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THE TWENTY-EIGHTH AMENDMENT: WHY THE CONSTITUTION SHOULD BE AMENDED TO GRANT CONGRESS THE POWER TO LEGISLATE IN FURTHERANCE OF THE GENERAL WELFARE

CASEY L. WESTOVER*

INTRODUCTION

It is time to redefine the concept of American federalism; it is time to change the Constitution. To that end this paper proposes enactment of the following constitutional amendment—the General Welfare Amendment: Congress shall have the power to legislate in furtherance of the general welfare.

The rationale for this admittedly fundamental change lies at the heart of the justification for government itself—the Constitution, as it currently stands, creates a system of government that fails to accomplish one of the basic purposes of its existence—the protection of *all* its citizens. Time and again, state governments have failed to protect women and minorities from violence at the hands of other citizens. Further, as demonstrated in *United States v. Morrison*,¹ the federal government does not have the power to intervene. Thus, the system of federalist government established by the United States Constitution results in a lack of protection for the basic physical safety of certain groups of citizens. The General Welfare Amendment would help to solve this problem by giving the federal government the long overdue power to protect such groups as women and minorities. Further, for certain structural reasons explained herein, the federal government can be expected to utilize this power where states have traditionally failed.

In order to understand the need for the General Welfare Amendment, it is first necessary to understand the current limits

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1. 529 U.S. 598 (2000).

on federal power. Thus, a brief discussion of *Morrison*,² the seminal Supreme Court case on this issue, is unavoidable. *Morrison* held that the enactment of the Violence Against Women Act (VAWA) was beyond the substantive power of Congress under either the Commerce Clause or Section 5 of the Fourteenth Amendment.³ In recent years, the Supreme Court has shown a greater willingness to impose such limits, known as negative restraints,⁴ on the substantive reach of congressional power.⁵ The result is poor constitutional policy—enforcing negative restraints on congressional authority inhibits the ability of the federal government to protect groups traditionally under-protected by the states. That the result is poor constitutional policy, however, does not mean that *Morrison* is necessarily an example of poor constitutional interpretation.⁶ The Court was right to read limitations into the Commerce Power as the text of the Constitution requires real limitations on the exercise of that power. The holding on Section 5, on the other hand, cannot be described as clearly correct;⁷ the Court's decision is at best one plausible decision among others.⁸ Although the merits of the Section 5 holding are debatable, the Court's decision is entrenched and unlikely to be overruled anytime soon.

Because the holdings in *Morrison* are either correct or firmly entrenched, and result in poor government from a policy standpoint, the proper recourse is the Amendment process.⁹ Congress should ratify the General Welfare Amendment as the Twenty-eighth Amendment to the Constitution. Although this

2. *Id.*

3. *Id.* at 627.

4. *See id.* (stating that there are two types of limits on congressional power). Negative restraints are those limits that arise from the enumeration of powers. *Id.* The Constitution grants Congress the power to act in only certain specified areas. *Id.* Actions of Congress are, therefore, restricted to those specific areas. These limits on congressional power, exemplified by *Morrison*, are referred to herein as negative restraints. *Id.* The other type of limitation on congressional power, positive restraints, arise from constitutional prohibitions on specific congressional action. *Id.* These limits on congressional power are exemplified by the Bill of Rights—even when acting within the scope of an enumerated power, Congress is prohibited from restricting the free exercise of speech. *Id.*

5. *See United States v. Lopez*, 514 U.S. 549, 566 (1995) (discussing the fact that, although Congress may have authority to regulate commercial activities that affect interstate commerce and that affect the educational process, such Congressional authority does not extend to the regulation of all aspects of local schools).

6. *See generally Morrison*, 529 U.S. 598.

7. *See generally id.*

8. *See generally id.*

9. *See U.S. CONST.* art. V (stating that "Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution. . .").

Amendment would significantly alter our federalist system of government, it would not substantially harm the interests that federalism is purported to protect.

Part I of this paper will briefly examine the decision in *Morrison*, focusing on why the Court's Commerce Clause decision is correct, and how its Section 5 holding is entrenched. Part II will make the argument for the General Welfare Amendment, and in the process explain how *Morrison* results in poor constitutional policy. Part III analyzes the role that States would occupy in the Union if the General Welfare Amendment were adopted. Finally, Part IV takes a step back and looks at the effect on the General Welfare Amendment would have on all of constitutional law.

I. UNITED STATES v. MORRISON AND CONSTITUTIONAL INTERPRETATION

In its interpretation of the Commerce Clause, *Morrison* is correct.¹⁰ The Court's interpretation of Section 5 in *Morrison* is entrenched, and therefore is unlikely to be overruled in the near future. A significant amount of academic thought has already been produced on these holdings,¹¹ and it would be redundant to fully re-develop the arguments here. A brief sketch of the decision, however, will help explain why Congress should ratify a General Welfare Amendment.

A. *United States v. Morrison and the Violence Against Women Act: The Facts and the Law*

A young woman was raped in September of 1994; it was her

10. See generally *Morrison*, 529 U.S. 598.

11. See, e.g., Lamar F. Jost, Note, *Constitutional Law – The Commerce Clause in the New Millennium; Enumeration Still Presupposes Something Not Enumerated*, 1 WYO. L. REV. 195 (2001) (noting that members of the Supreme Court, specifically Justice Souter, believed there to be sufficient evidence to find that gender motivated violence substantially affects interstate commerce, thus allowing Congress to have the authority to enact The Violence Against Women Act (VAWA)). See also Steven G. Calabresi, "A Government of Limited and Enumerated Powers": *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995) (setting forth similar arguments written prior to the decision in *Morrison*, and stating that Congress has limited powers according to those enumerated in the Constitution); Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987) (discussing the limitations of Congressional reach of regulation under the Commerce Clause); Russell F. Pannier, *Lopez and Federalism*, 22 WM. MITCHELL L. REV. 71 (1996) (theorizing that federal regulation under the Commerce Clause "should be understood as a limitation upon federal power implicit in that Clause itself, rather than as a limitation arising directly from the Tenth Amendment."); Michael J. Trapp, Note, *A Small Step Towards Restoring the Balance of Federalism: A Limit to Federal Power under the Commerce Clause*, 64 U. CIN. L. REV. 1471 (1995) (agreeing with the *Lopez* court and holding that "gun possession near schools does not substantially affect interstate commerce.").

first semester at Virginia Tech.¹² The assailants were two members of the University football team.¹³ As happens with so many young victims, the woman became depressed, stopped attending classes, and withdrew from the University.¹⁴ In early 1995, the woman filed a complaint against her attackers under the University's Sexual Assault Policy.¹⁵ One of the men was not punished, while the other was suspended from school for two semesters.¹⁶ The punishment, however, was set aside because the University Senior Vice President thought it "excessive."¹⁷ When the victim learned of this through a local newspaper because the University had failed to inform her, she left Virginia Tech permanently.¹⁸

In December of 1995, the victim sued her attackers and the University in the United States District Court for the Western District of Virginia.¹⁹ Her cause of action against the young men was brought under the civil remedy provision of the Violence Against Women Act (VAWA).²⁰ The Violence Against Women Act states, in relevant part, that "[a]ll persons within the United States shall have the right to be free from crimes of violence motivated by gender."²¹ The enforcement provision subjects any person who commits a crime of violence motivated by gender, thereby depriving another of the right to be free of such crimes, to civil liability in an action brought by the victim.²² The District Court held VAWA unconstitutional as its enactment was beyond the power of Congress.²³ The Fourth Circuit, upon rehearing the case en banc, affirmed.²⁴ The Supreme Court also affirmed, holding VAWA beyond the scope of congressional power pursuant to both the Commerce Clause and Section 5 of the Fourteenth

12. *Morrison*, 529 U.S. at 602.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Brzonkala v. Virginia Polytechnic & State Univ.*, 935 F. Supp. 772 (W.D. Va. 1996).

20. 42 U.S.C. § 13981 (2000). The Violence Against Women Act is a large statute with many provisions. *Id.* For the purpose of this analysis, references to VAWA should be taken to imply the civil rights provision considered in both *Morrison* and 42 U.S.C. § 13981 (2000). *Id.*

21. 42 U.S.C. § 13981(b) (2000).

22. 42 U.S.C. § 13981(c) (2000).

23. *See Brzonkala v. Virginia Polytechnic & State University*, 169 F.3d 820, 829 (4th Cir. 1999) (stating that the district court vacated a judgment that found that VAWA was a legitimate exercise of congressional power).

24. *Id.* at 830 (affirming the District Court of the Western District of Virginia and holding that VAWA does not regulate an activity that is substantially related to interstate commerce, and thus is not within the authority of Congress).

Amendment.²⁵

B. Morrison: The Enactment of VAWA as Beyond the Scope of the Commerce Power

In holding VAWA beyond the reach of Congress's power under the Commerce Clause, the Court relied principally on the 1995 case *United States v. Lopez*.²⁶ *Lopez* was the first case since the New Deal to enforce a negative restraint on congressional exercise of the Commerce Power.²⁷ In *Lopez*, the Court held that Congress could not use the substantial effects doctrine²⁸ to regulate non-economic activity under the Commerce Clause.²⁹ Following this holding, the *Morrison* Court refused to uphold VAWA under the substantial effects doctrine, stating that "[g]lender motivated crimes of violence are not, in any sense of the phrase, economic activity."³⁰ Because VAWA did not regulate economic activity, the Court reasoned that its enactment was beyond the scope of the Commerce Power.³¹

Any interpretation of the Constitution must be faithful to its text and structure. Such is not an argument of original intent, but a textualist argument.³² "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite The regulation of commerce . . . is a new power; but that seems to be an addition . . . from which no apprehensions are entertained."³³ If the United States is not bound by the text of the Constitution, the resulting government will be one of people, not of law.³⁴ By ensuring that interpretations of the Constitution are compatible with the text of the document, the government is forced to justify its actions "in terms of basic

25. See *Morrison*, 529 U.S. at 598.

26. *Lopez*, 514 U.S. at 549.

27. *Id.*

28. See generally *Wickard v. Filburn*, 317 U.S. 111 (1947) (laying the foundations of the substantial effects doctrine); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

29. *Lopez*, 514 U.S. at 560. "Where *economic* activity substantially affects interstate commerce, legislation regulating that activity will be sustained." *Id.* (emphasis added).

30. *Morrison*, 529 U.S. at 613.

31. *Id.* See *Jost*, *supra* note 11, at 215-19 (explaining the full holding in *Morrison*, 529 U.S. 598); see also *Trapp*, *supra* note 11, at 1472, 1479-84 (explaining the full holding in *Lopez*, 514 U.S. at 549).

32. THE FEDERALIST NO. 45, at 202 (James Madison) (American Classics Series 1964). See also *Morrison*, 529 U.S. at 627 (Thomas, J., concurring) (stating that, from an originalist perspective, the only flaw in *Morrison* might be that it does not provide enough of a limit on congressional power).

33. THE FEDERALIST NO. 45, at 202 (James Madison) (American Classics Series 1964).

34. *Pannier*, *supra* note 11, at 86.

constitutional principles whose meaning and force are beyond the immediate political control of any [government agents].³⁵ Only by remaining faithful to the text can we be sure that our government will not diverge from the path mapped by the people, and descend into tyranny.

An interpretation of the Commerce Clause that does not place at least *some limits* on Congress' legislative power is not faithful to the text of the Constitution. Considered in isolation, the phrase stating that Congress shall have Power "[t]o regulate Commerce . . . among the several States,"³⁶ is susceptible to broad interpretation. Under the substantial effects doctrine mentioned in *Lopez*³⁷ and *Morrison*,³⁸ one could reasonably conclude that the power to regulate interstate commerce includes the power to regulate anything that has a substantial effect on the regulated subject.³⁹ But the clause cannot be read in isolation as it is part of a larger document whose context reveals that the power cannot be so broad. Article I, Section 8 enumerates several specific powers of Congress.⁴⁰ The best interpretation of this structure is that the power of Congress is limited.⁴¹ Enumeration must presuppose something not enumerated.⁴² To remove any remaining doubt, the Tenth Amendment states that "[t]he powers not delegated to the United States . . . are reserved to the States respectively, or to the people."⁴³ Thus, the text and structure of the Constitution is clear; congressional power is not unlimited.⁴⁴

The interpretations of the Commerce Power, undertaken by the dissent in *Morrison*, would essentially grant Congress plenary power.⁴⁵ Justice Breyer admits in his dissent that "[w]e live in a Nation knit together by two centuries of scientific, technological, commercial, and environmental change. Those changes, taken together, mean that virtually every kind of activity, no matter how local, genuinely can affect commerce, or its conditions, outside the State—at least when considered in the aggregate."⁴⁶

Combining the preceding theory with the dissenters' broad theory of substantial effects would lead to congressional plenary power. Such a reality is extrapolated by Chief Justice Rehnquist

35. *Id.* at 85.

36. U.S. CONST. art. I, § 8, cl.3.

37. *See generally Lopez*, 514 U.S. 549.

38. *See generally Morrison*, 529 U.S. 598.

39. *Id.* at 639 (Souter, J., dissenting).

40. U.S. CONST. art I, § 8.

41. Epstein, *supra* note 11, at 1396.

42. *Gibbons v. Ogden*, 22 U.S. 1, 195 (1824).

43. U.S. CONST. amend. X.

44. Epstein, *supra* note 11, at 1396; Pannier, *supra* note 11, at 80-81.

45. *Morrison*, 529 U.S. at 657 (Breyer, J., dissenting).

