

A One-Sided Federalism Revolution: The Unaddressed Constitutional Compromise on Federalism and Individual Rights

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I. INTRODUCTION: THE TWO SIDES OF FEDERALISM

The revival of federalism has become a defining theme of the modern Court. Commentators have described the Court’s decisions as sparking a “federalism revolution.” This so-called revolution comes after a long dormancy. From the late 1930s to the early 1990s,

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constitutional provisions related to federalism were largely ignored. However, under the leadership of the late Chief Justice Rehnquist, the Court has attempted to revive the constitutional role and authority of the states.

Through a wide array of cases employing both the Tenth and Eleventh Amendments, the Court has stalled or even reversed the constitutional drift of power from the states to the federal government that began in the 1930s. This “new federalism” has attempted to resuscitate the role of the states in the constitutional system, as well as revive certain federalism doctrines that were abandoned during the New Deal. Just as a frustration with the ineffectual response of the states to the Great Depression caused regulators and constitutional lawyers to favor a dramatic expansion of the national government during the 1930s, a frustration with and suspicion of large, centralized government and its inflexible bureaucracies has helped fuel the current drift toward empowering smaller, localized governments. But in addition to this size-of-government concern, there is another side of federalism—the individual liberty side. In the view of the constitutional Framers, a vibrant federalism would help ensure individual liberty by limiting and monitoring the power of the federal government to infringe on the liberties of its citizens.

One of the primary constitutional rationales behind federalism was the belief that such a governmental structure would help preserve individual liberty. Strong and independent state governments would check any abuses committed by the federal government. This structural aspect of the Constitution served as a complement to the Bill of Rights, which explicitly recognized certain selected individual freedoms. But whereas the Bill of Rights protections were limited to its identified freedoms, federalism had a much broader scope: built into the very structure of America’s constitutional democracy, federalism would protect individual liberty as a whole, in every aspect in which it could be threatened by a distant central government.

This liberty aspect of federalism was largely abandoned in the 1930s when the Court ceased enforcing the federalism provisions of the Constitution. This cessation marked a necessary step in upholding the New Deal legislation, which gave broad powers to the national government. Having given up this structural protection of liberty, the Court then focused almost exclusively on the substantive individual rights provisions in the Constitution as a way of protecting individual freedom. It was this focus, for instance, that led the Court to derive new, unenumerated rights out of the general language of the Constitution, such as the right to privacy. Instead of relying upon the

structural organization of the Constitution to protect privacy, the Court created a specific substantive right.

Looking back over nearly seventy years of constitutional history, an inverse relationship can be detected between the Court's activism on substantive individual rights and its enforcement of structural provisions such as federalism. The less the Court enforces structural provisions, the more it relies on creating and enforcing substantive individual rights. Consequently, now that the Court is reinvigorating federalism, it should correspondingly lessen its activism on individual rights, such as the right to privacy. In effect, this would form the second half of the federalism revolution—a stepping back from substantive individual rights as the only protection of individual liberty. However, this has not yet occurred. Even though federalism has been reinvigorated, the Court still relies as much as ever on judicial enforcement of substantive individual rights for the preservation of liberty.

History has shown that the Court elevated its scrutiny of individual rights, as well as its creation of new rights, only after it downgraded its scrutiny of structural issues like federalism. Therefore, it is logical to expect that the reverse should happen: that after heightening its review of federalism doctrines it should diminish its scrutiny of substantive individual rights. By taking such an approach, the Court could reconnect with the structural ways in which the Constitution protects liberty as a whole. Moreover, putting added emphasis on the Constitution's structural protections of liberty would help revive a notion that has practically disappeared in constitutional law: the notion that individual liberty can and must coincide with majoritarian rule.

This Article begins Part II with a description of federalism and a discussion of its basic principles as they appear in the Constitution. It examines the Framers' intent concerning the federalism scheme incorporated into the Constitution, as well as the purposes for which those federalism principles were intended. Part III of the Article addresses the history of federalism decisions in the Supreme Court. In particular, it analyzes the decline of federalism throughout much of the twentieth century, during which time the Court intensified its review of individual rights cases so as to make up for its nonenforcement of structural provisions (e.g., federalism) designed to protect individual liberty. Part III also examines the Rehnquist Court's recent revival of federalism, which has occurred primarily in three constitutional areas: the Tenth Amendment, the Commerce Clause, and the Eleventh Amendment sovereign immunity provisions.

In Part IV, this Article examines the constitutional role of federalism as a structural protection of liberty. This structural feature was intended by the Framers to provide a more all-encompassing protection of individual liberty than the Bill of Rights. However, because of the constitutional compromise of the 1930s, the Court abandoned the structural protections of federalism and instead focused its sights exclusively on selected substantive individual rights. Part V addresses the consequences of this constitutional compromise, the corrosive fallout of which can be seen through the creation and application of the constitutional right of privacy. Finally, in the Conclusion, this Article suggests that the modern Court has accomplished only one half of a federalism revolution. Although it has strengthened the constitutional role and authority of the states, it has not carried the revolution over into the individual liberty area. Instead of increasing its reliance on the structural provisions of the Constitution to protect liberty, the Court is still concentrating almost exclusively on substantive individual rights.

II. THE FEDERALISM DOCTRINE

A. *Constitutional Principles*

The doctrine of federalism refers to the sharing of power between two different levels of government, each representing the same people.¹ The Constitution establishes a dual governmental structure consisting of state and national governments. Although its purpose was to create a strong national government, the Constitution also sought to preserve the independent integrity and lawmaking authority of the states.² This bifurcated system of power was codified in the Tenth Amendment, which divides sovereign power between those delegated to the federal government and those reserved to the states.³

¹ Federalism reflects the balancing of power between the states and national government. See *Younger v. Harris*, 401 U.S. 37, 44 (1971) (suggesting that the constitutional scheme envisions a federal structure in which states are equal partners with the national government). As David Walker describes it:

federalism is a governmental system that includes a central government and at least one major subnational tier of governments; that assigns significant substantive powers to both levels initially by the provisions of a written constitution; and that succeeds over time in sustaining a territorial division of powers by judicial, operational, representational and political means.

