Court characterized DOMA as a “federal intrusion on state power,” but in the same sentence declared it was not deciding whether such intrusion “disrupts the federal balance.”<sup>174</sup> Of course, federal intrusion on state power is the very definition of “disrupting the federal balance.” And disruption of the federal balance is the very thing “principles of federalism” classically prohibits. Facially, these assertions in *Windsor* are so collectively schizophrenic that no judge worth their salt could write them in quick succession without understanding, and likely leveraging, their contradictory nature.

To make matters worse, the majority asserted that “principles of federalism” were not relevant (“quite apart from”), but yet declared that the “[s]tate's power in defining the marital relations [was] of central relevance” to the case. If the Court believed that “principles of federalism” were not significant to the case, but nevertheless thought the “state's power,” and New York's decision to exercise that power, were “central” to the case—clearly a federalism concern—then what kind of federalism is at work here?

In explaining *why* the states' “power in defining the marital relation” was central, the Court quickly merged into individual rights language: New York used its “historic and essential authority” to confer on same-sex couples “a dignity and status of immense import.”<sup>175</sup> The opinion continued with this evasive conceptual oscillation between federalism and equal protection:

The arguments put forward by [DOMA's defenders] are . . . candid about the congressional purpose to influence or interfere with state

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172. See *Romer v. Evans*, 517 U.S. 620, 631–32 (1996).

173. *Windsor*, 133 S. Ct. at 2692 (emphasis added).

174. See *id.*

175. *Id.*

sovereign choices about who may be married. As the title and dynamics of the bill indicate, its purpose is to discourage enactment of state same-sex marriage laws and to restrict the freedom and choice of couples married under those laws if they are enacted. The congressional goal was “to put a thumb on the scales and influence a state’s decision as to how to shape its own marriage laws.” . . . DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.<sup>176</sup>

Language such as this makes rather clear that at some level *Windsor* was about federalism, but the degree to which this is true is unclear, especially in light of the Court’s ultimate claim that DOMA was invalid under equal protection principles via the Fifth Amendment. To conclude that “principles of federalism” were irrelevant, one must ignore the Court’s repeated, methodical, and crutching injection of state sovereignty language into what otherwise would resemble a traditional equal protection analysis. Hence Justice Roberts’ dissenting assertion that “it is undeniable that [the Court’s] judgment is based on federalism.”<sup>177</sup> Even scholars relatively inclined to accept judicial reasoning as explicated on its face have recognized this.<sup>178</sup>

Besides the opinion’s actual language, it is highly likely that the signatory justices had federalism concerns front and center in their minds given what is known about those justices’ philosophies.<sup>179</sup> For this reason, scholars such as Ernest Young threw their weight behind federalism attacks on DOMA long before the Court handed down its decision,<sup>180</sup> and scholars generally assumed that not only would Kennedy author the *Windsor* opinion, but also that the resulting opinion would invalidate the relevant DOMA provisions on freestanding federalism grounds.<sup>181</sup> Importantly, however, there is a big problem with the freestanding federalism approach, a problem that likely explains why the Court did not take this route.

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176. *Id.* at 2693, 2695.

177. *Id.* at 2697 (Roberts, C.J., dissenting).

178. *See, e.g.,* Young, *Defining Rights*, *supra* note 5, at 46 (“Congress’s usurpation of the states’ role was a pervasive factor throughout the Court’s equal protection analysis.”).

179. *See, e.g.,* Erin Fuchs, *Justice Kennedy’s Former Clerk Explains Why He Thinks His Old Boss Killed the Defense of Marriage Act*, BUS. INSIDER (June 28, 2013, 1:17 PM), <http://www.businessinsider.com/why-did-kennedy-strike-down-doma-2013-6>.

180. *See Brief of Federalism Scholars as Amici Curiae in Support of Respondent Windsor* at 3–4, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307) (arguing that regulation of marriage is “reserved to the states,” and that section 3 of DOMA unconstitutionally “lacks a limiting principle to cabin its usurpation of state control over domestic relations”).

181. *See, e.g.,* Richard Socarides, *The Biggest Stakes in the Supreme Court Marriage Cases*, THE NEW YORKER (June 24, 2013), <http://www.newyorker.com/news/news-desk/the-biggest-stakes-in-the-supreme-court-marriage-cases>.