46. *Id.* at 660 (citing *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 251 (1964)).

in *Lopez*.⁴⁷ The Chief Justice stated that, once these arguments are accepted, it is hard to “posit any activity by an individual that Congress is without power to regulate.”⁴⁸ Because such an interpretation is incompatible with the text of the Constitution, it is unacceptable.⁴⁹ Former Chief Justice John Marshall put it best: “The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.”⁵⁰

Although the principles of textualism require that some limitations be read into the Commerce Power, it does not follow that limiting congressional power results in the best governmental structure. In fact, as Part II will demonstrate, negative restraints on congressional authority result in a government that cannot fulfill all of its purposes. In short, good constitutional interpretation results in bad constitutional policy. Thus, the only way to remedy the policy problem while remaining faithful to the text is to amend the Constitution to grant Congress the general welfare power.

C. *Morrison*: The Entrenchment of a Narrow Section 5 Power

The Court in *Morrison* also held that VAWA was beyond Congress’ power pursuant to Section 5 of the Fourteenth Amendment.⁵¹ The part of the opinion dealing with Section 5 is far from a model of clarity as “[i]t seems to conflate the state action requirement of Section 1 [of the Fourteenth Amendment] with some form of limitation on the Section 5 power.”⁵² Because the remedies are not directly aimed at the state actors violating the Constitution, it appears, however, that the primary holding is that VAWA is not proportional and congruent to the constitutional violations of the States because the remedies are not directly aimed at the state actors violating the Constitution.⁵³

The substantive provisions of the Fourteenth Amendment are

47. *Lopez*, 514 U.S. at 564.

48. *Id.*

49. *Id.* at 560-61. The argument presented here is more an argument for why the dissents are wrong than a specific explanation for why the opinion of the Court is right. *Id.* The argument establishes that there must be limits on the Commerce Power, but does not define what those limits should be. *Id.* In light of the argument in Part II of this paper, pushing for removal of all negative restraints on congressional authority by Amendment, it would be pointless here to discuss the proper scope of the specific limits that should be read into the Commerce Clause. It is enough to say that the Constitution, as it currently stands, requires some limits.

50. *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

51. *Morrison*, 529 U.S. at 613.

52. Robert C. Post & Reva B. Siegel, *Equal Protection by Law: Federal Antidiscrimination Legislation after Morrison and Kimel*, 110 YALE L.J. 441 (2000).

53. *Morrison*, 529 U.S. at 625.

undoubtedly directed at the states: “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. . . .”⁵⁴ From the early days of Fourteenth Amendment interpretation, the Court has read those provisions to mean that the Amendment cannot be violated absent some form of “state action.”⁵⁵ Congress enacted VAWA against a backdrop of “evidence that many participants in state justice systems are perpetuating an array of erroneous stereotypes and assumptions [against women] . . . [that often] result in insufficient investigation and prosecution of gender-motivated crime.”⁵⁶ The Court admitted that this type of “state-sponsored gender discrimination violat[e] equal protection.”⁵⁷ It might seem, then, that VAWA should have withstood the challenge. The Court did not agree, holding that if the statute were enacted in response to a pattern of equal protection violations, it still was not “corrective in its character, adapted to counteract and redress the operation of . . . prohibited state laws or proceedings of state officers.”⁵⁸ VAWA was not proportional and congruent to the constitutional violations, as is required of remedial legislation passed pursuant to Section 5,⁵⁹ because it was “aimed at proscribing discrimination by officials which the Fourteenth Amendment might not itself proscribe; it [was] directed not at any State or state actor, but at individuals who have committed criminal acts motivated by gender bias.”⁶⁰

The *Morrison* majority developed a double hurdle of state action.⁶¹ The first hurdle, which VAWA cleared, is the traditional state action requirement. In other words, Congress must legislate in response to state deprivations of substantive Fourteenth Amendment rights—in this case discriminatory enforcement of state law by State officials would suffice. VAWA was unable to clear the second hurdle, which the Court created in deciding *Morrison*.⁶² Remedial legislation passed pursuant to Section 5 of the Fourteenth Amendment must be proportional and congruent

54. U.S. CONST. amend. XIV, § 1.

55. *Civil Rights Cases*, 109 U.S. 3, 11 (1883); see *United States v. Harris*, 106 U.S. 629, 640 (1883) (differentiating between laws regulating actions by individuals persons and those of the state).

56. *Morrison*, 529 U.S. at 620.

57. *Id.* at 620.

58. See *id.* at 625 (quoting *Civil Rights Cases*, 109 U.S. at 18) (internal citations omitted).

59. See *City of Boerne v. Flores*, 521 U.S. 507, 547 (1997) (holding that Section 5 remedial legislation must be congruent and proportional to the evil it addresses). See also *infra* notes 278 to 285 and accompanying text (analyzing the holding in *Boerne* as one about separation of powers and federalism).

60. *Morrison*, 529 U.S. at 626.

61. See generally *id.*

62. See generally *id.*

to substantive Fourteenth Amendment violations. Any remedy that is not aimed directly at the state action in question, according to *Morrison*, flunks that test.⁶³ Although Congress acted to remedy constitutional violations which themselves were the product of state action, the consequences of the remedial legislation were not directly aimed at that state action, so VAWA could not be a valid exercise of congressional power pursuant to Section 5.

This is not to say that the Court was clearly correct, as it was in interpreting the Commerce Clause. Only Justice Breyer took up the Fourteenth Amendment issue in dissent, and his interpretation is equally plausible.⁶⁴ In fact, the arguments in favor of upholding VAWA under Section 5 of the Fourteenth Amendment are at least as strong as the Court's argument.⁶⁵ The fact remains, however, that the Court has decided the issue, and there is nothing to indicate that it will back away from that decision anytime soon.

In fact, recent Section 5 cases indicate the Court's steadfast attitude. The Court has taken every opportunity in recent years to roll back congressional authority pursuant to Section 5.⁶⁶ Therefore, regardless of whether the negative limitations surrounding Section 5 are correct interpretations, they are entrenched, and becoming more so every year with every holding of the Supreme Court. If these negative limitations on congressional power are poor constitutional policy, as Part II will contend, the General Welfare Amendment is the only remedy to the situation.

63. See generally *id.*

64. See *id.* at 664-65 (Breyer, J., dissenting) (discussing previous court holdings that Section 5 does not allow Congress to use the Fourteenth Amendment to regulate individuals, but rather only state action).

65. See *id.* at 664-66 (arguing the error in the majority's holding that there were not inadequacies in many states remedies for violations by stating that the task forces of 21 states submitted reports documenting constitutional violations). See also Post & Siegel, *supra* note 52 (setting forth various arguments about the scope of congressional power under Section 5); Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in Brzonkala v. Morrison*, 75 N.Y.U. L. REV. 150 (2000) (arguing that the Court should analogize the Section 5 issue in *Morrison* to *Jones v. Mayer*, 392 U.S. 409 (1968)). Although the policy arguments in Part II of this analysis are phrased in terms of justifying a General Welfare Amendment, they could be adapted to argue in favor of greater congressional discretion under Section 5.

66. See, e.g., *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (ruling that the abrogation of state's rights under the ADEA was not with Congressional authority under Section 5 of the Fourteenth Amendment); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627, 630 (1999) (holding that Congressional abrogation of state sovereign immunity from claims of patent infringement under the Patent Remedy Act was an invalid exercise under Section 5); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (explaining that other decisions indicate a general trend toward a narrow interpretation of congressional authority under Section 5).

II. JUSTIFYING THE GENERAL WELFARE AMENDMENT

Part II will establish three main points. First, that a foundational, justifying purpose for government is the protection of “social liberty;” second, that States have refused, and for certain systematic reasons will continue to refuse, to adequately protect even the basic social liberty of “disfavored” groups; and third, that the federal government does a better job of protecting the social liberty of disfavored groups because of the size of the national polity.

Although the Constitution, as it presently stands, maintains negative restraints on congressional power, our system of government would better serve its purposes if Congress had plenary legislative authority. We can and should rid our government of negative restraints imposed in cases like *Morrison* by ratifying a Twenty-Eighth Amendment, granting Congress the power to legislate in furtherance of the general welfare.

The purpose of the General Welfare Amendment is to secure the liberty of citizens of the United States. This may seem counterintuitive in light of the traditional argument that “federalism” protects the liberty of citizens by diffusing federal power.⁶⁷ To the extent that this assertion is true,⁶⁸ it takes account of liberty in only its political sense, and ignores the detrimental effect that negative restraints on congressional power have on the concept of liberty that justifies the very existence of government.

“Liberty” will be defined by Isaiah Berlin’s concept of negative liberty.⁶⁹ Negative liberty is the area of freedom in which a person can act unobstructed by others.⁷⁰ For the purposes of this paper it is necessary to further divide the concept into its political and social dimensions. “Political liberty” is the freedom to act unobstructed by the government. “Social liberty,” on the other hand, is the freedom to act unobstructed by other individuals. It is easy to see that, by hypothesis, negative restraints on

67. See THE FEDERALIST NO. 51 (James Madison) (American Classics Series 1964); see also THE FEDERALIST NO. 28 (Alexander Hamilton) (American Classics Series 1964).

68. See *infra*, Part II. F. (discussing the ways in which the proposed General Welfare Amendment would promote, rather than undermine, the goals of federalism).

69. See Isaiah Berlin, *Two Concepts of Liberty*, FOUR ESSAYS ON LIBERTY 118, 122-23 (1969) (defining the concepts of negative liberty and negative freedom (and using both terms interchangeably) as one’s inability to attain a goal because of the actions or obstructions of another human being).

70. *Id.* Analysis has been limited to the concept of negative liberty to further two ends. First, it simplifies the analysis. Second, concepts of positive liberty are more controversial and some might question whether society should actively seek to further its cause. By focusing on the negative dimensions of liberty, questions of political ideology can be removed somewhat from the analysis.

congressional authority can help protect political liberty. If the areas in which government can act are limited to certain enumerated powers, the opportunities to obstruct the free acts of citizens will be limited to those areas. But there is a catch: the power of government to protect social liberty is also limited by negative restraints. This is problematic because, as a brief review of traditional political philosophy will reveal, the protection of social liberty is a primary justification for the very existence of government.

A. *Discerning the Purpose of Government: "If we have a prince, it is so that he may preserve us from having a master."*⁷¹

Traditionally, political philosophers have tried to discern the purposes of government by exploring how a government might arise from a theoretical "state of nature."⁷² State of nature theory does not purport to be an exposition of historical fact.⁷³ Philosophers use the state of nature as an explanatory tool, elucidating fundamental attributes of government by examining how a government might arise from a collection of autonomous individuals.⁷⁴ If one can isolate reasons why a group of autonomous individuals might need or want a government when they otherwise would not have one, it is possible to generalize from those reasons the broader purposes of government. While it would be impossible to catalog the countless theories of this type, it will be helpful to briefly summarize some of the more prominent and representative theories, focusing on the role social liberty plays in each.

Perhaps no state of nature theory is better known, or more often cited, than that of Thomas Hobbes. Hobbes' theory, as explained in his *Leviathan*,⁷⁵ takes the position that life in the state of nature is a life in "continual fear and danger of violent death; and the life of man solitary, poor, nasty, brutish, and short."⁷⁶ The law of nature, to Hobbes, "is the liberty each man has

71. JEAN-JACQUES ROUSSEAU, *Discourse on Inequality*, ROUSSEAU'S POLITICAL WRITINGS 47 (Julia Conaway Bondanella trans., Alan Ritter & Julia Conaway Bondanella eds., W.W. Norton & Co. 1988) (1755) (quoting Panegyrcus).

72. See generally ELI SAGAN, *AT THE DAWN OF TYRANNY: THE ORIGINS OF INDIVIDUALISM, POLITICAL OPPRESSION, AND THE STATE* (1985).

73. See generally *id.* (stating an anthropological analysis of how government actually does develop and evolve).

74. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 7-8 (1974) (discussing the description of that which is non-political, by using political terms, and stating that the materializing of a government starts with rules against actions that are based on morality).

75. THOMAS HOBBS, *LEVIATHAN - PARTS I AND II* (Herbert W. Schneider ed., Prentice Hall 1958) (1651).

76. *Id.* at 107.

to use his own power, as he will"⁷⁷ to further the end of self-preservation. This induces all individuals to act in a self-interested fashion all the time. The state of nature thus exists as a perpetual state of war, in which every person fares for himself or herself. In this state of war, every person has the right to make use of any resource in the defense of his or her safety, including the bodies of other individuals.⁷⁸

The state of nature is pre-governmental. As is evident from Hobbes' theory, political liberty is maximized in the state of nature because there is no government to restrict individuals' freedom of action.⁷⁹ Social liberty, on the other hand, is minimized in the Hobbesian state of nature. People do by right whatever best suits their individual ends, regardless of the effect on other people.

Because the Hobbesian state of nature is so inhospitable, people seek peace and protection, and are willing to "lay down this right to all things, and be contented with so much liberty against other men as he would allow other men against himself,"⁸⁰ thereby forming a government. This statement is telling. People willingly "lay down" their maximum political liberty to a governmental authority so that the liberty of "other men against himself" will be limited. For Hobbes, individuals consent to government, thereby surrendering the political liberty that they "naturally love,"⁸¹ so that the newly created sovereign will protect their social liberty.

Jean-Jacques Rousseau's theory of the state of nature is substantially different from that of Hobbes.⁸² To Rousseau, the pure state of nature is perhaps the best of all possible worlds.⁸³ Everyone is self-sufficient, and because no person is dependent upon any other, it is impossible for one person to do another more than transitory harm.⁸⁴ However, simple technological advancements change the pure state of nature into a civil society, and these advancements in social structure thus lead to an

77. *Id.* at 109.

78. *Id.* at 109-10.

79. *Id.*

80. *Id.* at 110.