DAVID B. WALKER, *THE REBIRTH OF FEDERALISM: SLOUCHING TOWARD WASHINGTON* 20 (1995).

² Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 *YALE L.J.* 1425, 1466 (1987).

³ *Id.* at 1492.

The Tenth Amendment prohibits the national government from exercising undelegated powers that will infringe on the lawmaking autonomy of the states.⁴

The Framers believed that by protecting the pre-existing structure of state governments, the Constitution could safely grant power to the national government, since the former would independently monitor the latter's exercise of power.⁵ Similar to the way in which the colonial governments had mobilized opposition to oppressive acts by Parliament, the state governments would serve as vigilant watchdogs against abuses committed by the federal government.⁶

The founding generation was so committed to federalism that even a nationalist like Justice Marshall acknowledged in *McCulloch v. Maryland*⁷ that the national government was "one of enumerated powers" and could "exercise only the powers granted to it."⁸ Indeed, federalism concerns were so important to the Founders that nearly all the arguments opposing the new Constitution involved the threat to state sovereignty.⁹

Although there is no single "federalism" clause in the Constitution, the Tenth and Eleventh Amendments are often the focus of the Court's federalism decisions.¹⁰ In addition to these two amendments, references to federalism pervade the constitutional scheme. Throughout the text, the Framers use the term "states" to denote independent entities of sovereignty.¹¹ The term "states" is also used in a way that suggests the Framers "intended that these governments possess some of the traditional immunities that states enjoyed" prior to adoption of the Constitution.¹²

⁴ The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

⁵ See, e.g., GARRY WILLS, *EXPLAINING AMERICA: THE FEDERALIST* 108–11 (1981).

⁶ See, e.g., THE FEDERALIST NO. 26, at 172 (Alexander Hamilton) (Clinton Rossiter ed., 1961); Amar, *supra* note 2, at 1501.

⁷ 17 U.S. (4 Wheat.) 316 (1819).

⁸ *Id.* at 405.

⁹ Larry D. Kramer, *Putting the Politics Back Into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 252 (2000).

¹⁰ The Eleventh Amendment states that the "Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

¹¹ Michael B. Rappaport, *Reconciling Textualism and Federalism: The Proper Textual Basis of the Supreme Court's Tenth and Eleventh Amendment Decisions*, 93 NW. U. L. REV. 819, 821, 831–34 (1999).

¹² *Id.* at 821. According to Nicholas Rosenkranz, the structure of the Constitution and its recognition of the "states" all work to establish federalism as a "constitu-

In the constitutional scheme, federalism provides an avenue for local self-determination, in addition to a vertical check on government oppression, with the states serving as a localized control on the centralized national government.¹³ Under the Framers' view of federalism, the national government would exert supreme authority only within the limited scope of its enumerated powers; the states meanwhile would exercise the remainder of sovereign authority, subject to the restraint of interstate competition from other states.¹⁴

Because the Framers took for granted the sovereign powers of the states, the Constitution is somewhat one-sided in its references to governmental authority. It explicitly lists the powers of the federal government; but to the extent it defines state powers, it does so primarily through negative implication, by setting out the limited constraints on those powers.¹⁵ Furthermore, the Tenth Amendment, though not granting power to any governmental entity, recognizes that any and all powers not granted to the federal government have been reserved to the states.¹⁶

By prohibiting the federal government from infringing on powers reserved to the states, the Constitution establishes a system of dual sovereignty. The Framers "split the atom of sovereignty" by designating two different political entities (federal and state), "each protected from incursion by the other."¹⁷ This division of authority between the state and federal governments, with the latter enjoying only limited, enumerated powers, was not created for the benefit of the states but for the benefit of the American people.¹⁸ According to the Framers, the principle of dual sovereignty would prevent any distortion of the balance of power that in turn would subject the people to a tyrannous federal government.¹⁹ As Professor Steven Calabresi explains, federalism is a vital ingredient of America's constitutional democracy:

tional default rule." Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2097 (2002).

¹³ Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 504 (1987).

¹⁴ William H. Pryor, Jr., *Madison's Double Security: In Defense of Federalism, the Separation of Powers, and the Rehnquist Court*, 53 ALA. L. REV. 1167, 1175 (2002).

¹⁵ See U.S. CONST. art. I, § 8; Jay S. Bybee, *The Tenth Amendment Among the Shadows: On Reading the Constitution in Plato's Cave*, 23 HARV. J.L. & PUB. POL'Y 551, 555 (2000).

¹⁶ U.S. CONST. amend. X; Bybee, *supra* note 15, at 567.

¹⁷ *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). The Constitution created a structure of "two orders of government, each with its own direct relationship . . . to the people who sustain it and are governed by it." *Id.*

¹⁸ *New York v. United States*, 505 U.S. 144, 181 (1992).

¹⁹ See *Gregory v. Ashcroft*, 501 U.S. 452, 458-60 (1991).

It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare. It is part of the reason why democratic majoritarianism in the United States has not produced violence or secession for 130 years, unlike the situation for example, in England, France, Germany, Russia, Czechoslovakia, Yugoslavia, Cyprus, or Spain. There is *nothing* in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document.²⁰

Principles of federalism are also incorporated within the Supremacy Clause.²¹ The Supremacy Clause safeguards federalism by requiring that any federal law displacing a state law be adopted according to the precise lawmaking procedures outlined in the Constitution.²² Even in those delegated areas where the national government has authority over the states, the Supremacy Clause limits the federal laws to those meeting the constitutional procedures for “the supreme Law of the Land.” Thus, federal lawmaking procedures preserve state autonomy by “impos[ing] burdens on governmental processes that often seem clumsy, inefficient, even unworkable.”²³ Although these cumbersome processes are often decried as contributing to gridlock, they give states more freedom to govern by making it more difficult for the federal government to enact national laws that supersede state laws.²⁴

The notion of federalism, premised on fostering a competition for power between state and federal governments, is similar in many ways to the constitutional separation of powers between the branches of government.²⁵ Both are structural provisions of the Constitution,

²⁰ Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: *In Defense of United States v. Lopez*, 94 MICH. L. REV. 752, 770 (1995).