Fundamentally, federalism amounts to the same type of “negative liberty”<sup>182</sup> for states that individuals enjoy under individual rights provisions: it protects states’ ability to *do things*—namely regulate within their borders—without the federal government stopping them.<sup>183</sup> The analytical elephant in the room is that DOMA did not prevent New York from recognizing same-sex marriage and making such marriages legally valid generally.<sup>184</sup> What it *did* do is declare that such state policy would not control how federal law would be applied in New York. Thus, far from precluding the legalization of same-sex marriage in the states, DOMA declared that such state sovereign decisions would not govern in discrete federal-law contexts.<sup>185</sup> Indeed, one could go so far as to argue—plausibly but not necessarily persuasively—that Section 3 of DOMA protected *federal* regulatory autonomy from excessive *state interference*. Those who advanced freestanding federalism arguments faced the task of demonstrating that state sovereignty included the ability not only to legalize same-sex marriage, and define marriage for purposes of state law, but also to dictate how federal tax law would be applied within their borders. This argument is too ambitious; but the stench of federal arrogance was strong, as that stench was what inspired good-faith federalism arguments in the first place. So how should the judge sensitive to this arrogance and its implications frame and tackle the problem?

The best conclusion is that the majority (especially Justice Kennedy) believed DOMA “offended” state autonomy by disregarding state laws in regulatory contexts wherein states have been traditionally thought to reign supreme.<sup>186</sup> Federalism in *Windsor* took the form of indignance that the federal government would disregard the moral determinations made by state legislatures of the propriety of certain marital arrangements.<sup>187</sup> The *symbolic* flouting of state policy determinations about matters of traditionally local concern represented nothing more than federal disrespect (rather than a material usurpation) of the states’ traditional relationship with its own citizens. Such can hardly be deemed

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182. Used here to mean its usual meaning: freedom from government action. *See, e.g.*, STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 5 (2005) (defining it as the “freedom to pursue [one’s] own interests and desires free of improper government interference”).

183. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418, 431 (1979) (“The essence of federalism is that states must be free to develop a variety of solutions to problems and not be forced into a common, uniform mold.”); Fishkin, *supra* note 77 (“[S]tates are sovereign in that they possess the power to make law.”). Of course, the flip side of this definitional coin is that federalism protects individuals from federal laws that dabble in the state regulatory province, even absent some state law with which the federal law “interferes.” But this still presupposes that the federal law does indeed regulate in a manner in which only state law is constitutionally permitted.

184. *United States v. Windsor*, 133 S. Ct. 2675, 2683 (2013).

185. *See id.*

186. *See* Barnett, *supra* note 169.

187. *See* Ernest A. Young & Erin C. Blondel, *Federalism, Liberty, and Equality in United States v. Windsor*, 2012–2013 CATO SUP. CT. REV. 117, 139–40 (2012).

a “federalism” problem unless the operative conception of federalism is that it serves not only as a check on substantive federal regulatory overreach, but also as a mechanism of maintaining a healthy dynamic of federal humility and state prestige.

Scholarly responses that have tried to nudge the opinion toward a close increment of doctrinal or theoretical coherence have proven unsatisfactory. This is largely because they resort to, or rely on, more traditional doctrinal rubrics, predominantly the problematic freestanding federalism premise discussed above. As such, no explanation of the *Windsor* opinion is as satisfactory as the penumbral framing: that the decision was driven by the offensiveness of DOMA to state dignity.

Ernest Young, for example, has been at the forefront of noted scholars offering rational reconstructions of the *Windsor* opinion. He and Erin Blondel have argued that, contrary to the reactions of some who described the opinion as making little sense, it was actually a “brilliant” illustration of how “federalism and equality doctrine intersect,”<sup>188</sup> and how the debate over which set of principles “truly” drove the opinion—federalism or equal protection—misses the fundamental ways these two broad constitutional principles are pervasively intertwined.<sup>189</sup> The ultimate point Young and Blondel set out to establish is not the relatively unambitious notion that the federalism and equal protection analyses in the opinion *independently* work to buttress the correctness of the Court’s judgment, but rather that the conceptual intermingling of the two is perfectly consistent with traditional doctrinal understandings.<sup>190</sup> Their argument seems to strain to fit the Court’s opinion into established doctrinal and theoretical molds, and does not allow for the judicial perversion of those molds that descriptive legal realism requires. Hence, in this posture Young, in separate work, overreaches in declaring that the opinion was not “muddled or vague” as scholars almost unanimously claim; on the contrary, “the rationale is actually quite evident on the face of [the] opinion.”<sup>191</sup>

Young and Blondel begin with the noncontroversial propositions that the “Constitution’s structural features” are designed to ultimately “secure the liberty of the people[,]” and that, sometimes, “rights and structure intersect at the doctrinal level as well.”<sup>192</sup> The problem is, the argument never persuasively illustrates how these propositions prove the point specifically with regard to the *Windsor* opinion; that is, how these general truths work to reconcile the Court’s invocation of federalism principles in its equal protection analysis, given the unusual and conspicuous manner in which the Court intermingled the

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188. *Id.* at 119.

189. *Id.* at 118.

190. *See id.* at 118–19.