81. *Id.* at 139.

82. To understand Rousseau's theory of government, it is necessary to look at two of his essays: *Discourse on Inequality* and *On Social Contract*. ROUSSEAU, *supra* note 71, at 3, 84. Because he deals with emergence from the state of nature in the former, most citations in this paper will be to the *Discourse on Inequality*. *Id.*

83. *See id.* at 51 (philosophizing that the origins of governments are all based on the differences that existed between individuals when they were founded).

84. *Id.* at 33. "[I]t is impossible to enslave a man without first having put him in position of being unable to do without another person. Since this situation did not exist in the state of nature, it leaves everyone free of the yoke and makes the law of the strongest useless." *Id.*

interdependent society.⁸⁵ Interdependence leads to inequality as individuals, relying on others for their needs, become subject to the will of those upon whom they rely.⁸⁶ Thus, for Rousseau, the emergence of civil society leads to a situation where the strong, the “haves,” are able to impose upon the social liberty of the weak, the “have nots.”⁸⁷ Although in a perfect state of nature, political liberty is maximized and deprivations of social liberty are at a minimum, the natural progression of mankind leads to severe deprivations of basic social liberties such as slavery and exploitation.

Rousseau’s solution to this problem is that all individuals consent to government.⁸⁸ People give themselves to “superiors . . . to defend themselves against oppression and to protect their property, their liberties, and their lives, which are, so to speak, the constituent elements of their being.”⁸⁹ Rousseau is very explicit about the trade that individuals make in consenting to government:

What man loses by the social contract is his natural liberty and an unlimited right to everything that tempts him and to everything he can take; what he gains is civil liberty and the ownership of everything he possesses [W]e must carefully distinguish between natural liberty, which is limited only by the strength of the individual, and civil liberty, which is limited by the general will⁹⁰

Rousseau’s concepts are defined in a different manner, but the ideas are exactly what is proposed by this analysis. “Natural liberty” is the freedom that one possesses in the state of nature—in other words, it is maximum political liberty. “Civil liberty” is social liberty. For Rousseau, government emerges because individuals are willing to trade maximum political liberty for a sovereign body that can protect social liberty.

John Locke’s work is also important to this analysis because it directly influenced the thinking the founding fathers,⁹¹ and because his concept of the state of nature falls into a middle

85. *Id.* at 34-46.

86. *Id.* at 43.

87. *Id.* at 44.

88. *Id.* Rousseau has very particular ideas about how consent is given and the way in which the government, once constituted, should govern. *Id.* These details are outside the scope of this analysis, which is only interested in political theory to the extent that it can help explain the purposes of government. *See id.* (explaining the details of consent and government).

89. *Id.* at 47.

90. *Id.* at 95-96.

91. *See* MICHAEL P. ZUCKERT, *NATURAL RIGHTS AND THE NEW REPUBLICANISM* 19 (1994) (noting that Locke’s work influenced Thomas Jefferson, who based parts of the Declaration of Independence on his writings).

ground between those of Hobbes and Rousseau. For Locke, the state of nature is a state of "perfect freedom."⁹² Although Hobbes concluded that such conditions would lead to a chaotic world full of dangers, Locke believed that behavior in the state of nature is constrained by "natural law."⁹³ Natural law, according to Locke, is simply the obligation to respect the natural rights of others, which he considered to be the rights to life, health, liberty, and property.⁹⁴

Although Locke believed that these rights were derived in some sense from the law of God, his theory is not inextricably intertwined with theology.⁹⁵ Natural law theory is another way of describing the general moral principles that underlie the entire field of political philosophy.⁹⁶ It is important to see that the natural rights surmised by Locke fit into the working definition of liberty. If one individual were to impinge upon the health, life, or liberty of another, the second individual's freedom to act would certainly be constrained.

If all individuals in the state of nature are obliged to follow this natural law, why form a government that would constrain the state of "perfect freedom?" Locke answers that, although everyone is obliged to follow the natural law, there are factors that make its universal observation unlikely. First, because people are self-interested, individual interpretations of the law of nature will be skewed in favor of the interpreter.⁹⁷ Second, because there is no formal mechanism for neutral dispute resolution, disputes will be judged by the self-interested parties.⁹⁸ Third, even when an individual's natural rights have unquestionably been violated, that individual may lack the power to enforce his or her rights.⁹⁹ In such a situation, rights are tenuous at best; people have rights, but the interpretation and enforcement of those rights in any specific case is uncertain. Therefore, individuals are willing to "[unite] for the mutual preservation of their . . . liberties."¹⁰⁰

Locke is explicit about the trade that individuals make when they consent to be governed. "[T]hough men when they enter into society give up the equality [and] liberty . . . they had in the state of nature into the hands of the society . . . it being only with an

92. JOHN LOCKE, *The Second Treatise of Civil Government*, TWO TREATISES OF GOVERNMENT 122 (Thomas I. Cook ed., Hafner Publishing Co. 1947) (1690).

93. *Id.* at 132.

94. *Id.*

95. *See generally id.*

96. D.D. RAPHAEL, PROBLEMS OF POLITICAL PHILOSOPHY 103 (1970).

97. LOCKE, *supra* note 92, at 184-85. *See* ROBERT NOZICK & JONATHAN WOLFF, PROPERTY JUSTICE AND THE MINIMAL STATE 39 (1991) (setting forth a concise explanation of the problems in the "Lockean" state of nature).

98. *Id.*

99. *Id.*

100. LOCKE, *supra* note 92, at 184.

intention in every one the better to preserve himself, his liberty and property. . . ."¹⁰¹ For Locke, the trade is that contemplated by Hobbes and Rousseau—maximum political liberty for a structure that is capable of protecting social liberty.

Although these three theorists have different conceptions of the state of nature, each comes to the same conclusion as to why the condition of maximum political liberty gives way to a system of government. In all three of these views, deprivations of social liberty by other individuals in the state of nature are unbearable, so people become willing to give up some political liberty by consenting to a government that has the power to restrain their freedom. Thus, classic state of nature theory reveals that a root purpose of government is the protection of social liberty.

In fact, although political philosophers differ widely in many aspects of their thinking, it is difficult to find a state of nature theory that does not reach this conclusion as to the purposes of government. Even modern libertarian theorist, Robert Nozick, in *Anarchy, State, and Utopia*, a classic work in libertarian thought, develops a state of nature theory that ultimately justifies some government for the purpose of protecting social liberty.¹⁰² Nozick's theory is worth examining here for two reasons. First, as it was developed in the 1970s, it shows that state of nature theory is relevant in modern political theory.

Although it is impossible to adequately summarize Nozick's theory in a few paragraphs, it is necessary to highlight some of the broad themes so that this analysis can be understood in context. Nozick differs from the classic theorists already examined because his theory of government is not one of consent.¹⁰³ Instead, Nozick develops an "invisible hand" theory of the state,¹⁰⁴ postulating that a state could develop from the following set of circumstances. Individuals in the state of nature join a "protective association" to help ensure the vindication of their rights.¹⁰⁵ Due to forces in the market for protective services, competing associations will tend to merge until one is the dominant protective association over a certain geographical area.¹⁰⁶ Finally, the dominant protective association will enforce rules against non-member individuals, and prevent non-members from enforcing their own rights without the approval of the association.¹⁰⁷ Thus, according to Nozick,

101. *Id.* at 186.

102. NOZICK, *supra* note 74.

103. *See generally id.*

104. *Id.* at 18.

105. *See generally id.*

106. *See generally id.*

107. *Id.* at 12-88. *See also* NOZICK & WOLFF, *supra* note 97, at 42-47 (stating a thorough summary of this theory of associations).

individuals "back into a state without really trying."¹⁰⁸

Therefore, because Nozick's theory is not based on consent, inquiry into the reasons that people form a government is not necessary. Instead, it is necessary to ask why people join a protective association. It is that act that puts into motion the chain of events that accidentally, but inevitably, leads to government.

Nozick's conception of the state of nature is the same as Locke's.¹⁰⁹ Individuals have natural rights to life, health, liberty and property.¹¹⁰ Although Nozick claims that this is his starting point,¹¹¹ it is possible to derive a more fundamental notion from the body of his work. For Nozick, the fundamental right is self-ownership. All individuals have a separate existence. It is a violation of that right to force an individual to sacrifice part of his or her self for advantage of another.¹¹²

The second reason making Nozick's theory worthy of examination is that it shows that theorists across the political spectrum agree that the protection of social liberty is a foundational justification for the existence of government. Nozick's ultimate conclusion in *Anarchy, State, and Utopia*, a classic work in libertarian thought, is that only the most minimal state is justified. Although there is a great deal of tension between his conclusion and this paper's proposal for a General Welfare Amendment, it is important to note that his reason for government's existence can be categorized with those of the theorists already examined—government for Nozick arises out of the need to protect social liberty, even if he has a confined notion of what that liberty is. The difference is one of degree, not of kind.

This right is unprotected in the state of nature due to the very same problems hypothesized by Locke. Individuals make self-interested judgments as to what constitutes a violation of their rights, and may or may not have the actual power to protect those rights.¹¹³ Therefore, to protect these rights, individuals form protective associations, and the state evolves from those associations.¹¹⁴ Again, the purpose of government, or at least its precursor, is the protection from impingement by other individuals.¹¹⁵

108. NOZICK, *supra* note 74, at 1.

109. *See id.* at 10-12 (stating that Locke's state of nature as "a state of personal freedom to order their actions and dispose of their possessions and persons as they think fit. . ."). *See generally* LOCKE, *supra* note 92.

110. NOZICK, *supra* note 74, at 10.

111. *Id.* at 9.

112. NOZICK & WOLFF, *supra* note 97, at 7-8.

113. NOZICK, *supra* note 74, at 11.

114. *Id.* at 12.

115. Also, according to Nozick, protection of the fundamental right to self ownership—the protection of social liberty—is the only legitimate function of

Having examined state of nature theory, it becomes clear that a justifying purpose of government is the protection of social liberty.¹¹⁶ This is the conclusion reached regardless of how one hypothesizes life in the state of nature, and regardless of what sort of government a theory ultimately supports.

Once the protection of social liberty is accepted as a primary justification for government, the problem of negative restraints becomes apparent. Negative restraints on congressional authority can enhance political liberty by preventing the federal government from using its power to protect social liberty. Thus, the Constitution, as interpreted in *Lopez* and *Morrison*, creates a federal government that does not have the power to fulfill the ends of governments generally.¹¹⁷ But, the federal government is not the only government contemplated by the Constitution—state governments maintain significant legislative authority. If the current federalist structure adequately protects the social liberty of citizens, as implied by *Lopez* and *Morrison*,¹¹⁸ then vesting a general welfare power in Congress would at best be superfluous, and at worst provide avenues through which our political liberty could needlessly be further eroded. In order to decide whether the General Welfare Amendment is justifiable, it is necessary to determine whether our current constitutional structure adequately protects social liberty.

B. Social Liberty in the Current Constitutional Structure

Within the current constitutional structure there is plenary

government. *Id.* at 149. This is what he calls the “minimal state.” *Id.* It should be made clear that his theory, in total, would not support the General Welfare Amendment. It would instead call for one enumerated power of government, the power to protect the rights of individuals from invasion by other individuals. *Id.* On a philosophical level, adding this specific power to the list of enumerated powers in Article I, § 8 would solve the concerns raised in this analysis. However, the vague nature of such a power would make this solution impracticable. The General Welfare Amendment is a practical solution to the disjunction between the purpose and powers of government. Part II.D, *infra*.

116. See RAPHAEL, *supra* note 96, at 102-06 (explaining the general theory of natural rights). Nature theory is just one approach employed by political philosophers. Another important tradition, utilitarianism, assumes that the purpose of anything is its utility in promoting general happiness. *Id.* at 106. A utilitarian defense of the General Welfare Amendment would involve an extensive law and economics analysis that is beyond the scope of this paper. There are also less prominent theories, such as the “Darwinian” view of state evolution. See, e.g., HUGH TAYLOR, ORIGIN OF GOVERNMENT (1919) (setting the major thesis of this book by offering that “all speculation on politics must start with the Darwinian theory.”). Because state of nature theory is the prominent tradition in non-utilitarian political philosophy, however, the focus of this article remains with that tradition.

117. *Lopez*, 514 U.S. at 551; *Morrison*, 529 U.S. at 601.

118. *Id.*

authority to legislate in furtherance of social liberty. The power is split between the federal government and the governments of the states.¹¹⁹ However, in practice, this authority has not led to adequate protection of social liberty. State governments, which bear the primary responsibility for protecting social liberty, have a poor historical record for protecting women and minorities.

Congress has the power to legislate pursuant to any of its enumerated powers, as listed in Article I, Section 8, and the several Amendments to the Constitution.¹²⁰ While acting pursuant to an enumerated power, Congress is constitutionally permitted to pursue most ends.¹²¹ Further, where permitted to legislate, Congress is permitted to pursue the end of social liberty. However, as *Morrison* makes clear, Congress is prohibited from pursuing that end when acting outside the scope of an enumerated power. Thus, the enumerated powers of Congress limit its ability to legislate in furtherance of social liberty.

This void is filled by the “police power” of state governments, which refers to the residual sovereign authority of state governments not “surrendered to the federal government.”¹²² The police power is expansive, encompassing all legislative authority not *exclusively* entrusted to the federal government.¹²³ The power of a state to regulate the interactions of its own citizens pursuant to the police power has never been questioned by the Supreme Court.¹²⁴ States, via the police power, have virtual plenary authority to legislate in furtherance of social liberty.¹²⁵

Because state power is by nature expansive while federal power is limited to certain enumerated areas, exclusive responsibility for protecting social liberty often falls to state governments. Thus, either the state or federal (or sometimes both)

119. This is, of course, an overstatement. The Constitution contains numerous positive restraints on governmental authority, such as the Bill of Rights, that act as limits on the substantive power of both States and the federal government. In this section, however, the paper deals only with negative restraints on governmental authority.