²¹ U.S. CONST. art. VI, cl. 2. The Supremacy Clause states: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land” *Id.*

²² See Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1338–39 (2001). “Although federal lawmaking procedures are generally regarded as ‘integral parts of the constitutional design for the separation of powers,’ they also preserve federalism both by making federal law more difficult to adopt, and by assigning lawmaking power solely to actors subject to the political safeguards of federalism.” *Id.* at 1324 (quoting *INS v. Chadha*, 462 U.S. 919, 946 (1983)). The Constitution also protects federalism by ensuring small-state equality of representation in the U.S. Senate and by giving states a prominent role in the selection of the President. *Id.* at 1343–44, 1367–68.

²³ *Id.* at 1371 (quoting *Chadha*, 462 U.S. at 959) (alteration in original).

²⁴ *Id.*

²⁵ Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 950 (2005) (arguing that, to the Framers, the competition among branches

with the separation of powers doctrine focusing on the horizontal allocation of power among the different branches of the federal government.²⁶ Federalism, on the other hand, addresses the vertical allocation of power and rests upon the Framers' belief that "each of the principal branches of the federal government will owe its existence more or less to the favor of the State Governments."²⁷

B. The Values of Federalism

The most-often cited value of federalism is that it provides a check on the tyranny of the federal government.²⁸ By granting only limited powers to the national government, as well as by maintaining two levels of competing governments, the Framers sought to control the power of the national government.²⁹ A second value of federalism relates to the close relationship between state governments and their constituencies, the assumption being that the smaller the governing unit, the more likely it is to be responsive to the needs of the community.³⁰ Smaller political units are also able to foster a deeper sense

would result in "a balanced equilibrium, in which no branch can accumulate a potentially monarchical or tyrannical quantum of power, try as each of them will").

²⁶ It was foreseen that the separation of powers alone would offer little protection to the states, since it was presumed that all the federal branches would share an interest in expanding national power. John C. Yoo, *The Judicial Safeguards of Federalism*, 70 S. CAL. L. REV. 1311, 1390–91 (1997).

²⁷ THE FEDERALIST NO. 45, at 291 (James Madison) (Clinton Rossiter ed., 1961).

²⁸ Federalism offers a structure of "overlapping legal remedies for constitutional wrongs." Amar, *supra* note 2, at 1504. Although recent history focuses most attention on instances where the federal government has stepped in to remedy state violations of civil rights, there have also been times when the states have been called upon to address federal abuses. *Id.* at 1506. Prior to *Bivens v. Six Unknown Named Federal Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), for example, only the state law of trespass was available to persons whose homes had been illegally searched by federal agents. Amar, *supra* note 2, at 1506. Furthermore, in the early state habeas corpus cases, states provided a means by which those who were incarcerated in federal prisons, "in violation of their federal constitutional rights," could obtain their freedom. *Id.* at 1509.

²⁹ Alexander Hamilton argued that the "necessity of local administrations for local purposes, would be a complete barrier against the oppressive use of such a power." THE FEDERALIST NO. 32, at 197 (Alexander Hamilton) (Clinton Rossiter ed., 1961). A "state/federal division of authority protects liberty—both by restricting the burdens that government can impose from a distance and by facilitating citizen participation in government that is closer to home." *United States v. Morrison*, 529 U.S. 598, 655 (2000) (Breyer, J., dissenting).

³⁰ See DAVID L. SHAPIRO, FEDERALISM: A DIALOGUE 91–92 (1995); Michael McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1493–94 (1987) (reviewing RAOUL BURGER, FEDERALISM: THE FOUNDERS' DESIGN (1987)). State legislatures are better connected to their constituents' interests than is Congress. See V.F. Nourse, *Toward a New Constitutional Anatomy*, 56 STAN. L. REV. 835, 875 (2004). National decisionmakers or representatives are less likely to be aware of localized in-

of community and increased opportunities for political participation.³¹ As Professor Wechsler has observed, the states “are the strategic yardsticks for the measurement of interest and opinion, the special centers of political activity, [and] the separate geographical determinants of national as well as local politics.”³²

A third value of federalism lies in its facilitation of states as laboratories of experimentation.³³ This value is reflected in Justice Brandeis’s observation 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.”³⁴ Of course, underlying this social laboratory value, as well as all the other values of federalism, is the right of individuals to move from state to state, and hence “vote with their feet” on the desirability or wisdom of particular state policies.³⁵

terests than are decisionmakers or representatives in a disaggregated, state system.
Id.

³¹ See *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991) (stating that federalism “makes government more responsive by putting the States in competition for a mobile citizenry”); *Fed. Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 789–90 (1982) (O’Connor, J., concurring in part, dissenting in part) (arguing that federalism fosters citizen participation in government affairs).

³² 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, 546 (1954).

³³ *Gregory*, 501 U.S. at 458 (stating that federalism “allows for more innovation and experimentation in government”). As Justice O’Connor has observed, “the 50 States [have] serve[d] as laboratories for the development of new social, economic, and political ideas.” *Fed. Energy Regulatory Comm’n*, 456 U.S. at 788 (O’Connor, J., concurring in part, dissenting in part). Furthermore, unlike Congress and the national government, the states are “neck-deep in the quotidian work of policing streets, educating children, feeding the hungry, sheltering the homeless, and protecting the public health.” Aaron Jay Saiger, *Constitutional Partnership and the States*, 73 FORDHAM L. REV. 1439, 1443 (2005).

³⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). And not just state legislatures are capable of this experimentation. State judges “demonstrate a greater willingness to experiment with legal norms,” and because they “are generally closer to the public” any misjudgments they make are “more readily redressable by the People.” Saiger, *supra* note 33, at 1458–59 (quoting Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132, 1163, 1168 (1999)).