191. Young, *Defining Rights*, *supra* note 5, at 40.

192. Young & Blondel, *supra* note 187, at 118.

abstractions. It is, after all, the method actually used, not the latent possibilities, that has drawn charges of nonsense from many commenters.<sup>193</sup>

For example, Young and Blondel argue that “[t]he Court decided *Windsor* primarily on the ground that DOMA lacked any legitimate federal interest.”<sup>194</sup> That is, while under “traditional rational basis review” the Court does not usually “hold the legislature to its actual purpose as long as some possible basis justifies the law,”<sup>195</sup> “[f]ederalism . . . helps explain why the Court limited its review to DOMA’s *actual* purpose” of asserting a moral position on marriage.<sup>196</sup> Thus, as the argument goes, the fact that Congress’ actual purpose implicated marriage policy—the traditional turf of the states—had the effect of intensifying the equal protection scrutiny the Court applied.

The problem, however, is one that Young and Blondel anticipate but never fully confront: coherent precedent already calls for a consideration of actual purposes under rational basis review when laws discriminating against homosexuals are involved. In *Romer v. Evans*,<sup>197</sup> the Court addressed the constitutionality of a Colorado state constitutional amendment that forbade localities from enacting legislation protective of homosexuals.<sup>198</sup> In allegedly applying rational basis review, the Court dismissed theoretically conceivable interests of the state in passing the amendment, and concluded that its actual purpose was to create a “classification of persons . . . for its own sake,” based on animus toward that group.<sup>199</sup>

*Romer* provides an obviously available and precedential basis for inquiry into actual purposes. Young and Blondel provide little reason to conclude that federalism concerns provoked this aggressive inquiry rather than the fact that DOMA was a law that discriminated against homosexuals “for its own sake,” based on animus toward them as a class.<sup>200</sup> Their response, judging from their article, would be that the Court’s repeated allusion to federalism principles makes this apparent: “each time that Kennedy mentioned dignity, he emphasized that this was a relationship [that] *the State* has sought to dignify. Each of the burdens that he cited deprived same-sex couples of state-law rights and

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193. See, e.g., Tara Helfman, *A Ruling Without Reason*, COMMENT. (June 6, 2013, 4:15 PM), <https://www.commentarymagazine.com/2013/06/26/a-ruling-without-reason/> (“In a 26-page opinion brimming with constitutional catch phrases but containing no coherent rationale, the Court delivered an outcome that many find politically favorable but that no serious reader could possibly find legally sound.”).

194. Young & Blondel, *supra* note 187, at 142.

195. *Id.* at 138.

196. *Id.* at 140.

197. 517 U.S. 620 (1996).

198. *Id.* at 623–24.

199. *Id.* at 635.

200. This, in turn, demonstrates why a traditional equal protection analysis would have been a more coherent avenue for disposition, as well as one more grounded in precedent. See Young & Blondel, *supra* note 187, at 139.

responsibilities.”<sup>201</sup> But highlighting the fact that the Court emphasized federalism loops back only to the obvious fact that the Court indeed repeatedly and methodically did so. Unanswered is the question of *why* it did so—which re-begs the question of how Young and Blondel’s proffered explanation is more plausible than others’. Because the Court, in light of *Romer*, did not need to rely on federalism principles in order to justify inquiry into actual purposes, their argument is unpersuasive.<sup>202</sup>

The specific manner in which Young and Blondel allege federalism animated the Court’s analysis is made less convincing given that they do not make it altogether clear how DOMA, as they put it, “intruded on the states’ sovereign authority to define marriage for themselves.”<sup>203</sup> And, indeed, this is where the alternative reading of *Windsor* proposed herein surfaces, for Young and Blondel’s analytical approach illustrates the need to adapt to conceptual mutations prompted by Court creativity, rather than to stretch traditional frameworks to translate that creativity into a familiar language.

The closest Young and Blondel come to explaining the alleged “intrusion” on state sovereignty is their highlighting of various *inconveniences* suffered by the states in complying with DOMA.<sup>204</sup> For example, “DOMA required state officials to disregard state law when administering federal programs. State officials administering veterans’ cemeteries, for example, had to exclude veterans’ same-sex spouses in spite of state law.”<sup>205</sup> As another example, “DOMA interfered with implementing and enforcing state law itself and imposed substantial costs on the states. For example, it made spousal-support

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201. *Id.* (citation omitted) (internal quotation marks omitted).