120. See generally U.S. CONST.

121. See, e.g., *The Lottery Cases*, 188 U.S. 321, 357 (1903) (stating that “Congress, for the purpose of guarding the people of the United States against the ‘widespread pestilence of lotteries’ . . . may prohibit the carrying of lottery tickets from one state to another.”).

122. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1046 (3d ed. 2000).

123. See generally *id.* at 1021-43 (illustrating that such a limit exists as to the Commerce Clause). State governmental power is only limited in areas where Congress has the *exclusive* power to act pursuant to some enumerated power. The primary example of such a limit is the “dormant Commerce Clause,” which prohibits States from regulating interstate commerce. *Id.*

124. See generally *Gibbons v. Ogden*, 22 U.S. 1 (1924).

125. Unless, of course, they are prevented from legislating by positive restrictions in either the federal or State Constitution.

government(s) will have the power to act in furtherance of social liberty. This does not mean, however, that the General Welfare Amendment is unimportant, as the current governmental system as it is theoretically designed, does not always protect social liberty.

State governments have a poor history of protecting the basic social liberties of women and minorities. At various times in our national history, the legislative, executive, and judicial branches of states have failed to protect groups of disfavored¹²⁶ citizens from violence at the hands of other citizens.¹²⁷ Because state governments have the primary responsibility for protecting social liberty, failure on their part to do so means that our system of government does not accomplish that foundational purpose of government. The context surrounding congressional enactment of VAWA demonstrates the degree to which State governments can fail in their responsibility to protect social liberty.

When Congress passed VAWA, violence was the leading cause of injury for women ages fifteen to forty-four.¹²⁸ "As many as four million women per year were the victims of domestic abuse,"¹²⁹ and one woman was raped every six minutes.¹³⁰ Because these problems do not fall within the scope of a federal enumerated power,¹³¹ State governments alone had the power to protect women from these most fundamental deprivations of social liberty. Their response was inadequate.

State legislatures failed to pass laws adequately protecting women from violent attacks. Although almost every State passed

126. The term "disfavored" will be used throughout in reference to groups of citizens who have generally been excluded from power and influence and denied equal status in American society for any number of reasons. Women and minorities are primary examples of disfavored groups.

127. See RAPHAEL, *supra* note 96, at 107 (noting that there are times when a Government will not be promoting the common good). This analysis will focus on instances where States failed to protect members of certain disfavored groups from violence at the hands of other citizens. By limiting the examples to this domain, two goals are accomplished. First, differences in political ideology fall out of the discussion. People with different political philosophies will differ in the extent to which they believe society should be willing to trade political liberty for social liberty. However, protection from violence is the very root of social liberty, and it seems unlikely that anyone would argue that a government ought not to protect citizens from violent attacks by other citizens. Second, it is precisely this sort of federal power that *Morrison* calls into question. *Morrison*, 529 U.S. at 627. The holding of *Morrison* struck down a law intended to help protect women from gender motivated violence. *Id.*

128. Surgeon General Antonio Novello, *From the Surgeon General, U.S. Public Health Service*, 267 JAMA No. 23, 3132 (1992).

129. S. REP. NO. 103-138, at 38 (1993).

130. S. REP. NO. 102-197, at 36 (1991).

131. See *Morrison*, 529 U.S. at 627 (explaining that the Fourteenth Amendment does not prescribe remedies for gender-based violence).

hate crime legislation in the 1980s, few if any included gender as a protected group, and less than a dozen states had done so when Congress began to consider VAWA.¹³² Some violent acts against women were not even considered a crime. For example, in a few states it was not illegal for a husband to rape his wife.¹³³ In several others, spousal rape was not considered a crime barring an aggravating factor, such as the use of a weapon.¹³⁴ Even when a man was convicted of rape, most state sentencing statutes did not have much bite.¹³⁵ "Almost one-quarter of convicted rapists never go to prison, and another quarter [receive] sentences [averaging] . . . 11 months."¹³⁶

Even when state legislatures passed laws to protect women from violence, state executive and judicial branches often failed to adequately enforce them.¹³⁷ Crimes of violence that primarily affect women were treated less seriously than comparable crimes that primarily affect men.¹³⁸ Police sometimes refused to take reports, and prosecutors allowed offenders to plead to less serious charges.¹³⁹ In certain counties, state attorneys refused to file acquaintance-rape cases "because they [felt] convictions [were] unlikely."¹⁴⁰ Police sometimes required that a victim pass a polygraph exam before they would pursue her allegations.¹⁴¹

Even when charges were brought, rape prosecutions did not fare as well as other prosecutions in state courts. "[A] rape case is more than twice as likely to be dismissed as a murder case, and nearly 40 percent more likely to be dismissed than a robbery case."¹⁴² While "69 percent of suspects arrested for murder are convicted of murder, and 61 percent of arrested robbery suspects are convicted of robbery," less than half of suspects arrested for rape are convicted of rape.¹⁴³ These discrepancies can be attributed to deep suspicion of victims' credibility and victim

132. S. REP. NO. 102-197, at 42.

133. S. REP. NO. 103-138, at 47 (citing a NOW Legal Defense and Education Fund Memo on file with the Senate Judiciary Committee).

134. See DIANA E. H. RUSSELL, RAPE IN MARRIAGE 21-22 (Indiana University Press 1990) (illustrating examples of aggravated assault not covered by hate crime legislation such as rape of a wife without the suffering of additional violence such as kidnapping or threat with a weapon).

135. S. REP. NO. 103-138, at 38.

136. *Id.*

137. See *id.* at 49 (noting that State remedies have proven inadequate and sources of protection have been lacking).

138. *Id.*

139. *Id.* at 42.

140. S. REP. NO. 102-197, at 47 (citing the REPORT OF THE FLORIDA SUPREME COURT GENDER BIAS STUDY COMMISSION 142 (1990)).

141. S. REP. NO. 103-138, at 45.

142. *Id.* at 42.

143. See *id.* (noting that "only one-half of all rapists serve an average of only 1 year or less in prison").

blaming attitudes unique to crimes against women. Judges and juries require more corroboration from rape victims than from victims in other crimes,¹⁴⁴ and trials often focus on the behavior of the woman, instead of the actions of her assailant.¹⁴⁵

Some examples will make the statistics more poignant. One probation officer questioned whether a nine-year-old girl was a "real victim," because he heard she was a "tramp."¹⁴⁶ A judge stated at a hearing that a victim of domestic violence "probably should have been hit."¹⁴⁷ Finally, a prosecutor "badgered a 15-year-old: 'Come on, you can tell me. You're probably just worried that your boyfriend got you pregnant, right? Isn't that why you're saying he raped you.'"¹⁴⁸

Congress had this record of state refusal and inability to protect women from violence before it when VAWA was passed in 1994. State government had failed to protect the social liberty of women in the most basic sense, and the federal government attempted to step in. *Morrison*, however, held that this was beyond the reach of congressional power. Thus, because State governments would not adequately protect the social liberty of women, and the federal government was prevented from doing so by the negative restraints on its legislative authority set forth in *Morrison*, government failed to adequately protect women from deprivations of basic social liberty.

Women are not the only group whom States have failed to adequately protect. Time and again, states have failed to protect the basic social liberties of many disfavored groups. Perhaps the most abysmal example of this failure is the Southern States' treatment of African-Americans. Leaving aside the system of legalized slavery, which is a definitional failure to protect social liberty, State governments have repeatedly failed to protect African-Americans from violence.¹⁴⁹

144. ILLINOIS TASK FORCE, GENDER BIAS IN THE COURTS 99 (1990).

145. S. REP. NO. 103-138, at 45-46 (citing the STATE OF IOWA, FINAL REPORT OF THE EQUALITY IN THE COURTS TASK FORCE 151 (1993)).

146. S. REP. NO. 102-197, at 34 (1991) (citing THE VERMONT SUPREME COURT & THE VERMONT BAR ASSOCIATION, REPORT OF THE VERMONT TASK FORCE ON GENDER BIAS IN THE LEGAL SYSTEM 140 (1991)).

147. *Id.* (citing ADMINISTRATIVE OFFICE OF THE CALIFORNIA COURTS, JUDICIAL COUNCIL, ACHIEVING EQUAL JUSTICE FOR WOMEN AND MEN IN THE COURTS 65 (1990)).

148. *Id.* (citing CONNECTICUT TASK FORCE ON GENDER BIAS, REPORT OF THE CONNECTICUT TASK FORCE ON GENDER BIAS 17-18 (1991)).

149. To cite one example, approximately 2,500 African-Americans were murdered by white southern lynch mobs in the post reconstruction years (1880-1930). STEWART E. TOLNAY & E. M. BECK, A FESTIVAL OF VIOLENCE 17 (1995). State and local authorities, however, usually turned a blind eye to such activities, or worse, were active participants in the lynchings. *Id.* at 205-06. The federal government's response to the situation was undoubtedly half-hearted, but attempts were made to offer some protection at the federal level.

C. *Why States Fail: The Reasons for State Refusal to Protect Social Liberty*

Having noted instances of States refusing to protect the social liberty of disfavored groups, it is now necessary to focus on two questions: First, why is it that states often fail to protect the basic social liberty of disfavored groups, and second, why would the federal government be expected to do a better job? The answers to both questions lay in the phenomena of majority tyranny and interest group concentration within smaller polities.

James Madison warns in *The Federalist No. 10* that:

The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression . . . Hence it clearly appears, that the same advantage, which a Republic has over a Democracy, in controlling the effects of faction, is enjoyed by a large over a small Republic – is enjoyed by the Union over the States composing it.¹⁵⁰

Madison returned to this thought in *The Federalist No. 51*, concluding that “[i]n the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good.”

The point is clear, the smaller the polity, the greater the danger for tyranny of the majority. The reason is that the population of a larger polity necessarily has greater diversity of interests. More interests cutting across more groups makes the concentration of individuals with similar goals of oppression difficult.

Of course, it would be a misnomer to speak of “the majority” in strictly numeric terms. Although America is a republic, power has never simply been at the whim of those most numerous. Large amorphous majorities, such as women, can have trouble coalescing for any sort of organized action.¹⁵¹ The wealthy, and

DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 207, 209 (1980). Between 1866 and 1874 Congress passed various acts aimed at preventing racially motivated violence. *Id.* at 209-10 (citing statutes currently codified in 18 U.S.C. §§ 242, 241 (2000)). *See also* Ku Klux Klan Act of 1871, ch. XXII, 17 Stat. 13 (1871) (making it unlawful in 1871 to deprive any individuals of rights under color of state law).

150. THE FEDERALIST NO. 51 (James Madison) (American Classics Series 1964).

151. Steven G. Calabresi, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403, 1409 (1982).

those already in positions of power, can have disproportionate influence on the political process. Indeed, some scholars have noted that relatively wealthy white suburban voters continually manage to grab a disproportionate amount of government expenditures on infrastructure, despite the fact that they make up only about twenty-five percent of relevant populations.¹⁵² The terms “majority” and “entrenched majority,” therefore, will be used herein to refer to those who are the traditional power holders in American politics. To some extent this is an issue of numbers, but one cannot ignore the influence of wealth and power in forming electoral and legislative majorities. This does not mean that Madison’s intuitions are inapplicable. The government can be expected to take into account an even less diverse range of interests when power is wielded by a privileged minority.

Under Madison’s theory, one expects to see greater protection of social liberty at the federal level than at the state level since the national polity is far more expansive than that of any individual state. “At the state level . . . the smaller number of factions facilitates the forming of entrenched majority coalitions.”¹⁵³ Because Congressional coalitions are less stable, and the votes of interest groups are needed on a variety of subjects, disfavored interest groups have the ability to assert more influence.¹⁵⁴ Support for various other legislative agendas is leveraged by interest groups for support of disfavored rights and interests.¹⁵⁵ Thus, when state majorities would be complacent in the face of violence against disfavored groups, interest groups at the federal level might be able to spur Congress into action.

The dynamics of interest group diversification would also affect the executive and judicial branches of the federal government, though perhaps not as directly. The President is accountable to the same national polity as Congress. Because the President must appeal to a variety of interest groups to be elected, he or she is subject to the same logrolling phenomenon as the legislature.¹⁵⁶ Thus, it is reasonable to expect that a President

152. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2003-04 (2000).

153. Calabresi, *supra* note 151, at 1407.

154. *Id.*

155. *Id.*

156. Note that although the pressures faced by the President and Congress stem from the fact that the federal government is accountable to a national majority, they each feel the pressure in different ways. Individual Congresspersons are not subjected to the national polity, but for Congress as a whole to get anything done, it must be able to incorporate various interests to form issue specific majorities. The President, on the other hand, is directly accountable to the national polity as a whole, and as a result must engage in interest group balancing just to be elected.

would use his or her influence over the national executive to further the interests of disfavored groups needed to form his electoral majority. Although the federal judiciary is not directly accountable to voters, judges are appointed by the President, and confirmed by the Senate, both of which are accountable to the national polity. To the extent that political dynamics force the President and the Senate to take account of disfavored interests, it is reasonable to expect that they would seat judges who would do the same, lest they lose the support of disfavored interest groups in future political battles. On a practical level, Congress, in passing VAWA, indicated its belief that the other branches of the federal government would do a better job protecting women than their counterparts in State governments.¹⁵⁷

The Madisonian theory has been borne out over the more than two hundred years of American constitutional history. Minority and disfavored interests, shunned at the state level, have often found support at the national level.¹⁵⁸ The most obvious example is slavery.¹⁵⁹ While the white majority in Southern States fought to maintain the institution of slavery, it was the federal government that stepped in to end the practice.¹⁶⁰ The federal government also ended segregation in the face of entrenched opposition from Southern majorities.¹⁶¹ Stepping outside the realm of race, the federal government has also protected the rights of accused criminals where states have refused to do so,¹⁶² the interests of welfare recipients, the poor generally,¹⁶³ middle-class farmers, and other groups that might find themselves shunned at the State level.¹⁶⁴

Returning to the questions at the beginning of this section, the answers are now clearer. The reason that states often fail to protect the basic social liberty of disfavored groups¹⁶⁵ is the problem of majority tyranny. Entrenched state majorities

157. S. REP. NO. 102-197, at 48 (1991).

158. DAVID A. SHAPIRO, *FEDERALISM: A DIALOGUE* 53 (1995).

159. *Id.*

160. *Id.* Indeed, prior to the Civil War the institution of slavery was often defended on the grounds of federalism and States' rights. *Id.*

161. *Id.*

162. *Id.* at 53-56.