³⁵ Anuj C. Desai, *Filters and Federalism: Public Library Internet Access, Local Control, and the Federal Spending Power*, 7 U. PA. J. CONST. L. 3, 52 (2004); see also William Van Alstyne, *Federalism, Congress, the States and the Tenth Amendment: Adrift in the Cellophane Sea*, 1987 DUKE L.J. 769, 777 (arguing that the “constraints imposed as an incident of federalism itself, namely that people can and will move, enter, or exit, if suitably attracted or repelled, as each state has reason to bear in mind”). Scholars argue that state autonomy “allows those who disagree with certain policies, but are politically powerless to change them, to leave the jurisdiction or choose not to locate there in the first

The existence of a multiplicity of geographically diverse jurisdictions is believed to “promote competition among governments for citizens and corporations (and their related tax dollars), thereby maximizing choice and utility for everyone and resulting in an aggregate increase in social welfare.”³⁶ This geographic diversity argument pervades the various justifications for federalism. A federalism structure “assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society.”³⁷ It allows different communities to choose different laws and modes of governance that reflect the diversity of citizen needs and interests.³⁸ To the extent that local majorities in different states have divergent preferences, a federal system can result in a higher degree of citizen satisfaction than a unitary system can.³⁹ If, for example, a majority in one state prefers a policy of high taxes and high levels of government services, whereas the majority in another state favors low taxes and fewer government services, both majorities can be accommodated by their respective state governments.⁴⁰ A competition between states can also prevent

place.” Betsy J. Grey, *The New Federalism Jurisprudence and National Tort Reform*, 59 WASH. & LEE L. REV. 475, 512 (2002).

³⁶ Desai, *supra* note 35, at 50.

³⁷ Gregory, 501 U.S. at 458.

³⁸ Desai, *supra* note 35, at 49.

³⁹ John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System*, 99 NW. U. L. REV. 89, 106 (2004).

⁴⁰ The ability of federalism to satisfy diverse preferences obviously requires a degree of citizen mobility, whereby citizens who find themselves in a state whose policies they oppose “can move to another state with more favorable ones.” *Id.* at 107. “As transportation costs have fallen, and a national culture makes Americans feel more at home outside the state where they were born, citizens have become more mobile.” *Id.* at 109. This mobility is further enhanced by the existence of interstate competition through which states actively compete with each other to attract new citizens. *Id.* at 108. “Interstate competition is motivated, in part, by the desire of state governments to attract taxpaying citizens and corporations, which has the effect of increasing the funds available to them for public spending of all kinds.” *Id.*

Even the Justices who dissented from the Court’s recent federalism decisions espouse the need for “robust [political] competition.” Richard H. Pildes, *The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28, 123 (2004). Justice Stevens describes competition as “the ‘central theme’ of the Court’s democracy jurisprudence.” *Id.* (citing *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 382 (1997) (Stevens, J., dissenting)).

According to Professor Amar:

a healthy competition among limited governments for the hearts of the American People can protect popular sovereignty and spur a race to the high ground of constitutional remedies. Each government can act as a remedial cavalry of sorts, eager to win public honor by riding to the rescue of citizens victimized by another government’s misconduct.

Amar, *supra* note 2, at 1428.

the abuses often associated with monopoly status: “If individuals and firms are freely mobile and can choose among a number of jurisdictions, they will shop for the jurisdiction that offers their most-preferred policy package of public goods, regulations and tax rates.”⁴¹

III. FEDERALISM AT THE SUPREME COURT

A. *The Decline of Federalism*

Essentially, only two major federalism decisions came down from the Court between 1937 and 1986: *Oregon v. Mitchell*,⁴² which was overturned by the Twenty-Sixth Amendment, and *National League of Cities v. Usery*,⁴³ later overruled by *Garcia v. San Antonio Metropolitan Transit Authority*.⁴⁴ Thus, for a half century, and throughout the terms of the Warren and Burger Courts, federalism was largely a forgotten issue. Prior to 1937, however, the Court was far more willing to scrutinize the overreaching of federal power and its infringement on state autonomy.⁴⁵

There are critics of this interstate competition. These critics see competition as being a destructive force. For instance, it used to be thought that competition for industry would cause states to lower environmental standards, “leading to a destructive ‘race to the bottom,’ preventable only by the federalization of environmental regulation.” Levinson, *supra* note 25, at 946. Indeed, this would be the course expected if states were seen as concerned exclusively with industrial growth. *Id.* at 946–47. However, because state residents value the environment, along with industry, state governments have been found not to maximize industrial growth at the expense of all other concerns, but to balance the benefits of industrial growth with the costs of pollution. *Id.* at 947.

⁴¹ See Levinson, *supra* note 25, at 945.

⁴² 400 U.S. 112 (1970).

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

⁴⁴ 469 U.S. 528 (1985); Steven G. Calabresi, *Separation of Powers and the Rehnquist Court: The Centrality of Clinton v. City of New York*, 99 NW. U. L. REV. 77, 80 (2004).

⁴⁵ See Desai, *supra* note 35, at 115 (noting the Court’s willingness in the context of Congress’s taxing power). A dual sovereignty model of federalism prevailed from 1789 until the New Deal. WALKER, *supra* note 1, at 24. This dual sovereignty envisions an equal distribution of power between the state and federal levels of government and, according to some scholars, constitutes “the essential federalist feature of the Constitution.” *Id.* at 23.

From Reconstruction to the New Deal, courts “continued to cite the Ninth Amendment in conjunction with the Tenth as one of the twin guardians of state autonomy.” Kurt T. Lash, *The Lost Jurisprudence of the Ninth Amendment*, 83 TEX. L. REV. 597, 601 (2005). Both Amendments “serve as barriers against the expansion of federal power.” *Id.* at 602. Although initially used to resist President Roosevelt’s efforts to regulate the national economy, both the Ninth and Tenth Amendments ended up being “reduced to no more than truisms” by the New Deal constitutional revolution. *Id.*

During the nineteenth century and throughout the early twentieth, the Court adhered to a federalist vision, under which it “made substantial use of the Tenth Amendment as a limit on congressional power.”⁴⁶ But after 1937, the Court switched positions, adopting a nationalist model.⁴⁷ In the wake of the New Deal, the expansion of federal powers increasingly eroded the Tenth Amendment protections, and the Court from 1937 to roughly the 1990s “served generally as a major force for centripetalism.”⁴⁸ During that time, not one federal law was held to exceed Congress’s Commerce Clause powers, and only one federal law was ruled to violate the Tenth Amendment.⁴⁹