202. This problem also infects Young’s argument that *Windsor* merely reflects—albeit implicitly—the widely accepted notion that equal protection analysis “require[s] governments to recognize rights that they have already created, or that other governments have created, as a matter of positive law.” Young, *Defining Rights*, *supra* note 5, at 42. As the argument goes, much like it would default to state law in, say, defining property interests for purposes of unconstitutional Takings claims, the Court in *Windsor* simply took the state’s definition of a “class of similarly situated persons” for equal protection purposes. *Id.* at 43. Again, this merely re-begs the question of why the Court did not bother stating or clearly suggesting that this drove its analysis. Indeed, had the Court followed this allegedly well-established analytical path, the Court’s failure to simply state as much, instead opting to repeatedly and vaguely reference state sovereignty, would seem all the more strange if Young were correct. Also, Young did not provide examples of the Court ever borrowing from state law for purposes of equal protection analysis in the manner it allegedly did so in *Windsor*. See text accompanying *supra* notes 192–93. Thus, Professor Randy Barnett appears to disagree with Young’s “borrowing” premise. See Barnett, *supra* note 169 (asserting that the Court “transcend[ed] . . . doctrinal line[s] by using *state laws* to identify an individual’s liberty interest that justifies subjecting a *federal law* to heightened scrutiny. This is not how the doctrine has previously worked”).

203. Young & Blondel, *supra* note 187, at 118.

204. *Id.* at 131.

205. *Id.*

orders between same-sex couples unenforceable in bankruptcy”<sup>206</sup> and the like. It is not obvious that—nor even apparent how—these intersections of federal and state law amount to federal “intrusion” on state sovereign policy choices. Federal and state law interact regularly, and Young and Blondel provide no precedential support for the idea that such interactions categorically amount to federal “usurpation.”

The point is not that Young and Blondel are wrong to focus on DOMA’s purposes in characterizing how federalism inspired the Court’s equal protection analysis; this article after all does the same thing. In this sense, they are correct in disagreeing with the excessively dismissive criticism that the opinion amounted to only meaningless “blather about traditional state sovereignty and marriage.”<sup>207</sup> But they go to the opposite extreme with their formalism. Where their analysis seemingly fails is in concluding that DOMA’s purpose was problematic because it, under a traditional conception of federalism and what federalism violations look like, interfered with New York’s regulatory sovereignty.<sup>208</sup> If we take a different approach and keep *Windsor*’s federalism as we find it—as least as much as we can while making sense of it—it is best characterized as an expressive answer to an expressive problem created by Congress: a formal flouting of the states’ moral authority.

## 2. *Shelby County v. Holder* and “Equal Sovereignty”

*Shelby County* reveals itself to be an example of penumbral federalism in action in much the same way *Windsor* does: through a focus not only on Court language but also through the tacit rejection of prudential approaches more analytically forceful and rooted in precedent, in favor of question-begging federalism conceptualizing.

In *Shelby County*, the Court addressed the continuing validity of the Voting Rights Act (VRA).<sup>209</sup> The VRA, passed pursuant to Congress’ authority to enforce the Fifteenth Amendment,<sup>210</sup> regulates the states’ management of their elections to ensure state laws do not impede voting on the basis of race or

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206. *Id.*

207. Young, *Defining Rights*, *supra* note 5, at 46 (quoting Sandy Levinson, *A Brief Comment on Justice Kennedy’s Opinion in Windsor*, BALKINIZATION (June 26, 2013), <http://balkin.blogspot.com/2013/06/a-brief-comment-on-justice-kennedys.html> [hereinafter Levinson, *Brief Comment*]).

208. Young & Blondel, *supra* note 187, at 118.

209. *Shelby Cnty. v. Holder (Shelby County)*, 133 S. Ct. 2612, 2621–22 (2013).

210. Section 1 of the Fifteenth Amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. CONST. amend. XV, § 1.



systemically disable racial minorities from electing their preferred candidates.<sup>211</sup> Important for present purposes are two provisions of the VRA.

First, Section 5 of the VRA required that states “pre-clear” changes to their election laws with the U.S. Attorney General before these laws could go into effect.<sup>212</sup> The original reason for this remedy made perfect sense when the VRA was enacted, and it arguably still does: the standard remedy of enforcement through private suit was inadequate in light of the costs and time necessary to fully and effectively pursue such litigation.<sup>213</sup>

Second, Section 4 of the VRA established the geographical “coverage” of the VRA’s pre-clearance provision.<sup>214</sup> Because the problem of race-based disenfranchisement was heavily concentrated in the southern states when the VRA was originally enacted in 1965, the most aggressive provisions of the law, including the preclearance requirement, only covered those states.<sup>215</sup>

The problem in *Shelby County* was that Congress had not, since 1965, reevaluated whether changed circumstances brought the original coverage formula out of sync with the otherwise legitimate purpose of the statute.<sup>216</sup> According to the Court, continued reliance on forty year-old data made the coverage formula in Section 4 “irrational,”<sup>217</sup> and thus unequal treatment of the states based on such data was a violation of the “principle of equal sovereignty.”<sup>218</sup> This means, according to the Court, that pre-clearance was not a valid exercise of Congress’ power to “enforce” the Fifteenth Amendment with

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211. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified at 42 U.S.C. § 1973 (2012)).