163. On welfare recipients and the poor generally, see Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 522, 592-94 (1999).

164. Calabresi, *supra* note 151, at n.16.

165. That women have historically been a disfavored group cannot be questioned. Any claim that this problem has been remedied in the modern world can be refuted by reference to a simple political statistic. See U.S. CENSUS BUREAU, *STATISTICAL ABSTRACT OF THE UNITED STATES* Nos. 481, 482 (1999) (listing the total female elected officials as totaling 100,531 as compared to males at 324,255, and listing the total women holding state offices). As of 1998 only twenty percent of state legislators were women. *Id.*

furthering the interests of white men will be unresponsive to cries for help from women and minorities. State governments come to embody local prejudices, and therefore refuse to step in and protect the social liberty of disfavored groups from deprivation by those who have been, and remain, in power. This is the reason that states had not adequately responded to the problem of violence against women when Congress passed VAWA, and the reason states never adequately responded to the post-reconstruction lynching problem. One would expect the federal government to do a better job as the diffusion of interests on the national level makes the federal government more suited to the protection of disfavored interests. Further, this intuition has been borne out by history, most recently by the passage of VAWA.¹⁶⁶

D. United States v. Morrison, *Majority Tyranny, and the General Welfare Amendment*

Considering that the federal government is better equipped to protect the social liberty of disfavored groups than the states are, and that the states have refused to protect the social liberty of those groups, and subsequently considering these circumstances in light of Part I, the problem becomes apparent: the reinvigoration of negative restraints on federal legislative authority will, in certain situations, render the federal government powerless to intervene in the face of state refusal to protect the basic social liberty of disfavored groups. *Morrison* is an example of this precise phenomenon.¹⁶⁷

To ensure that the American system of government will adequately protect the social liberty of all citizens, the Constitution should be amended to eliminate all negative restraints on Congressional authority. Congressional power is limited to specifically defined enumerated powers, or the current Constitutional Amendments. It follows that negative restraints on Congressional power can be eliminated by making an expansive grant of legislative power to Congress.

In that vein, this paper proposes enacting the following Amendment to the Constitution: *Congress shall have power to legislate in furtherance of the general welfare*. This broad grant of legislative power would eliminate negative restraints on congressional authority, thereby empowering Congress to protect social liberty. The General Welfare Amendment would have supported the enactment of VAWA, but the Act was struck down because it was beyond the substantive power of Congress.¹⁶⁸

166. 42 U.S.C. § 13981 (2000).

167. *Morrison*, 529 U.S. at 598.

168. See *Morrison*, 529 U.S. at 602 (affirming that “Congress lacked constitutional authority to enact” the disputed provisions of VAWA).

One might argue that the rationale developed thus far does not support such a leap. On a certain level this is true; the proposed Amendment grants more power to Congress than the power to protect the social liberty of disfavored groups when States have failed to do so. A precisely tailored grant of legislative power, however, would not provide a workable solution. The Supreme Court would be left the task of defining "social liberty," and might read negative restraints into that phrase in the name of States' rights. "General welfare," on the other hand, is not susceptible to such a limiting interpretation. Not only is the concept of the general welfare power broadly accepted as a plenary grant of legislative authority,¹⁶⁹ the Supreme Court has already defined the term in conjunction with the Spending Clause.¹⁷⁰ The Spending Clause states that Congress has the power to "provide for the . . . general Welfare of the United States."¹⁷¹ Although the Court has purported to require that expenditures benefit the "general" public, as opposed to any specific group or individual,¹⁷² the standard is extremely deferential, granting discretion to Congress unless the choice is a clear display of arbitrary judgment.¹⁷³ There is little room, at this point, for the Court to read meaningful negative restraints into general welfare. Granting Congress general welfare power would close the door on judicially enforced negative restraints that might prevent Congress from protecting social liberty.

Therefore, to ensure that the proposed Amendment achieves its aim, it is necessary to grant somewhat more power than the rationale would otherwise justify. Although that could result in increased federal regulation beyond the protection of social liberty, the effect would not be systematically harmful to American democracy. Instead, it would simply reflect the reality of modern political culture.

E. The National Political Culture: A Structural Rationale for the General Welfare Amendment

The focus of this paper is an instrumental rationale for the General Welfare Amendment, but it is important to note that there is a strong structural rationale as well. America is comprised of one large political culture, not fifty, and issues of national importance should be decided on a national level.

169. See, e.g., Pannier, *supra* note 11, at 79 (defining "general welfare power" as the power to enact any legislation the legislature believes would "promote the common good of the persons subject to its jurisdiction").

170. U.S. CONST. art. I, § 8, cl. 1.

171. *Id.*

172. *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 738 (1950).

173. *TRIBE*, *supra* note 122, at n.19 (citing *Helvering v. Davis*, 301 U.S. 619, 640 (1937)).

There is real cultural diversity in America, but that diversity is not accurately confined to the boundaries of the states. Instead, diversity in America stems from the various racial, religious, and ethnic groups that reside here.¹⁷⁴ For the purposes of this paper, a group of Americans maintaining a distinct cultural identity founded on one or more of these characteristics will be called an “identity-based” cultural group. In the vast majority of cases, identity-based cultural differences in this country are pan-regional. For example, African-Americans, Jews, and White Anglo-Saxon Protestants, like most identity-based cultural groups, can be found in all or most parts of the country.¹⁷⁵ For this reason federalism is simply irrelevant to the reflection of these cultural differences in governmental policy.

“For all our diversity, undoubtedly our strong sense of national identity rests on a common American culture, widely shared among our people.”¹⁷⁶ The mobility and communications technology of modern society have served to unify that culture more than ever.¹⁷⁷ This is not to say that the common American culture completely eviscerates identity-based distinctions. It does not. Instead, American culture embraces those distinctions, incorporating diversity as a component of the larger unifying culture.¹⁷⁸

Perhaps the most important incarnation of unified American culture is the common political culture. Dating back to the revolution, the common political culture has been based in ideals. Although the relevant ideals have changed somewhat over time, foundation in ideals has remained constant. The ideals binding America into one political culture today are “individualism, egalitarianism, democracy, nationalism, and tolerance of diversity.”¹⁷⁹ Adherence to these ideals holds a diverse America together as a cohesive political unit.

The existence of a national culture, and specifically the national political culture, has resulted in a “social consensus that

174. See Nathan Glazer, *The Constitution and American Diversity*, FORGING UNITY OUT OF DIVERSITY 60, 62 (Robert A. Goldwin et al. eds., 1989).

175. Mormonism in Utah is a possible exception to this generalization. See Edward L. Rubin & Malcolm Freeley, *Federalism: Some Notes on a National Neurosis*, 41 U.C.L.A. L. REV. 903, n.155 (1994) (citing Glazer, *supra* note 174, at 60-64 and discussing the general cultural themes of America as having no boundaries, with the exceptions of Utah, Puerto Rico, and Guam).

176. KENNETH L. KARST, *BELONGING TO AMERICA* 29 (1989).

177. See James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 828 (1992) (discussing the more recent move toward a mobile and nationally structured economy).

178. See KARST, *supra* note 176, at 30 (illustrating this point by stating that new citizens who swear to defend the Constitution are embracing an American culture that is “a mixture of behavior and belief that infuses our law and our institutions, transcending race and religion and ethnicity.”).

179. *Id.* at 30-31.

fundamental values in this country will be debated and resolved on a national level.”¹⁸⁰ The large size of the national polity may render any individual’s sense of participation rather attenuated, “[b]ut this does not transform the states . . . into true political communities.”¹⁸¹ At one time some states may have had distinct political cultures, but that is no longer the case.¹⁸² Thus, because American political culture is national in scope, not local, political problems that have captured the consciousness of Americans should be resolved on the federal level.

Although, as the social liberty rationale should have made clear, it is likely that the federal government will be more protective of disfavored groups than the States have been, this structural point is not dependant on any such outcome. Insofar as politics are concerned, America is culturally one state. The political community as a whole should resolve important decisions of national scope.

*F. The Valuable Aspects of Federalism: Why the Amendment
Helps More Than it Hurts*

Before determining that the General Welfare Amendment is justified, it is necessary to do more than analyze its beneficial aspects. Federalism has been defended over the years on the grounds that it protects several interests that should not lightly be discarded. If the General Welfare Amendment would do substantial harm to any such interest, it might not be justifiable. Therefore, it is necessary to examine the supposed benefits of federalism to determine whether the general welfare power would undermine them in any serious way.

In *Gregory v. Ashcroft*,¹⁸³ the Supreme Court, per Justice O’Connor, listed the purported benefits of federalism. Among these benefits are better protection of fundamental liberties, increased opportunity for citizen involvement in a democratic process, increased experimentation and innovation in government, making “government more responsive by putting the States in competition for a mobile citizenry,” and increased sensitivity to the diverse needs of a heterogeneous society.¹⁸⁴ It is unlikely, however, that the General Welfare Amendment would harm any of these interests. The reasons vary somewhat by the specific interest, but there are two common themes. First, there are political aspects of federalism and other constitutional guarantees that would check the power of Congress armed with general welfare power. Second,

180. Gardner, *supra* note 177, at 828.

181. Rubin & Freeley, *supra* note 175, at 946.

182. *Id.* at 944.

183. *Gregory v. Ashcroft*, 501 U.S. 452 (1991).

184. *Id.* at 458.

many of these interests are more properly characterized as benefits of decentralization and thus are goals the General Welfare Amendment might actually facilitate.

The *Gregory* Court focused on the protection of individual liberty as the primary benefit of federalism.¹⁸⁵ This is the traditional argument in favor of federalism, finding its roots in the writings of both Hamilton¹⁸⁶ and Madison.¹⁸⁷ This argument can only be true insofar as it refers to "political liberty." Federalism, specifically our system of limited enumerated powers, is harmful to social liberty. In constructing any system of government, however, one must always be aware that social liberty can be protected only at the expense of political liberty.¹⁸⁸ By giving government the power to protect us from others, we give government the power to restrain our action. The question is, how much of our political liberty are we willing to trade to ensure that our social liberty will be protected; or for the purposes of this analysis, would the General Welfare Amendment surrender too much of our political liberty for the gains it would accrue to our social liberty?

There are several reasons to believe that the General Welfare Amendment would not substantially decrease the current level of political liberty in America. First, the Amendment would grant very little power that does not already exist within our system of government. Plenary legislative authority already exists at the state level, and the Amendment would simply grant this power to the federal government as well. Second, all positive constitutional restrictions on governmental authority would still be effective.¹⁸⁹ The General Welfare Amendment would not give the federal government power to pass any law that the states do not already have the power to pass. In this absolute sense political liberty would not suffer.

This is, to some extent, an overstatement. Any state's legislative authority is limited by positive restrictions in both the Federal and State Constitutions. In some instances, a state constitution might be more protective of political liberty than the Federal Constitution.¹⁹⁰ To the extent that this is true in any

185. See *id.* at 458-60 (examining the balance between state and federal power and its affects of individuals).

186. See THE FEDERALIST NO. 28 (Alexander Hamilton) (discussing the availability of actions of the federal government by use of force).

187. See THE FEDERALIST NO. 51 (James Madison) (discussing the separate powers of different governments).

188. See generally Part II. A.

189. See *infra*, Part IV. B (outlining the fact that the General Welfare Amendment, if enacted, would not affect specific prohibitions of government action).

190. See generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61

individual instance, the Amendment would grant the federal government power that the state government lacks. The Vermont case *Baker v. State*¹⁹¹ is the best recent example of this phenomenon. In *Baker*, the court held that the Common Benefits Clause of the Vermont State Constitution entitles same-sex couples to the same benefits that the state grants married heterosexual couples.¹⁹² This is a power not construed to be a part of the Federal Constitution.

The extent of this phenomenon, however, is not substantial. Although there are numerous examples of state courts interpreting their constitutions to provide greater protection for political liberty than the Federal Constitution,¹⁹³ state courts do not systematically serve this end. Often, state courts will refuse to interpret their own constitution, or will not be clear about which constitution they are interpreting.¹⁹⁴ When state courts do explicitly undertake to interpret their constitutions, the provision at issue is usually given exactly the same meaning as a corresponding provision in the Federal Constitution.¹⁹⁵ Thus, state constitutionalism does not systematically provide greater protection for political liberty than the Federal Constitution.¹⁹⁶

The argument that federalism increases political liberty is not only about the absolute existence of power, but instead relies heavily on the effects of allocating power to different sources. Alexander Hamilton summed up the point in Federalist No. 28, stating that "power being almost always the rival of power, the general government will at all times stand ready to check the usurpations of the state governments, and these will have the same disposition towards the general government."¹⁹⁷ The

N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

191. 744 A.2d 864 (Vt. 1999).