The year 1937 is seen as a transformational year in the Court’s approach to the exertion of national power; in that year, President Roosevelt sent to Congress a bill that would authorize him to appoint one new Supreme Court justice for each sitting justice who had served ten years or more and had not retired within six months after his seventieth birthday.⁵⁰ Under this “court-packing” plan, the number of Supreme Court justices was to be raised to fifteen.⁵¹ Whether the Court was influenced by this bill and its likely passage cannot be known for sure; but shortly thereafter, the Court began upholding New Deal legislation of the kind that had previously been struck down. Initiating a new era of constitutional interpretation, the Supreme Court endorsed a permanent enlargement in the scope of federal power, at the expense of the states.⁵² Under this relaxed posture toward congressional power, the Court would uphold a wide range of statutes over the next fifty years, including congressional

⁴⁶ Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 8 (2000). For instance, the Court ruled that a congressional act banning the shipment of goods made by child labor violated the Tenth Amendment. *Hammer v. Dagenhart*, 247 U.S. 251, 276 (1918), *overruled by* *United States v. Darby*, 312 U.S. 100, 115–16 (1941).

⁴⁷ Chemerinsky, *supra* note 46, at 8.

⁴⁸ WALKER, *supra* note 1, at 27. Whenever the Court was presented with challenges to the expansion of national authority during this period, it “almost always upheld these actions.” *Id.* Thus, the Court has been very much on the side of national authority. The chief exception to this rule is the Court’s decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which in turn proved to be aberrational. *Id.*

⁴⁹ *Nat’l League of Cities*, 426 U.S. at 852, *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 531, 557 (1985). The Commerce Clause states that “Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” U.S. CONST. art I, §8, cl. 3.

⁵⁰ WALKER, *supra* note 1, at 95.

⁵¹ *Id.*

⁵² *See, e.g.*, *NLRB v. Fainblatt*, 306 U.S. 601 (1939); *Consol. Edison Co. v. NLRB*, 305 U.S. 197 (1938).

regulation of racial discrimination in places of public accommodation and purely local incidents of loan sharking.⁵³

During the constitutional period, the states served both as the primary check on the central government and as the primary venue for self-government; but during the New Deal, states appeared helpless to address the social crisis brought on by the Great Depression.⁵⁴ Furthermore, the notion that the states would act as a check on the federal government seemed irrelevant, considering the urgent need for immediate national action. Thus, unconcerned with protecting states from congressional overreaching, the Court in the late 1930s permitted the explosion of federal regulation.⁵⁵

As an example of a pre-1937 case, *United States v. Butler*⁵⁶ involved a constitutional challenge to the Agricultural Adjustment Act. Ruling that the power to regulate agriculture was not among Congress's enumerated powers, the Court struck down the Act.⁵⁷ Moreover, "[b]ecause regulating agriculture was a power reserved exclusively to the states, the principle of 'dual sovereignty,' as embodied in the Tenth Amendment, precluded Congress" from interfering in this area.⁵⁸

According to some commentators, "*Butler* represents the high-water mark of the Court's adherence to the principles of 'dual sovereignty.' . . . By the end of the 1936 Term, the Court had eliminated most of the federalism constraints on Congress's powers . . ." ⁵⁹ Soon thereafter, it was giving almost complete deference to Congress in

⁵³ See *Perez v. United States*, 402 U.S. 146, 155–56 (1971); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261–62 (1964); *Katzenbach v. McClung*, 379 U.S. 294, 299–301 (1964).

⁵⁴ Sunstein, *supra* note 13, at 442.

⁵⁵ For criticisms of this constitutional approach and its betrayal of the Framers' intent, see generally Calabresi, *supra* note 20, at 752; Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979); William Marshall, *American Political Culture and the Failures of Process Federalism*, 22 HARV. J.L. & PUB. POL'Y 139 (1998); Yoo, *supra* note 26, at 1311.

⁵⁶ 297 U.S. 1 (1936).

⁵⁷ *Id.* at 68.

⁵⁸ Desai, *supra* note 35, at 80.

⁵⁹ *Id.* at 89–90. Furthermore, "[t]he last time the court held that a federal tax was a 'regulatory' tax exceeding Congress's taxing power was in 1936." *Id.* at 84 (referring to *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)). *Carter v. Carter Coal Co.* held "that a tax . . . on coal produced by coal producers who would not 'agree' to extensive regulations setting forth, among other things, wages [and] working conditions . . . could not rest upon the taxing power." *Id.* at 84 n.352. The following year, in *Sonzinsky v. United States*, 300 U.S. 506 (1937), the Court upheld a license tax on firearms dealers. *Id.* at 84. Commentators have viewed *Sonzinsky* as a repudiation of the pre-1937 approach. *Id.*

any conflict with the Tenth Amendment.⁶⁰ In *Darby*, the Court treated the Tenth Amendment not as a substantive restraint on federal power, but as simply “declaratory of the relationship between the national and state governments.”⁶¹ To the Court, the Tenth Amendment had no real constitutional role; it was merely a “truism.”⁶² The implication of this pronouncement, however, is that the enumerated powers doctrine carries no judicially enforceable power.⁶³

The Burger Court in 1976 briefly revived the Tenth Amendment. In *National League of Cities v. Usery*,⁶⁴ the Court struck down federal wage and overtime requirements applying to state employees, reasoning that the power to determine wages was an “undoubted attribute of state sovereignty” and a core governmental function “essential to [the] separate and independent existence” of state sovereignty.⁶⁵ Justice Rehnquist explained that “there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner.”⁶⁶ Though conceding the broad Commerce Clause powers possessed by Congress, the Court nonetheless crafted a Tenth Amendment exception when the object of those powers was a state government.⁶⁷ The “traditional governmental functions” test was used to determine whether congressional regulation had violated the Tenth Amendment.⁶⁸ The difficulty with this test, however, was in defining the specific areas of state activity that were vital for maintaining and protecting state sovereignty. It was a difficulty that contributed

⁶⁰ See, e.g., *United States v. Darby*, 312 U.S. 100, 125–26 (1941) (holding that Congress could ban the transportation of goods manufactured by firms whose employees’ wages and hours did not meet the requirements of the Fair Labor Standards Act).