212. *Id.* § 5, 79 Stat. at 439.

213. As the Court noted in *South Carolina v. Katzenbach*, wherein the Court originally upheld the VRA:

Voting suits are unusually onerous to prepare, sometimes requiring as many as 6,000 manhours spent combing through registration records in preparation for trial. Litigation has been exceedingly slow, in part because of the ample opportunities for delay afforded voting officials and others involved in the proceedings. Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration. Alternatively, certain local officials have defied and evaded court orders or have simply closed their registration offices to freeze the voting rolls.

383 U.S. 301, 314 (1966) (citation omitted).

214. § 4(b), 79 Stat. at 438, *invalidated by Shelby County*, 133 S. Ct. at 2612.

215. *See id.*

216. *Shelby County*, 133 S. Ct. at 2628.

217. *Id.* at 2629 (emphasizing that “Congress . . . reenacted a [coverage] formula based on 40-year-old facts having no logical relation to the present day[,]” and noting the “irrationality of continued reliance on the § 4 coverage formula” in imposing preclearance).

218. *Id.* at 2623 (internal quotation marks omitted).

“appropriate” legislation, a power Section 2 of the Amendment expressly grants Congress.<sup>219</sup>

As discussed below, the “fundamental principle of equal sovereignty” was not necessary to the Court’s decision. Regardless, the phraseology is there, and very deliberately so; which begs the question of why. Given that the Court prominently showcased equal sovereignty to justify the outcome, scholars predictably focused on the legitimacy of it as a “fundamental principle.” They were virtually unanimous in their rejection of equal sovereignty as a legitimate and controlling aspect of either the Court’s federalism jurisprudence or the meaning of the Constitution as an original matter.<sup>220</sup> No doubt, scholars and Justice Ginsburg in her dissent were right to note the disingenuousness of the majority’s suggestion that equal sovereignty has long been recognized as a “fundamental principle” in the Court’s case law. But most commenters went further.

According to a vast majority of commenters, equal sovereignty as a constitutional rule was implausible and the product of rhetorical trickery. For example, Sanford Levinson accused Chief Justice Roberts of basing his analysis on nothing more than the fact that “he, as a legislator, would not have joined Congress’s overwhelming 2006” renewal of the VRA.<sup>221</sup> Professor Richard Hasen accused the majority of “hid[ing] behind a cloak of judicial minimalism,” and characterized Roberts as a “patient man playing a long game[,]”<sup>222</sup> leaving the reader to cynically wander through the darker possibilities in determining what exactly the “game” is. According to Hasen, the majority issued an “audacious opinion that ignored history”<sup>223</sup> and was “nefarious” in avoiding answering certain doctrinally important questions.<sup>224</sup> Conservatives ready to defend the Court’s reasoning were hard to find.<sup>225</sup> Richard Posner announced that the *Shelby County* ruling was “about the conservative imagination,” declaring that the equal sovereignty principle was a “principle of constitutional law of which I had never heard—for the excellent reason that . . . there is no

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219. Section 2 reads: “The Congress shall have power to enforce this article by appropriate legislation.” U.S. CONST. amend. XV, § 2.

220. See, e.g., *id.* at 70–71 (noting that the Court suddenly used equal sovereignty to override Congress in *Shelby County*).

221. Levinson, *supra* note 28.

222. Richard L. Hasen, *The Chief Justice’s Long Game*, N.Y. TIMES, June 25, 2013, available at [http://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html?\\_r=0](http://www.nytimes.com/2013/06/26/opinion/the-chief-justices-long-game.html?_r=0).

223. Richard L. Hasen, *Shelby County and the Illusion of Minimalism*, 22 WM. & MARY BILL RTS. J. 713, 714 (2014).

224. *Id.* at 730.

225. Professor Richard Epstein was one of the few outliers. See Richard Epstein, *The Cynicism of the Voting Rights Act’s Defenders*, RICOCHET (Apr. 2, 2014), <https://ricochet.com/archives/the-cynicism-of-the-voting-rights-acts-defenders/>.

such principle.”<sup>226</sup> According to Posner, “apart from the spurious principle of equal sovereignty, all that the majority had on which to base its decision was tenderness for ‘states’ rights”:<sup>227</sup> “there is no doctrine of equal sovereignty. The opinion rests on air.”<sup>227</sup> As such, the opinion must have been driven not by a concern for “states’ rights in some abstract sense, but for” the policy preferences of the majority.<sup>228</sup>