192. See *id.* at 867.

193. See Sol Wachtler, *Our Constitutions – Alive and Well*, 61 ST. JOHN'S L. REV. 381, 397 (1987) (stating that over 350 state court decisions were handed down between 1970 and 1984 that stated that the Supreme Court's minimal requirements did not rise to the level of the particular state's threshold).

194. See Gardner, *supra* note 177, at 785 (stating that the obscurity of the basis of a court's interpretation in one of the general trends in recent constitutional decisions).

195. See *id.* at 788 (stating that often, state courts fail to set forth whether their rulings rest on state of federal grounds because both constitutional have the same meaning).

196. See generally *id.* But see David Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221, 221 (1988) (stating that "state supreme courts have recently interpreted states' constitutions to confer more rights than their federal counterpart in well over 400 cases."); Wachtler, *supra* note 193, at 397 (stating that state courts have gone beyond the minimal protections set forth by the Supreme Court in over 350 cases).

197. THE FEDERALIST NO. 28 (Alexander Hamilton).

traditional argument is that dividing power among two distinct governments will cause each to protect the political liberty of citizens from usurpation by the other. Adoption of the General Welfare Amendment would no doubt significantly alter the balance of powers established by the Constitution. This change toward centralization, however, would not endanger the level of political liberty currently enjoyed by American citizens.

There is anecdotal evidence that centralization does not necessarily march hand-in-hand with political tyranny,¹⁹⁸ nor federalism with political liberty. The United Kingdom has a highly centralized government, with a long tradition of political liberty.¹⁹⁹ Conversely, Brazil saw the coexistence of federalism with the oppressive Vargas dictatorship.²⁰⁰ It seems, therefore, that support of political liberty might have more to do with national political traditions than with how power is dispersed.

Also, the elimination of judicially enforced negative restraints on congressional authority does not mean the eradication of "federalism" from our system of government. There are political aspects of federalism that would prevent Congress from abusing the general welfare power. There are currently vast legislative areas in which Congress has the power to preempt State regulation, but chooses not to.²⁰¹ Congress does not regulate in these areas because it cannot overcome the "sub-constitutional"²⁰² checks of federalism's political safeguards. Among these safeguards are the fact that every State is guaranteed two Senators, elected by the State as a whole; every State is guaranteed at least one member of the House of Representatives, and all districts of representation are drawn intrastate; and Presidential elections are focused on States as Electoral College voting units.²⁰³ Just as these aspects of federalism protect political liberty today by limiting the actions of Congress, they would serve to prevent political tyranny at the hands of a Congress armed with general welfare power. The Supreme Court has accepted these

198. The term "political tyranny" will be used as shorthand for unacceptable deprivations of political liberty.

199. See WILLIAM H. RIKER, *FEDERALISM: ORIGIN, OPERATION, SIGNIFICANCE* 140 (1964) (contrasting the governments of the United Kingdom and Brazil).

200. *Id.*

201. See SHAPIRO, *supra* note 158, at 114 (quoting H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* (1953), and theorizing that the federal government is "generally interstitial in nature.").

202. *Id.* at 118.

203. *Id.* at 116-17 (citing Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 *COLUM. L. REV.* 543 (1934) and M. Diamond, *The Federalist on Federalism: Neither a National nor a Federal Constitution but a Composition of Both*, 86 *YALE L.J.* 1273 (1977)).

political aspects of federalism as sufficiently protective of federalist interests in the past.²⁰⁴

Congress is also restrained by the internal checks and balances within the federal government. The founders relied heavily on dividing the powers of the federal government among different branches as a guarantor of political liberty.²⁰⁵ The internal system of checks and balances instituted by the founders is so extensive that some scholars deem it likely that this system alone was “very likely to prevent the advent of absolute power even in a government in which all authority was centralized.”²⁰⁶

It is also possible for negative restraints on Congressional power to actively *constrain* political liberty. Attempts by a national majority to enhance political liberty can be frustrated when that decision is left to the states.²⁰⁷ *City of Boerne v. Flores*²⁰⁸ was a realization of this possibility when the court negated Congress’ ability to pass “general legislation.”

In response to the outrage surrounding *Employment Division v. Smith*,²⁰⁹ where the Supreme Court virtually eliminated the protections of political liberty in the Free Exercise Clause, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA).²¹⁰ The Religious Freedom Restoration Act legislatively invalidated state (and federal) legislation that “substantially burdened” a person’s exercise of religion, absent a compelling governmental interest.²¹¹ The Religious Freedom Restoration Act was an attempt by Congress to enhance the political liberty of citizens vis-à-vis the States. The Supreme Court, however, struck down RFRA as beyond the reach of Congress’ power under Section 5 of the Fourteenth Amendment.²¹² Therefore, a negative restraint on Congressional authority prevented Congress from *enhancing*

204. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 552 (1985) (stating 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.”).

205. See THE FEDERALIST NO. 47 (James Madison) (discussing the rationale behind three branches of government).

206. SHAPIRO, *supra* note 158, at 51 (illustrating the Framers’ intent to design a federal government with internal checks to combat potential tyranny).

207. See RIKER, *supra* note 199, at 142 (illustrating this phenomenon by using the example of civil rights decisions by Southern and border states as they pertained to African-Americans).

208. 521 U.S. 507, 525 (1997). See also *supra* notes 278 to 282 and accompanying text (discussing *Boerne* as a case in which the Court held that the enactment of the RFRA was beyond the power of Congress and that Constitutional interpretation is the sole job of the Supreme Court).

209. 494 U.S. 872 (1990).

210. 42 U.S.C. § 2000bb, *et seq.* (1993).

211. *Boerne*, 521 U.S. at 515-16.

212. *Id.* at 536.

political liberty.

Finally, there are better constitutional mechanisms than federalism for protecting political liberty. Even in a system of truly separate sovereigns, each would have the power in its own sphere of authority to deprive political liberty, except to the extent that there are positive constitutional prohibitions on governmental action. For instance, if there were no First Amendment protection, the federal and state governments would be free to pass laws restricting the freedom of speech. The volumes of First Amendment cases striking down such laws offer little hope that federalism would protect this most valuable political liberty. Throughout American constitutional history, positive prohibitions on governmental power, as enforced by the Supreme Court, have stood as the primary counterweight to the dangers of political tyranny.²¹³ The General Welfare Amendment would not empower Congress to ignore these protections.²¹⁴ To the extent that Congress, thus empowered, would decrease political liberty in a manner the people find unacceptable, further positive prohibitions on governmental action could be added to the Constitution. Therefore, upon close examination, it is obvious that *Gregory's* primary rationale in favor of federalism—the preservation of political liberty—would not be offended by the General Welfare Amendment.²¹⁵

The other rationales for federalism that are set forth by *Gregory* will overlap to some extent. The reason for this overlap is that the General Welfare Amendment will not unduly harm the interests that federalism seeks to protect. However, as demonstrated by Professors Edward Rubin and Malcolm Freeley, these rationales actually justify decentralization more than they do federalism.²¹⁶ “Decentralization is a managerial concept; it refers to the delegation of centralized authority to subordinate units of either a geographic or a functional character.”²¹⁷ Decentralization allows for more effective management. An administrator with a more intimate knowledge of the subject matter will be better qualified to make decisions than a distant decision maker who is saddled with various other responsibilities.²¹⁸ Federalism, by contrast, is defined by Rubin and Freeley as a political system where “the subordinate units possess prescribed areas of jurisdiction that cannot be invaded by

213. SHAPIRO, *supra* note 158, at 49-50.

214. See *infra* page 85 (discussing how the General Welfare Amendment would not affect positive prohibitions of government authority).

215. See generally *Gregory*, 501 U.S. 452.

216. See generally Rubin & Freeley, *supra* note 175 (discussing power reserved to the states).

217. *Id.* at 910.

218. *Id.*

the central authority."²¹⁹ Rubin and Freeley's argument is relevant to this analysis because the General Welfare Amendment would create a system of "implicit decentralization" to the state level,²²⁰ and allow the federal government to decentralize decision making to even smaller units, where appropriate.

One of the benefits that Justice O'Connor attributes to federalism in *Gregory* is that "it increases opportunity for citizen involvement in democratic processes."²²¹ The argument is that "locating various decisions at the regional or local level will enable more people to participate in [decision making]."²²² An analysis of voter turnout shows that participation is much greater for national elections than for state and local elections.²²³ Therefore, as a matter of empirical fact, a larger percentage of the population participates via the ballot box in the federal government.²²⁴ Although participation can, and does, take forms other than voting,²²⁵ this fact casts some doubt on the participation rationale. Further, those other forms of participation include exerting pressure on representatives and going to city council meetings.²²⁶ These are as likely to exclude disfavored groups as to help them as they encourage the interest group concentration that leads to majority tyranny.²²⁷

Assuming that participation is a good thing, and it undoubtedly is in many respects, there is another reason to discount it as a rationale for federalism; federalism does not necessarily encourage participation. Instead, federalism simply allows states to decide as a matter of policy whether they will encourage participation, or choose to suppress it. There is no reason to believe that states will be more favorable to local units than the federal government.²²⁸ If participation is a primary political value, it should be enforced as a matter of national policy.

Another benefit that *Gregory* attributed to federalism was

219. *Id.* at 911. The operating definition of "federalism" is important. Although there are other aspects of "federalism," such as the political aspects, Rubin and Freeley limit their definition to precisely what the General Welfare Amendment would alter. *Id.* For purposes of this section, federalism means precisely a system of limited enumerated powers with judicially enforced negative restraints.

220. See *infra* pages 80-81 (discussing in detail the idea of "implicit decentralization" and its effects).

221. *Gregory*, 501 U.S. at 458.

222. Rubin and Freeley, *supra* note 175, at 915.

223. D. Bruce La Pierre, *Political Accountability in the National Political Process - The Alternative to Judicial Review of Federalism Issues*, 80 NW. U. L. REV. 577, 631 n.310 (1985).

224. *Id.*

225. Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 391 (1997).

226. Rubin & Freeley, *supra* note 175, at 915.

227. *Id.*

228. *Id.* at 916.

that it “allows for more innovation and experimentation in government.”²²⁹ This argument is derived from the dissent of Justice Brandeis in *New State Ice Co. v. Liebmann*,²³⁰ in which he stated that “one of the happy incidents of the federal system [is] that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”²³¹ While this rationale is theoretically appealing, there is reason to doubt whether experimentation systematically takes place as a matter of practice. Public officials are primarily concerned with reelection. Committing resources to a novel idea is risky when failure can cost one his or her job.²³²

Further, a decentralized system would be a better vehicle for experimentation than the current arrangement. To discover which policy choice is best, a central authority can institute different policies in different sub-units. The control necessary to the experimental method is available in a decentralized system, but not in a federalist system.²³³ In practical terms, however, this sort of experimentation is unlikely to take place very often, even in a decentralized system. Innovation in government does not emerge in this controlled manner, but instead under the pressure of trying to solve immediate problems.²³⁴ Under these circumstances states can be expected to innovate novel solutions.

The General Welfare Amendment, however, would not harm this arrangement. States would not be preempted from action unless the federal government were to implement a national solution, and the political safeguards of federalism would prevent the federal government from implementing national solutions to problems better solved at the state and local level.²³⁵ Further, when such innovation actually yields a useful solution, the General Welfare Amendment would allow the federal government to implement it nationally, as opposed to relying on the action of fifty separate state legislatures. Thus, to the extent that experimentation and innovation actually take place, the General Welfare Amendment certainly would not hurt the process, and actually might help it.

Gregory also listed the assumption that federalism “makes government more responsive by putting the States in competition

229. *Gregory*, 501 U.S. at 458.

230. 285 U.S. 262 (1932).

231. *Id.* at 311.

232. Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 594 (1980).

233. Rubin & Freeley, *supra* note 175, at 923-24.

234. Friedman, *supra* note 225, at 398.

235. SHAPIRO, *supra* note 158, at 116-18.

for a mobile citizenry” as one of its justifying rationales.²³⁶ This argument, derived from modern public choice theory,²³⁷ is basically that States can offer different “packages” of legislation and benefits, and that citizens can choose, and relocate to, the jurisdiction that best suits them. In this way, a market develops in which states bid for citizens. There are notable examples where this precise phenomenon appears to have occurred. For example, homosexual populations have expanded in cities like San Francisco where the local package of legislation is more tolerant of homosexuality than elsewhere.²³⁸ It seems unlikely, however, that this option is available to all or even most Americans. Our society simply is not mobile enough to allow such a system to work.²³⁹ When people do move it usually has more to do with work, interpersonal relationships, and even the weather than it does any state’s particular package of legislative programs.²⁴⁰

Furthermore, certain disfavored populations, who are perhaps most in need of favorable benefits packages, are least likely to receive them. Economically disadvantaged people might not have the means to relocate even when better packages of legal services are available elsewhere.²⁴¹ More fundamentally, States have little incentive to actively seek economically disadvantaged populations.²⁴²

The argument can be brought into perspective by an example from the issues in *Morrison*.²⁴³ It would be hard to imagine every married woman in Oklahoma and North Carolina packing up their things and moving out of state in 1993 because those states refused to criminalize marital rape.²⁴⁴ Public choice theory simply cannot work for most Americans.

236. *Gregory*, 501 U.S. at 458.

237. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956) (discussing an in-depth explanation of public choice theory).