⁶¹ *Id.* at 124.

⁶² *Id.*

⁶³ Bybee, *supra* note 15, at 557–59.

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

⁶⁵ *Id.* at 845, 852 (internal quotation marks omitted).

⁶⁶ *Id.* at 845.

⁶⁷ Bybee, *supra* note 15, at 558. The Court recognized that although Congress’s Commerce Clause power is plenary, the Constitution limits that power insofar as it is used to regulate the states. *Id.*; *Nat’l League of Cities*, 426 U.S. at 842.

⁶⁸ *Nat’l League of Cities*, 426 U.S. at 851–52.

to the overruling of *National League of Cities* by *Garcia v. San Antonio Metropolitan Transit Authority*.⁶⁹

In *Garcia*, the Court effectively abandoned the attempt to shield the states from intrusive federal regulation.⁷⁰ Even though the federal law at issue in *Garcia* dictating certain wage and hour conditions to the states was similar to the law in *National League of Cities*, the Court upheld it.⁷¹ In so ruling, the Court “eliminated the Tenth Amendment as a viable defense for the states against federal intervention,” which in turn left the states without any constitutional defenses against national regulation of state governmental functions.⁷² According to the Court, any limits on the federal government’s power to invade state functions had to come from the political process.⁷³ Critics, however, saw this decision as abandoning a fundamental constitutional doctrine, as well as relegating states to a “trivial role” in the constitutional system.⁷⁴

In his *Garcia* opinion, Justice Blackmun adopted a view of state-federal sovereignty contrary to the view that prevailed during the constitutional period. He noted that the “sovereignty of the States is limited by the Constitution itself,” and that whatever sovereign authority the states possess is “only to the extent that the Constitution has not divested them of their original powers and transferred those powers to the Federal Government.”⁷⁵ This narrow view of state sovereignty contradicted the views of James Madison. According to Madison, the “powers delegated by the proposed Constitution to the Federal Government, are few and defined,” while those retained by the states are “numerous and indefinite.”⁷⁶ Madison further asserted that the “powers reserved to the several States will extend to all the

⁶⁹ 469 U.S. at 531 (holding that Congress could subject the states to generally applicable employment regulations enacted pursuant to the Commerce Clause).

⁷⁰ *Id.* at 560 (Powell, J., dissenting).

⁷¹ *Id.* at 555–56 (majority opinion).

⁷² Michael P. Lee, *How Clear is Clear?*, 65 U. CHI. L. REV. 255, 259 (1998). In *Garcia*, the Court found the “traditional governmental functions” test to be unworkable. 469 U.S. at 546–47. Contrary to *Usery*, the *Garcia* Court found that it could no longer distinguish between states acting as governments and states acting as proprietors. Bybee, *supra* note 15, at 559.

⁷³ The Court noted that it was extremely difficult to define the nature and content of any restrictions imposed by the Tenth Amendment. *Garcia*, 469 U.S. at 547. For this reason, the Court concluded that the role and independence of the states was to be protected not by judicial enforcement of the Tenth Amendment but by the very nature of the political process, in which state actors played a prominent and influential role. *Id.* at 550.

⁷⁴ WALKER, *supra* note 1, at 187.

⁷⁵ *Garcia*, 469 U.S. at 548, 549.

⁷⁶ THE FEDERALIST NO. 45, at 313 (James Madison) (Jacob Cooke ed., 1961).

objects, which, in the ordinary course of affairs, concern the lives, liberties and properties of the people.”⁷⁷

Extending its *Garcia* ruling, the Court in *South Carolina v. Baker*⁷⁸ held that the Tenth Amendment limits “are structural, not substantive—*i.e.*, that States must find their protection from congressional regulation through the national political process.”⁷⁹ Although the Court in *Baker* acknowledged that “extraordinary defects” in the political process might actually trigger some Tenth Amendment protections, it failed to explain what might constitute such a defect.⁸⁰

B. *The Rehnquist Court’s Revival of Federalism*

1. The Tenth Amendment Decisions

According to many commentators, the Rehnquist Court has made its most significant accomplishment in the area of federalism.⁸¹ After almost sixty years of dormancy, federalism made a constitu-

⁷⁷ *Id.*

⁷⁸ 485 U.S. 505 (1988).

⁷⁹ *Id.* at 512. The nationalist-orientation of the Court could also be seen in its decisions under 42 U.S.C. § 1983, which creates a federal cause of action for violations of federal rights under color of state law. In 1978, the Court reversed a previous ruling that a municipality could not be sued under § 1983. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 701 (1978) (overturning *Monroe v. Pape*, 365 U.S. 167 (1961)). Later, in *Owen v. City of Independence*, 445 U.S. 622, 638 (1980), the Court held that in § 1983 suits municipalities may not assert good faith as a defense. In the area of municipal antitrust liability, the Burger Court further handicapped states and municipalities by imposing on them various types of antitrust liability. Up until the 1970s, the Sherman Anti-Trust Act had been applied to private parties and corporations. But in the late 1970s and early 1980s, the Court applied the Act to the public sector, finding various municipalities liable for antitrust violations. See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978); *Cnty. Commc’ns Co., Inc. v. City of Boulder*, 455 U.S. 40 (1982) (ruling that the city of Boulder’s moratorium on cable television expansion was subject to antitrust scrutiny).

⁸⁰ *Baker*, 485 U.S. at 512. On the political front, federalism was also being affected by changes in the political party structure. Up until the 1960s, political parties had generally served as a decentralizing force, focusing debate and political conflict at the state and local levels. WALKER, *supra* note 1, at 32. However, centralizing forces have significantly eroded state and local power and influence in the parties. *Id.* Thus, national party organizations are now “stronger than they have ever been.” *Id.* at 33.