Most interesting about these responses is the manner in which the writers implicitly framed the underlying legal question, and thus what plausible answers may yield from an honest tackling of that question. Even the relatively “conservative” scholars seemed to assume that if a federalism-driven rule or principle such as “equal sovereignty” has not either been invoked before by the Court, or has no demonstrable role in the political theory musings of the founding generation, its validity is highly suspect, as are the intentions of those who invoke it. Hence responses like Eric Posner’s, charging that the notion of equal sovereignty is a “newly invented idea” and “a joke” in a “pretty lame” opinion,<sup>229</sup> or that the majority engaged in nothing but legislating from the bench.<sup>230</sup>

These reactions reflect prevailing expectations of what federalism reasoning is supposed to look like. But, using the penumbral lens, the majority’s reasoning in *Shelby County* can be read without much imagination as embodying a genuine belief about how federalism principles compelled the outcome obtained. A belief that federalism and the Tenth Amendment are quintessentially about not only the division of regulatory power but also about maintaining the states as viable competitors for citizens’ respect and loyalty, must make unequal burdening of the states by Congress at least preliminarily problematic, even if reasonable people can disagree about the ultimate propriety of such unequal treatment in specific contexts.

Besides the Court’s unembarrassed invocation of the ethereal federalism abstraction of “equal sovereignty,” other aspects of the opinion support the characterization of the opinion as falling on the penumbral federalism trendline. Most conspicuous is the fact that the Court did not need to rely on equal sovereignty in order to reach its conclusion. In fact, the two most obvious alternate routes would not only have more closely paralleled precedent and

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226. Richard A. Posner, *Supreme Court 2013: The Year in Review*, SLATE (June 26, 2013, 12:16 AM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/the\\_supreme\\_court\\_and\\_the\\_voting\\_rights\\_act\\_striking\\_down\\_the\\_law\\_is\\_all.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/the_supreme_court_and_the_voting_rights_act_striking_down_the_law_is_all.html).

227. *Id.*

228. *Id.*

229. Eric Posner, *John Roberts’ Opinion on the Voting Rights Act is Really Lame*, SLATE (June 25, 2013, 1:44 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2013/supreme\\_court\\_2013/supreme\\_court\\_on\\_the\\_voting\\_rights\\_act\\_chief\\_justice\\_john\\_roberts\\_struck.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2013/supreme_court_2013/supreme_court_on_the_voting_rights_act_chief_justice_john_roberts_struck.html).

230. See Levinson, *supra* note 28.

constitutional text, but also would have allowed the Court to go farther than it did and strike down preclearance altogether. A brief discussion of these alternatives, and the fact that the Court rejected them, helps to highlight how conspicuous it is that the Court chose to emphasize equal sovereignty, and thus underscores how that emphasis represents a conceptual priority in the minds of the majority justices.

Again, Congress passed the VRA pursuant to its power under Section 2 of the Fifteenth Amendment. After providing in Section 1 that states may not deny or abridge the right to vote on the basis of race, the Amendment provides that “Congress shall have power to enforce this article by appropriate legislation.” Since, theoretically at least, Congress can only exercise enumerated powers, it follows that if any provision of the VRA is not “appropriate” to “enforce” Section 1 as the terms are used in the Amendment, it is unconstitutional. Thus, much of the debate before and after *Shelby County* revolved around the contextual meaning of the terms “appropriate” and “enforce.”<sup>231</sup>

Unsurprisingly, then, the interpretive question is crucial primarily because the correct answer determines the deference level with which courts should approach questions of congressional power in the Reconstruction Amendment context. Some argue that the “appropriate/enforce” language triggers the same degree of congressional latitude as does the Necessary and Proper Clause with regard to Article I powers,<sup>232</sup> which according to recent jurisprudence is an extremely forgiving rationality analysis.<sup>233</sup> Indeed, the Court itself in *South Carolina v. Katzenbach*,<sup>234</sup> in upholding the original VRA, squarely asserted that “[a]s against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”<sup>235</sup>

This leads to easy-way-out number one. Recall that the Court in *Shelby County* characterized Congress’ reliance on forty year-old data as “irrational.”<sup>236</sup>

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231. See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966).

232. See, e.g., Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1810–11 (2010) (arguing that the enforcement provisions under the Reconstruction Amendments were intended to bestow on Congress the same breadth of power granted under the Necessary and Proper Clause). Cf. Akhil Reed Amar, *The Lawfulness of Section 5 – and Thus of Section 5*, 126 HARV. L. REV. F. 109, 113 (2013) (arguing that it would be ironic to view the VRA’s coverage provision as unconstitutional in light of the coercive and unequal conditions under which the former-Confederate states ratified the Reconstruction Amendments and rejoined the Union).

233. See *United States v. Comstock*, 560 U.S. 126, 134 (2010) (“[W]e look to see whether the statute constitutes a means that is rationally related to the implementation of a constitutionally enumerated power.”).

234. 383 U.S. 301 (1966).

235. *Id.* at 324.