238. Michael W. McConnell, *Federalism: Evaluating the Founders’ Design*, 54 U. CHI. L. REV. 1484, 1503 (1987).

239. See Ann Markusen, *American Federalism and Regional Policy*, 16 INT’L REGIONAL SCI. REV. 3, 9 (1994) (noting that mobility incurs high transaction costs). *But cf.* THOMAS R. DYE, *AMERICAN FEDERALISM: COMPETITION AMONG GOVERNMENTS* 15-16 (1990) (claiming that mobility in American society is sufficient to make such a system work).

240. Friedman, *supra* note 225, at 387-88.

241. Robert P. Inman & Daniel L. Rubinfeld, *A Federalist Fiscal Constitution for an Imperfect World: Lessons from the United States*, FEDERALISM: STUDIES IN HISTORY, LAW, AND POLICY 79, 84-86 (Harry N. Scheiber ed., 1988).

242. See *Saenz v. Roe*, 526 U.S. 489, 492-94 (1999) (providing a recent example; California, which has better public assistance benefits than other states, tried to impose a residency period before new citizens could take advantage of its programs; it was a clear attempt to dissuade needy persons from migrating to California).

243. See *generally Morrison*, 529 U.S. 598.

244. S. REP. NO. 103-138, at n.42 (1993).

Of course the San Francisco example proves that public choice theory does work in some situations. But federalism is not what makes it work, and the San Francisco example proves this. San Francisco is not a State; its political independence is not protected by federalism. If California were to implement statewide anti-homosexual policies, San Francisco would be bound. Furthermore, federalism guarantees only fifty separate jurisdictions, an insufficiently elastic supply.²⁴⁵

A real system of public choice would require a national commitment to the system on the local level.²⁴⁶ The General Welfare Amendment would allow the federal government to implement such a policy. Further, when local control is beneficial the political safeguards of federalism could be expected to restrain the federal government from regulating. In sum, a system of public choice benefits few, but if Americans are serious about public choice as a policy, the General Welfare Amendment could help develop a workable system.

Finally, *Gregory* praised federalism because it “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society. . . .”²⁴⁷ This is an appealing argument from a relativist perspective. If there are real cultural differences from state to state, it makes sense to allow those cultures to be governed by rules and norms that fit their culture.

While this may have been the case in 1788, American cultural distinctions today are not drawn neatly along the boundaries of the states. In modern America, cultural differences can primarily be attributed to the existence of identity-based cultural groups. As Part II. E. demonstrated, identity-based diversity is spread throughout the country, not concentrated in specific States.²⁴⁸ Still, one might argue that there are real cultural differences between different regions of the country, especially the Northeast, Midwest, South, and West.²⁴⁹ Regional diversity, to the extent that it is a real phenomenon, can be tied to federalism.²⁵⁰ States can act

245. Rubin & Freeley, *supra* note 175, at 918-19.

246. *Id.* at 919.

247. *Gregory*, 501 U.S. at 458.

248. See *supra* notes 177 to 185 and accompanying text (stating that diversity of cultures is not confined to state boundaries in modern society, and is instead spread throughout the country).

249. Calabresi, *supra* note 11, at 766-67.

250. Peter H. Schuck, *Introduction: Some Reflections on the Federalism Debate*, 14 *YALE L. & POLY REV.* 1, 14 (1996). Recall the argument of Part II.E, *supra*, that political culture in the United States is national in scope. Insofar as that is true, it is somewhat unrealistic to argue that states further the expression of regional differences in political culture. Admittedly, the truth may lie somewhere between the extremes, but the point in this section is to assume that Justice O'Connor has raised a real concern and explain why it

as a proxy, albeit an small one, for expressing regional differences in government policy.²⁵¹

The General Welfare Amendment, however, would not substantially hinder the governmental expressions of regional differences. By leaving in a federalist structure, the General Welfare Amendment ensures limited federalist regulation in areas of local concern.²⁵² Senators, representatives, and even the President have reasons to leave local concerns to local governments. Therefore, when interests are truly regional in nature, removing the negative restraints on congressional authority would not hinder the expression of cultural differences in governmental policy making when interests are truly regional in nature.

“Popular perception,” is another great concern that must be addressed and is beyond the academic rationales of federalism and is fundamental to the current constitutional structure. By recommending a centralized general welfare power in the federal government, the popular perception is the belief that Washington, D.C. is perhaps the least worthy recipient of more governmental power. Washington, as supporters argue, has a parochial national view toward government that ignores the concerns of individual people. This political elitist bend creates a government that is responsive only to interests that are able to capture attention on a national scale.

Any response to the popular perception must first acknowledge that it is, indeed, accurate. The federal government would focus the General Welfare power on issues of national concern. However, this does not mean that local and individual interests would be ignored. To ensure a workable system, the proposed Amendment would not abolish state and local government. Realistically, the federal government could not micro-manage 270,000,000 people across 3,697,192 square miles. As a practical necessity, decentralization is essential for an effective government. Thus, state and local governments would still have power and independence to meet local concerns in this reframed constitutional structure.²⁵³

More than ignoring local interests, the popular perception is concerned with the possibility of excessive federalization of local interests. To some degree the political aspects of federalism would ameliorate any tendency toward excessive federalization. As discussed previously, the federal government is comprised of

will not come to pass. *Id.*

251. *Id.*

252. SHAPIRO, *supra* note 158, at 114-18.

253. See Part III, *infra* (discussing the role of states after the enactment of the General Welfare Amendment, the retained powers of the states and the relationship between state and federal government).

actors from local jurisdictions.²⁵⁴ This dynamic would operate, as it does today, to prevent federal regulation in areas of truly local concern.²⁵⁵

But the political safeguards of federalism would not do all the work. Federalization of areas predominantly regulated by the states would take place. Such is the point of the General Welfare Amendment. The federal government would be cognizant of issues that concern the national political culture.²⁵⁶ The federal government would also be more concerned with the interests of groups traditionally excluded from effective participation in policy making at the state level. The potential focus of the federal government on nationally recognizable interest groups is, in fact, the very dynamic motivating the proposal of the General Welfare Amendment. Although the popular perception has merit, its focus on the negative aspects of federalization is something of a misrepresentation. There are benefits that, overall, outweigh the negatives.

The justifying rationales of federalism listed by Justice O'Connor in *Gregory* and contained in the popular perception would not be harmed substantially by enacting the General Welfare Amendment. In many cases these interests are actually furthered by decentralization, fostered by the General Welfare Amendment. In others, the political safeguards of federalism, and other constitutional mechanisms, will serve to protect the interest. In short, the General Welfare Amendment would do little, if any, harm to the interests of federalism.

In addition to the theoretical arguments, recent American constitutional history also supports the proposition. For half a century before *Lopez* was decided in 1995, the Supreme Court had not invalidated any legislation for exceeding Congress' authority under the Commerce Clause.²⁵⁷ The disappearance of negative restraints on congressional authority seemed so permanent that some scholars suggested that the Constitution had been amended implicitly.²⁵⁸ While *Lopez* was pending, David Shapiro wrote, "nothing in Justice O'Connor's pro-state-autonomy approach . . . suggests a reappraisal of the scope of congressional power to regulate *private* activity under the Commerce Clause."²⁵⁹ In the sixty years prior to *Lopez*, Congress essentially had general

254. See *supra* notes 203 to 222 and accompanying text (reiterating the composition of state representation in the federal government and emphasizing the notion of truly separate sovereigns).

255. SHAPIRO, *supra* note 158, at 116-17.

256. See Part II. E., *supra* (discussing the cultural composition of the United States and how the enactment of the General Welfare Amendment would relate to it).

257. Jost, *supra* note 11, at 210.

258. BRUCE ACKERMAN, *WE THE PEOPLE* 270 (2d ed. 1991).

259. SHAPIRO, *supra* note 158, at n.21 (emphasis in original).

welfare power and did not, in that period of time, harm the interests *Gregory* attributed to federalism. The General Welfare Amendment, like the expansive Commerce Power exercised prior to *Lopez*, would not endanger the interests of federalism.

III. CHANGING THE STRUCTURE: THE ROLE OF THE STATES IN THE RECAST UNION

Having proposed a fundamental change to the basic Federal Constitutional structure, it is necessary to spend some time considering the role that the states would play in this recast Union. That role can be summed up in two phrases, "concurrent-powers federalism"²⁶⁰ and "implicit decentralization." The first concerns the powers retained by the states, the second describes the relationship between the federal government and the states.

A. *From Reserved-Powers to Concurrent-Powers Federalism*

The Constitution currently establishes "reserved-powers federalism," meaning there are subjects which states can regulate, but the federal government cannot.²⁶¹ Enacting the General Welfare Amendment will alter this arrangement, giving the federal government general legislative power. Although the regulatory power of the federal government would be greatly expanded, it does not follow that the states will be left with none. States will retain their traditional legislative authority under the "police power." Because the state and federal legislatures will be empowered to regulate the same subject matter, the General Welfare Amendment will have established a concurrent-powers federalist system.

It is plausible to read the Tenth Amendment as the source of state power in the United States, "[t]he powers not delegated to the United States by the Constitution . . . are reserved to the States . . ."²⁶² Under this interpretation the General Welfare Amendment would eliminate all state authority. There would be no power "not delegated to the United States." The Tenth Amendment, though, has not been given this construction. It has instead been read as mere tautology, affirming that the powers of the federal government are limited to those specifically enumerated.²⁶³ State governments instead derive their power from their inherent sovereignty.²⁶⁴ This dominant interpretation of the

260. Pannier, *supra* note 11, at 79.

261. *Id.*

262. U.S. CONST. amend. X.

263. *U.S. v. Darby*, 312 U.S. 100, 124 (1941); *TRIBE*, *supra* note 122, at 860.

264. RUTH L. ROETTINGER, *THE SUPREME COURT AND STATE POLICE POWER: A STUDY IN FEDERALISM* 10 (1957). *See also Texas v. White*, 74 U.S. 700, 725 (1868) (stating the Constitution's assumption that the states are

Tenth Amendment would allow concurrent legislative power, which fits well with modern practice, where concurrent authority is quite common.²⁶⁵

There is another theory under which the powers of state governments could be diminished by the General Welfare Amendment. The most expansive grant of federal power in the current constitutional system is undoubtedly the Commerce Clause, which has been read to contain implicit limitations on state regulatory authority—the dormant Commerce Clause doctrine.

There are several reasons to believe that the General Welfare Amendment would not imply any such limitation. First, the argument at the base of dormant Commerce Clause doctrine is that the power to “regulate” “implies in its nature, full power over the thing to be regulated. It excludes, necessarily, the action of all others that would perform the same operation on the same thing.”²⁶⁶ The General Welfare Amendment grants Congress the power to “legislate in furtherance of.” This phrase does not have the same preemptive force as the “power to regulate.”

There are functional arguments as well. Even the seminal dormant Commerce Clause cases acknowledge that State regulation cannot be totally precluded when some diversity is necessary.²⁶⁷ There certainly are reasons to allow diversity of legislation across this vast nation, as the arguments in favor of federalism make clear. Further, the doctrine of constitutional doubt would militate against reading implied limitations into the General Welfare Amendment. The Supreme Court has long held that “[t]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible states.”²⁶⁸ Reading the Amendment as preclusive of all State power would offend the general constitutional structure. While an inference of exclusivity may be appropriate for a narrow grant of congressional power, “where Congress has an extraordinary grant of unlimited authority to adopt substantive legislation, the exclusivity of that power must be specified.”²⁶⁹

Because States derive their authority from sources that are

indestructible).

265. See *Tafflin v. Levitt*, 439 U.S. 455, 458 (1990) (holding that “[u]nder our federal system, the States possess sovereignty concurrent with that of the Federal Government . . .”). See generally MORTON GRODZINS, *THE AMERICAN SYSTEM: A NEW VIEW OF GOVERNMENT IN THE UNITED STATES* (1966) (detailing the “marble cake” theory of federalism).

266. *Gibbons*, 22 U.S. at 209.

267. See *Cooley v. Bd. of Wardens*, 53 U.S. 299, 315 (1851) (discussing the enactment of state laws as in line with the federal constitution).

268. *White*, 74 U.S. at 725.

269. Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717, 1720 (1991).

pre or extra-constitutional, and because the General Welfare Amendment should not be read to imply restrictions on state authority, the states would retain their traditional "police power" under the Amendment. The federal government and the states would have concurrent power to legislate for the general welfare—the Amendment would establish a system of concurrent-powers federalism. This does not mean, however, that the role of the states would be undiminished as more expansive federal power means more opportunities for preemption.

B. The Preeminence of Preemption: A System of Implicit Decentralization

Whenever there are concurrent powers in our federalist system, problems can arise when state regulation conflicts with federal regulation. The Supremacy Clause²⁷⁰ guarantees that these conflicts will be resolved in favor of the federal policy.²⁷¹ The constitutional method for determining whether a conflict exists, and determining the extent to which state law must therefore be displaced, is the preemption doctrine.²⁷² This is not meant to suggest that applying the preemption doctrine would be an easy task. The point is that preemption analysis would be the task, and that federal law would be supreme.

Because the states would be free to legislate unless preempted by the federal government, the resulting system would be one of implicit decentralization to the state level. A decentralized arrangement would further the interests often attributed to federalism.²⁷³ The states would make regulatory decisions unless Congress determined that the subject matter was of national concern. In most circumstances, states would continue to be free to provide greater protection for political and social liberty than that provided by the federal government. The political safeguards of federalism would dissuade Congress from divesting states of this power unless the matter was truly of national concern. But when Congress does decide to act, its decisions would be supreme.

IV. REPAINTING THE CONSTITUTIONAL LANDSCAPE:
WHAT HAVE WE DONE?

The effects of such profound change to the structure of the constitutional system would reverberate throughout all of

270. U.S. CONST. art. VI, cl. 2.

271. TRIBE, *supra* note 122, at 1172.

272. *See id.* (offering a thorough account of the preemption doctrine). *See generally* Friedman, *supra* note 225, at 342-47 (offering a less thorough, but more concise account of the preemption doctrine).