⁸¹ Although, one scholar has described the Court’s federalism decisions as just “puppy federalism” (as analogized to puppy love, being a mere distant imitation of the real thing). MARK TUSHNET, *THE NEW CONSTITUTIONAL ORDER* 56 (2003) (citing Edward L. Rubin, *Puppy Federalism and the Blessings of America*, 574 ANNALS AM. ACAD. POL. & SOC. SCI. 37, 38 (2001)).

tional comeback in the 1990s.⁸² Describing this federalism revolution, two noted constitutional scholars have written:

Federalism has become the defining issue of the Rehnquist Court. To the extent that its five Justice conservative majority has changed American constitutional law, its reasoning in re-defining the balance of power between the national government and the states will likely prove to be what the Rehnquist court is best known for.⁸³

According to another commentator, the Rehnquist Court “has exercised judicial review aggressively, issuing decisions that have reinvigorated the doctrine of federalism and restored power to the states.”⁸⁴ In the past decade or so, “there has been a slow but steady trend towards curbing the power of the federal government under the limitations of the Interstate Commerce Clause and the Tenth Amendment.”⁸⁵

Since the 1990s, the Court has “assumed an aggressive stance in safeguarding states from perceived overreaching by the federal government.”⁸⁶ In striking down various federal actions, the Court has “revived the effort to demarcate proper spheres of authority between the federal and state governments and to provide constitutional lefthandedness to federalism after a period where the constitutional boundaries were lowered.”⁸⁷ According to the *New York Times*, a “hallmark of the

⁸² The Rehnquist Court’s federalism decisions have been described as the “new federalism.” Casey L. Westover, *Structural Interpretation and the New Federalism: Finding the Proper Balance Between State Sovereignty and Federal Supremacy*, 88 MARQ. L. REV. 693, 725 (2005). This “new federalism” attempts to counter the long drift toward an imbalanced system greatly favoring the national government over the states. It also seeks to recognize the fact that for most of American history the states have been the chief architects “of the welter of servicing, financial, institutional, and jurisdictional arrangements” of the public sector. WALKER, *supra* note 1, at 249. States have also “provided the means by which most of domestic U.S. governance is conducted and nearly all domestic policies are implemented.” *Id.*

⁸³ Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause after Morrison*, 25 OKLA. CITY U. L. REV. 843, 844 (2000).

⁸⁴ Daniel J. Hulsebosch, *Bringing the People Back In*, 80 N.Y.U. L. REV. 653, 659 (2005) (reviewing LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004)).

⁸⁵ Robert Ward Shaw, Comment, *The States, Balanced Budgets, and Fundamental Shifts in Federalism*, 82 N.C. L. REV. 1195, 1217 (2004) (footnotes omitted).

⁸⁶ A. Brooke Overby, *Our New Commercial Law Federalism*, 76 TEMP. L. REV. 297, 305 (2003).

⁸⁷ *Id.* Besides its more restrictive interpretation of enumerated powers, the Rehnquist Court on occasion prevented Congress from creating new civil rights that might trump state laws or policies under the guise of the Fourteenth Amendment. In *City of Boerne v. Flores*, the Court ruled that Congress could not require the states to give more protections to religious exercise than the Constitution gave. 521 U.S. 507, 534–36 (1997). The *Boerne* ruling was later relied on to overturn other acts of Con-

Rehnquist Court has been a re-examination of the country's most basic constitutional arrangements, resulting in decisions that demanded a new respect for the sovereignty of the states and placed corresponding restrictions on the powers of Congress."⁸⁸

The Rehnquist Court waged its federalism revolution through three different constitutional approaches. It expanded state sovereign immunity under the Eleventh Amendment. It narrowed the scope of Congress's Commerce Clause powers. And it revived the Tenth Amendment as a limit on congressional power.

In *New York v. United States*,⁸⁹ the Supreme Court ruled that the federalism principles contained in the Tenth Amendment prohibited Congress from enacting legislation forcing state legislatures to administer a federal regulatory program.⁹⁰ At issue were provisions of the Low-Level Radioactive Waste Policy Act (LRWP Act), which required states to either adopt a federal regulatory program or be held financially responsible for damages as owners of the waste.⁹¹ In striking down this law, the Court held that by failing to provide the states with the choice not to regulate, the law "crossed the line distinguishing encouragement from coercion," thus violating the Tenth Amendment.⁹² Finding that the LRWP Act was an attempt by Congress to use the States as "implements of regulation,"⁹³ the Court ruled that

gress. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court overturned a federal statute making states liable to private parties for patent infringement and violations of the Lanham Act. 527 U.S. 627, 637-48 (1999). In *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000), and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001), the Court prohibited Congress, under the guise of the Fourteenth Amendment, from exposing states to private lawsuits alleging age and disability discrimination under federal law.

⁸⁸ Linda Greenhouse, *The Rehnquist Court and Its Imperiled States' Rights Legacy*, N.Y. TIMES, June 12, 2005, § 4, at 3, available at 2005 WLNR 9303554. Despite this attempt by the Court to strengthen state sovereignty, however, not all decisions went in favor of the states. In *Gonzales v. Raich*, 125 S. Ct. 2195, 2201 (2005), for instance, the Court upheld the power of Congress to ban the use of marijuana for medical purposes, even in states that permitted it.

⁸⁹ 505 U.S. 144 (1992).

⁹⁰ *Id.* at 188.

⁹¹ *Id.* at 175-77. The act stated that any state that failed to clean up its nuclear waste by 1986 would be deemed to be responsible for the waste and would be liable for any harms it had caused. See 42 U.S.C. § 2021e(d)(2)(C) (2000), *invalidated by New York*, 505 U.S. 144.

⁹² *New York*, 505 U.S. at 175, 149-54. In explaining its decision, the Court first noted that unlike previous Tenth Amendment cases, *New York* did not involve a law of general applicability. *Id.* at 160-61. Thus, the Court found that the law attempted to regulate states directly, rather than through the impact of generally applicable laws. *Id.* at 176-77.