236. See, e.g., *Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2629 (2013) (noting “the irrationality of continued reliance on the § 4 coverage formula”); *id.* at 2630–31 (“It would have been irrational for Congress to distinguish between States in such a fundamental way based on 40-year-old data.”).

Not only did the Court repeatedly use rationality terminology, it expressly gave a nod to *Katzenbach*'s use of the deferential rationality standard.<sup>237</sup> In other words, the Court implicitly applied the weaker rationality standard and concluded—with references to “equal sovereignty” intermingled—that the coverage provision failed this relatively forgiving standard.

This begs the question of why, if the Court felt it could plausibly conclude that reliance on the coverage formula was irrational, it employed the concept of equal sovereignty at all. What analyticalumph did the majority believe the concept contributed? Given the concept's lack of pedigree as truly a “fundamental principle,” the best answer is none. The Court did not depend on the equal sovereignty principle for its decision. Rather than logically *leading to* the rationality conclusion, the equal sovereignty principle is there to highlight what important values the rationality conclusion serves: it expresses the value of state dignity, which, absent a good justification, is “offended” by federal discriminatory treatment. Thus, unless we are to conclude that the equal sovereignty principle is there for essentially no reason, its function is easy to frame as an expression of the doctrinal importance of the penumbral values the Tenth Amendment implicitly makes important.<sup>238</sup>

This conclusion is reinforced by the fact that the Court rejected the other available alternative, one that would have made its judgment significantly more aligned with precedent than coupling the rationality standard with the seemingly atmospheric equal sovereignty principle. In *City of Boerne v. Flores*,<sup>239</sup> the Court held that under the Fourteenth Amendment, use of the term “enforcement” means that Congress has no authority to create new substantive rights, but rather can only pass laws that are “congruent and proportional” to the substantive right already guaranteed in Section 1.<sup>240</sup> Those supporting *Shelby County*, in turn,

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237. *Id.* at 2627 (citing *Katzenbach* after asserting that “[w]hen upholding the constitutionality of the coverage formula in 1966, we concluded that it was ‘rational in both practice and theory’”).

238. It should be noted that the Court cited to its prior decision in *Northwest Austin Municipal Utility District Number One v. Holder*, 557 U.S. 193 (2009), as precedential support for equal sovereignty being a “fundamental principle.” *Shelby County*, 133 S. Ct. at 203. Of course, this is not, nor has it been received as, evidence that the principle's “fundamental” status is established in precedent. Chief Justice Roberts wrote the opinion in *Northwest Austin*, and he wrote the *Shelby County* opinion as well. The equal sovereignty language in *Northwest Austin*, in turn, was clearly dicta, as the Court expressly reserved for another day resolution of the issue it was discussing in mentioning equal sovereignty. Further, when the Court in *Northwest Austin* described equal sovereignty as a fundamental principle, it was just as clear then that such a principle is not “fundamental” in a positivist sense. As such, it is not plausible that Roberts believed that the citation to *Northwest Austin* would be seen as legitimizing the Court's invocation of the principle. For this reason, the discussion here does not focus heavily on the fact that the Court had indeed described equal sovereignty as a “fundamental principle” in prior decisions. The majority—headed by Roberts in both cases—clearly invoked equal sovereignty because they thought it conceptually important to the decisions, not because they believed it was a controlling principle per precedent.

239. 521 U.S. 507 (1997).

240. *Id.* at 520.

borrowed this reasoning from *Boerne* and applied it to the Fifteenth Amendment,<sup>241</sup> which makes perfect sense given that the remedial provisions in both the Fourteenth and Fifteenth Amendments, while not identical, employ identical operative terms (“enforce” and “appropriate”).<sup>242</sup> Thus, given the outcome in *Shelby County*, one would have expected the Roberts Court to take the predictable and arguably logical step of noting that *Boerne* overruled *Katzenbach*, and therefore that heightened scrutiny was appropriate in the Fifteenth Amendment context as well. In fact, this was such an obvious path for the Court to take<sup>243</sup> that some commentators assumed that was the path taken after reading the opinion, even though the Court conspicuously avoided resolving the issue.<sup>244</sup>

This leads to easy-way-out number two: assert that *Boerne* required application of the congruent-and-proportional standard to the Fifteenth Amendment, and hold that the coverage provision, if not irrational, is at least a non-congruent and disproportional remedy relative to the substantive guarantees of the Fifteenth Amendment. The Court’s rejection of this obvious path of least resistance suggests that its invocation of equal sovereignty was quite purposeful, even if not analytically forceful. If that invocation was purposeful, its purpose was justificatory. Viewing the equal sovereignty principles as playing this role in the Court’s opinion helps make sense of it as a larger pattern of focusing on state dignity as an interest to protect through judicial vigilance. It thus indicates an increasing willingness to invoke penumbral values in animating its federalism jurisprudence.