273. *See supra*, Part II. F (discussing current federalism and its benefits).

constitutional law, most profoundly through the doctrines of federalism. To examine or even list all of these effects would be impossible. However, by analyzing some major doctrinal areas it is possible to see the emergence of interpretive principles. To ferret out these principles, it is necessary to look at three different classes of doctrine and examine, what would necessarily change, what would necessarily stay the same, and what would fall into a gray area.

A. Doctrines Overruled by the General Welfare Amendment

All doctrines of negative limitation would, by hypothesis, be overruled by the General Welfare Amendment. A negative limitation prevents congressional action that is beyond the scope of congressional power. The idea is best illustrated by the following example: Congress has the power to do X, Y, and Z only, and is therefore prohibited from doing A, B, or C. Under a regime of general welfare power, nothing is beyond the scope of congressional power. Thus, doctrines of negative limitation would no longer be appropriate.

Naturally, *Morrison*²⁷⁴ and *Lopez*²⁷⁵ would no longer be good law. Each strikes down an act of Congress as beyond the reach of the Commerce Clause, a fact that would no longer be important. The General Welfare Amendment would provide a sufficient basis to support both VAWA and the Gun Free School Zones Act of 1990,²⁷⁶ the statute at issue in *Lopez*.²⁷⁷ This does not mean, however, that the Commerce Clause will have been reduced to mere redundancy. It will remain important as the source of an implied limitation on the power of states—it will continue to support the dormant Commerce Clause doctrine.

Doctrines of negative limitation surrounding the enforcement power under Section 5 of the Fourteenth Amendment present a more complicated problem. *City of Boerne v. Flores*²⁷⁸ is the principle case. In *Boerne*, the Court held that RFRA was beyond the power of Congress to enact under Section 5 of the Fourteenth Amendment.²⁷⁹ In this way it looks as though *Boerne* is just like *Lopez*. The rhetoric in *Boerne*, however, casts some doubt on that conclusion. The decision is as much about the separation of powers as it is about federalism.²⁸⁰ The Supreme Court used *Boerne* to authoritatively pronounce that interpretation of the

274. See generally *Morrison*, 529 U.S. 598.

275. See generally *Lopez*, 514 U.S. 549.

276. 18 U.S.C. § 922(q) (2000).

277. See generally *Lopez*, 514 U.S. 549.

278. 521 U.S. 507 (1997).

279. *Id.* at 536.

280. *Id.* at 508.

Constitution is the domain of the Court alone.²⁸¹ This point is reinforced by recent citation of *Boerne* in cases having nothing to do with the Fourteenth Amendment.²⁸² One might expect the Court to rely on this principle and strike down RFRA regardless of the source of power under which Congress is purporting to act.

There is a problem with such an interpretation. By its terms the Section 5 power is tied to the substantive provisions of the Fourteenth Amendment. The general welfare power, on the other hand, would be conceptually separate from those provisions. While Congress can only invoke the Section 5 power when attempting to remedy a constitutional violation, it would not need to tie RFRA to the Free Exercise Clause under the General Welfare Amendment. Congress would only have to determine that RFRA furthers the general welfare, thereby avoiding any interpretation of the Constitution's substantive provisions.²⁸³ Thus, it seems clear that all negative restrictions on congressional authority would be overturned by the General Welfare Amendment, even those surrounding the Section 5 power.²⁸⁴ This does not mean that the Section 5 power would be redundant, as it would still provide Congress an avenue through which to abrogate State sovereign immunity.²⁸⁵

B. Doctrines Untouched by the General Welfare Amendment

The General Welfare Amendment would not affect positive prohibitions on the exercise of governmental authority. Positive prohibitions are provisions of the Constitution that specifically prohibit the government from taking certain action. The illustration here is more direct: Congress cannot do A, B, or C. Positive prohibitions are located throughout the Constitution. The most prominent examples are the civil liberties located in the Bill of Rights, and the provisions of Article I, Section 9. Congress

281. *Id.* at 536.

282. See *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Boerne* for the proposition that "Congress may not legislatively supersede our decisions interpreting and applying the Constitution").

283. *Morrison* is a useful tool for thinking about this problem. *Morrison*, 529 U.S. at 624. Imagine that the Court determined in *Morrison* that VAWA was a valid exercise of the Commerce power, but not the Section 5 power. *Id.* It would not follow that VAWA would be struck down as beyond the reach of Section 5; it would be upheld as within the reach of the Commerce power. That RFRA is unconstitutional as beyond the scope of the Section 5 power does not mean that it would be unconstitutional if enacted pursuant to some other congressional power.

284. The Court would not be precluded from inferring a separate, positive prohibition on congressional action derived from the separation of powers. Although a positive restraint would still invalidate the RFRA, it would be conceptually distinct from any negative limitation on congressional authority.

285. See *infra* Part IV. C (discussing the General Welfare Amendment's affect on Congressional power).

cannot infringe on positive prohibitions even when acting pursuant to a constitutional grant of power.²⁸⁶ By way of example, Congress could not use its general welfare power to pass an ex post facto law, infringe upon the freedom of speech, or establish a national religion.

C. The Gray Area

The effect of the General Welfare Amendment on some areas of constitutional law is uncertain. This uncertainty stems from two factors. The first is that, because it has never been important whether a restriction on congressional power is positive or negative, the Court has not always been clear on this point in describing its holdings. The second factor is that some positive restrictions on congressional power are derived from the federalist structure of the Constitution. To the extent that the General Welfare Amendment will alter that structure, it could cast doubt on the continuing validity of such positive restrictions. Two doctrines in particular are the anti-commandeering doctrine and the sovereign immunity doctrine.

Analyzing the anti-commandeering doctrine can shine light on both issues that cause confusion. There is no language in either *New York v. United States*²⁸⁷ or *Printz v. United States*²⁸⁸ explicitly terming the anti-commandeering restriction on congressional power either positive or negative. By returning to the definitions of these concepts it is possible to determine what the Court has done. The Court admits in *New York* that the statute in question falls “well within Congress’ authority under the Commerce Clause.”²⁸⁹ If the power is within the scope of the Commerce Clause, the restriction in question cannot be negative. When Congress is prohibited from doing something that is admittedly within the scope of a congressional power, that prohibition is positive in nature. The interpretive principle that can be derived is the following: determine whether the Act in question is within the scope of a congressional power; if it is, then the prohibition is positive. The anti-commandeering doctrine, as explained in *New York*, is a positive restriction on congressional authority.²⁹⁰

That the restriction is positive in nature does not itself mean

286. See *New York v. United States*, 505 U.S. 144, 156 (1992) (stating that “under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment.”).

287. *Id.*

288. 521 U.S. 898 (1997).

289. *New York*, 505 U.S. at 160.

290. *Id.* at 161.

that the anti-commandeering doctrine would survive enactment of the General Welfare Amendment. Although a positive prohibition, the restriction is not explicitly textual. The principles of anti-commandeering are derived from the Tenth Amendment and the general federalist structure of the Constitution.²⁹¹ The General Welfare Amendment significantly alters that structure, and therefore could be thought to undercut the foundation supporting the doctrine.

Reading the Amendment to eliminate the anti-commandeering doctrine would not be the best interpretation. The enumeration of powers is but one brick in the federalist wall established by the Constitution. In fact, the Court in *New York* relied much more heavily on the pre-constitutional nature of the States which would not be changed.²⁹² Further, the main rationale behind the anti-commandeering doctrine was that the federal government should not shirk accountability for its actions by forcing the State governments to execute federal policies.²⁹³

The General Welfare Amendment, by expanding the scope of federal power, makes the accountability interest more, not less, important. The best interpretation, therefore, is that the anti-commandeering doctrine should survive enactment of the Amendment.²⁹⁴

There are two interpretive principles that can be derived from this discussion. First, to the extent that the Court relies on the federalist structure to derive prohibitions on governmental action, one must look to the specific aspects of the structure that are most important in the case at hand. Second, looking to the rationale for a decision by the Court can help determine whether the General Welfare Amendment makes the limitation more or less important.

The fate of sovereign immunity doctrine under the General Welfare Amendment is also interesting and poignant. In *Seminole Tribe of Florida v. Florida*,²⁹⁵ the Supreme Court discusses its views on positive and negative restriction on government: "regulation of Indian commerce . . . is under the exclusive control of the Federal Government. Even when the Constitution vests in Congress complete law-making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."²⁹⁶ Cast in

291. *Id.* at 162; *Printz*, 521 U.S. at 919.

292. *See supra* Part III. A (discussing that, with the enactment of the General Welfare Amendment, the "reserved" powers of the states will be altered; however, states will remain able to regulate under the police power).

293. *Printz*, 521 U.S. at 930; *New York*, 505 U.S. at 168-69.

294. This argument is even stronger in the case of *Printz* because, as a case about executive commandeering, it also relies on separation of powers principles. *Printz*, 521 U.S. at 922.

295. 517 U.S. 44 (1996).

296. *Id.* at 72.

these terms, the restriction is positive.

Turning to the second prong of analysis—the source of the prohibition—the case for retaining sovereign immunity doctrine looks even stronger than the case for retaining the anti-commandeering doctrine. The reason is that there is a specific textual basis for sovereign immunity, the Eleventh Amendment.²⁹⁷ Although the Court candidly admits that the language of the Eleventh Amendment is not broad enough to support its expansive immunity doctrine,²⁹⁸ the textual basis serves as a foundation that the General Welfare Amendment could not wash away. Even though the Court relies to some extent on the structure of federalism,²⁹⁹ there is no reason to doubt the continued validity of sovereign immunity doctrine.

Further complicating matters with respect to sovereign immunity is the fact that Congress cannot abrogate sovereign immunity under the Commerce Clause,³⁰⁰ but can under Section 5 of the Fourteenth Amendment.³⁰¹ Therefore, it is necessary to determine whether the general welfare power would be more like the commerce power or the Section 5 power. A close reading of the cases reveals that the abrogative power of Section 5 is derived from special attributes of the Fourteenth Amendment that the General Welfare Amendment would not share. The “substantive provisions [of the Fourteenth Amendment] are by express terms directed at the States. Impressed upon them by those provisions are duties with respect to their treatment of private individuals. Standing behind the imperatives is Congress’ power to ‘enforce’ them ‘by appropriate legislation.’”³⁰² It is this aspect of the Fourteenth Amendment that allows Congress to abrogate sovereign immunity pursuant to the Section 5 power.³⁰³ The General Welfare Amendment is not aimed at the States, and therefore would not provide Congress with the power to abrogate sovereign immunity. This example shows that the different powers of Congress are still important. Congress would have to work within the framework of the Fourteenth Amendment to abrogate state sovereign immunity.

Before concluding this section, one other question must be addressed: if the nation can be convinced to amend the Constitution in such a fundamental way, why not avoid these

297. *Id.*

298. *Alden v. Maine*, 527 U.S. 706, 728-29 (1999).

299. *Seminole Tribe*, 517 U.S. at 54.

300. *See id.* at 72 (addressing the “Indian Commerce Clause”).

301. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 454-55 (1976).

302. *Id.* at 453.

303. *Id.*; *see Alden*, 527 U.S. at 756 (holding that “[b]y imposing explicit limits on the powers of the States and granting Congress the power to enforce them, the Amendment ‘fundamentally altered the balance of state and federal power struck by the Constitution.’”).

interpretive questions and write the answers into the Amendment? First, it would be impossible to anticipate every question, or the scope or permutations that any specific problem might take. More importantly the rationale that justifies enacting the General Welfare Amendment simply does not bear on these questions. There may or may not be good reasons to keep or do-away with these doctrines, but those arguments are beyond the scope this analysis.

V. CONCLUSION

Morrison's resolution of the Commerce Clause issue is right as a matter of constitutional interpretation.³⁰⁴ When interpreting the Constitution, adherence to the text of the document is vital—and the text demands that the powers of Congress be restrained. Although the Court's resolution of the Section 5 issue is less persuasive, it is settled all the same. The Court has circumscribed the Section 5 power, and there is no reason to believe that the majority is prepared to back away from its position.

That the decision is commendable, or at least final, as a matter of interpretation, does not mean that the result should be praised as the best constitutional policy. A primary purpose of government is to protect the social liberty of citizens. As the context surrounding the enactment of VAWA demonstrates, states often fail to protect the social liberty of disfavored groups. This refusal is a result of majority tyranny, which occurs more in small polities than in large. The federal government, encompassing a more expansive polity than any state, can be expected to provide that protection in situations where the states might not. But *Morrison*, by enforcing negative restraints on congressional authority, prevented Congress from doing that very thing, and thereby revealed a fundamental flaw in our system of government. The federal government is powerless to protect social liberty, even when states systematically fail to do so. The General Welfare Amendment would remedy this problem by removing all negative restraints on Congressional power.

Adopting the Amendment, therefore, is justified, so long as it would not unduly harm other interests. The interests at stake are the interests of federalism generally, and these interests would not suffer from the congressional general welfare power. For the most part, these interests would be served by the political safeguards of federalism and other constitutional protections. Further, to the extent that these interests are actually the interests of decentralization, they can be *enhanced* by the General Welfare Amendment.

Because the General Welfare Amendment is necessary to

304. See generally *Morrison*, 529 U.S. 598.

correct a fundamental flaw in our system of government, and because its enactment would not unduly harm the interests of federalism, the People of the United States should ratify the General Welfare Amendment to the Constitution: *Congress shall have the power to legislate in furtherance of the general welfare.*