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241. *Id.*

242. Compare U.S. CONST. amend. XV, § 2, with U.S. CONST. amend. XIV, § 5.

243. See, e.g., Rick Hasen, *The Curious Disappearance of Boerne and the Future Jurisprudence of Voting Rights and Race*, SCOTUSBLOG (June 25, 2013, 7:10 PM), <http://www.scotusblog.com/2013/06/the-curious-disappearance-of-boerne-and-the-future-jurisprudence-of-voting-rights-and-race/> (“Perhaps the biggest surprise of *Shelby County* is that the majority purported to ignore this *Boerne* issue. The majority does not even *cite* to *Boerne* even though this has been a key issue involving the constitutionality of Section 5 for years.”).

244. Jonathan H. Adler, *Making Sense of Shelby County*, VOLOKH CONSPIRACY (June 26, 2013, 8:36 AM), <http://www.volokh.com/2013/06/26/making-sense-of-shelby-county/>. Adler writes:

In the majority’s view, justifying limits on states in 2006 based on conduct from the 1960s and early 1970s . . . does more than ‘enforce’ the 15th Amendment’s guarantees. . . . Although the majority never says so explicitly . . . this imposes limits on the 15th Amendment’s enforcement power similar to those imposed under Section 5 of the 14th Amendment.

*Id.* This not to suggest that Adler was incorrect; one can certainly read the opinion as *effectively* making the *Boerne* standard operative in the Fifteenth Amendment context.

### III. CONCLUSION

The less willing the Court is inclined to enforce structural principles, the more willing it is to exalt those principles in its opinions.<sup>245</sup> Even those who wished otherwise readily admit that the federalism-sympathetic justices are, at the end of the day, too pragmatic to take dual federalism decisions like *Lopez* and *Morrison* to their logical and principled ends. What results from this pragmatism, combined with a sense of duty to protect, and reverence toward, structural principles, are exaltation of them and a focus on the structural benefits such exaltation may yield.

The ultimate lesson from viewing the decisions discussed above through the lens of penumbral federalism is to consider that, while they at close-up may seem like examples of abject conservative activism, from the 10,000-foot view they are perhaps part of a pragmatic shift in federalism framing by the Court. For this reason, scholars should keep their peripheral vision sharp and fight the temptation to dismiss penumbral rhetoric in the federalism context as cheap rhetorical trickery or the product of ungrounded exaltation of founding-era priorities. Rather, if scholars are to maintain a complete understanding of how federalism influences the judicial mind and the outcomes of cases, what is needed is an increasing sensitivity to both the fact of penumbral framing—manifest either through allusions or blatant declarations—as well as to the possible reasons why the Court approaches a particular federalism issue using such a framing.

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245. For evidence of this, see the Court's opinions in the separation-of-powers context—that is, in those extremely rare cases in which the Court is willing to adjudicate separation-of-powers disputes. For example, compare the Court's seemingly bold stand taking against the executive in *Boumediene v. Bush*, 553 U.S. 723 (2008), with its subsequent failure to enforce that decision in light of blatant lower court flouting of it. See Steve I. Vladeck, *The D.C. Circuit After Boumediene*, 41 SETON HALL L. REV. 1451, 1456 (2011). Vladeck explains that,

[D.C. Circuit] Judges Kavanaugh, Randolph and Silberman, along with Judge Janice Rogers Brown are effectively fighting a rear-guard action [against *Boumediene* . . . [and they]] have the general endorsement of virtually all of the district judges and the executive branch. That is by no means to commend these decisions, but rather to suggest that, if nothing else, fealty to precedent is not one of their shortcomings.

*Id.* See also Linda Greenhouse, *The Mystery of Guantánamo Bay*, 27 BERKELEY J. INT'L L. 1, 2–3 (2009) (“[H]ow can it be that nearly seven years after the first detainees arrived at the prison . . . not a single detainee has ever been released, by order of any court . . . against the wishes of the Administration?”); Katherine L. Vaughns, *Of Civil Wrongs and Rights: Kiyemba v. Obama and the Meaning of Freedom, Separation of Powers, and the Rule of Law Ten Years After 9/11*, 20 ASIAN AM. L.J. 7, 46 (2013) (asserting that, since *Boumediene*, the Court has “bow[ed] out gracefully” by “refus[ing] to ‘go to bat’ when the going got tough”); Linda Greenhouse, *Goodbye to Gitmo*, OPINIONATOR N.Y. TIMES (May 16, 2012, 9:00 PM), [http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?\\_r=0](http://opinionator.blogs.nytimes.com/2012/05/16/goodbye-to-gitmo/?_r=0) (arguing that D.C. Circuit detainee habeas review “has turned out to be anything but meaningful” after *Boumediene*, as the D.C. Circuit “has been something very close to a rubber stamp” for executive polices in this context).