⁹³ *Id.* at 161.

the Tenth Amendment is violated when Congress “commandeers” the states by forcing them to enact or administer a federal regulatory program.⁹⁴ Although the LRWP Act left the states with the choice of accepting title to hazardous waste or regulating according to the mandates of the Act, this choice was constitutionally deficient since the first option commandeered state governments for federal purposes, while the second basically mandated that state governments implement specific federal legislation.⁹⁵ By infringing on the core of state sovereignty, the Act, according to Justice O’Connor, was “inconsistent with the federal structure of our Government established by the Constitution.”⁹⁶

In *Printz v. United States*, the Court extended its ruling in *New York* by holding that the Tenth Amendment forbade Congress from enforcing certain provisions of the Brady Handgun Violence Prevention Act.⁹⁷ The Brady Act required state law enforcement personnel to participate in a federal regulatory program by conducting background checks and processing handgun applications before issuing any firearm permits.⁹⁸ As it had done in *New York*, the Court in *Printz* ruled that “the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.”⁹⁹ According to the Court, the federal government could “neither issue directives requiring the States to address particular problems, nor command the States’ officers . . . to administer or enforce a federal regulatory program,” since such commands violated the “constitutional system of dual sovereignty.”¹⁰⁰

Examining the issue from an historical perspective, Justice Scalia’s decision focused on the “structure of the Constitution,” seeing in it an “essential postulate” of state sovereignty.¹⁰¹ In laying out a view of state sovereignty much broader than the view given by Justice Blackmun in *Garcia*, Justice Scalia wrote that although “the states surrendered many of their powers to the new Federal Government, they retained a ‘residuary and inviolable sovereignty’” that is “reflected

⁹⁴ *Id.* at 176.

⁹⁵ *Id.* at 175–77.

⁹⁶ *New York*, 505 U.S. at 177.

⁹⁷ 521 U.S. 898 (1997).

⁹⁸ *Id.* at 902–04.

⁹⁹ *Id.* at 925. The Brady Act was therefore unconstitutional because it forced state executive officials to enforce federal laws. *Id.* at 933–35.

¹⁰⁰ *Id.* at 935. Justice Scalia found that Congress had essentially conscripted state and local governments to carry out a congressional mandate, and that this conscription encroached on state sovereignty. *Id.*

¹⁰¹ *Printz*, 521 U.S. at 918.

throughout the Constitution's text."¹⁰² According to Scalia, the Constitution embodies a "dual sovereignty" that prohibits the federal government from acting "upon and through the States."¹⁰³

2. Commerce Power Limitations

In two major Commerce Clause cases, in which individuals challenged the exercise of federal power, the Rehnquist Court held that Congress lacked the authority to intrude upon matters of state and local law enforcement.¹⁰⁴ In each case, the Court held that Congress could exercise only those powers enumerated in Article I.¹⁰⁵ It also narrowed the scope of Congress's Article I Commerce Clause powers, holding that Congress may only regulate economic activity that has a substantial effect on interstate commerce.¹⁰⁶ Through such rulings, the Court sought to curtail broad-reaching congressional regulations that would be incompatible with "our dual system of government."¹⁰⁷

In *United States v. Lopez*, for the first time since the New Deal, the Supreme Court nullified a congressional enactment under the Commerce Clause.¹⁰⁸ That enactment outlawed the possession of any firearm within 1000 feet of a school.¹⁰⁹ Striking down this prohibition, the Court held that the possession of guns near schools was not an activity constituting commerce and hence was not within the scope of the commerce power.¹¹⁰ In so ruling, the Court restricted the scope of the Commerce Clause to the regulation of those activities

¹⁰² *Id.* at 918–19 (citing U.S. CONST. art. III, § 2; art. IV, §§ 2–4; art. V).

¹⁰³ *Id.*

¹⁰⁴ See *United States v. Morrison*, 529 U.S. 598 (2000); *United States v. Lopez*, 514 U.S. 549 (1995).

¹⁰⁵ Although the Court may have revived judicial review of the Commerce Clause, it continues "to construe the Spending Clause to provide nearly a blank check for any spending that Congress chooses to undertake and to permit Congress to impose regulatory conditions that may parallel those barred by its Commerce Clause jurisprudence." McGinnis & Somin, *supra* note 39, at 115 (footnote omitted). See also *Sabri v. United States*, 540 U.S. 600 (2004) (upholding the imposition of various conditions on the granting of federal funds to states); *South Dakota v. Dole*, 483 U.S. 203 (1987).

¹⁰⁶ *Morrison*, 529 U.S. at 611; *Lopez*, 514 U.S. at 558–59.

¹⁰⁷ *Morrison*, 529 U.S. at 608; *Lopez*, 514 U.S. at 557.

¹⁰⁸ Prior to 1937, the Court had struck down an array of congressional Commerce Clause enactments, usually on the grounds that those enactments undermined the police power of the states. See, e.g., *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Champion v. Ames*, 188 U.S. 321 (1903). But in 1937, the Court reversed course and substantially expanded Congress's Commerce Clause powers. See, e.g., *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

¹⁰⁹ *Lopez*, 514 U.S. at 551.

¹¹⁰ *Id.* at 561.

having a “substantial effect” on interstate commerce.¹¹¹ It also recognized that some areas of “historical” state powers, including family law, criminal law enforcement, and education are beyond Congress’s power under the Commerce Clause.¹¹²

Continuing in the *Lopez* vein, the Court in *United States v. Morrison* struck down the civil remedy provision of the Violence Against Women Act.¹¹³ The Court ruled that the commerce power can apply only to an “economic endeavor,”¹¹⁴ and that gender-motivated violent crimes “are not, in any sense of the phrase, economic activity.”¹¹⁵ According to the Court, the Violence Against Women Act regulated not economic behavior such as commercial transactions, but conduct that has traditionally been left to state law.¹¹⁶ As Chief Justice Rehnquist wrote, the Constitution “requires a distinction between what is truly national and what is truly local.”¹¹⁷ Thus, contrary to *Garcia*, the *Morrison* opinion reflected a “deep-seated respect for states as sovereigns.”¹¹⁸

3. State Sovereign Immunity

The third focus of the Rehnquist Court regarding the doctrinal development of the new federalism was the expansion of state sovereign immunity. The Court did this in connection with lawsuits against states in both state and federal courts. Through its Eleventh Amendment jurisprudence, the Court has indicated that state sovereign immunity from private suits is critical to state autonomy.¹¹⁹

In *Alden v. Maine*,¹²⁰ the Court addressed suits in state court, ruling that sovereign immunity prevented Congress from compelling states to defend federal claims in state courts.¹²¹ In his majority decision, Justice Kennedy discussed the need to protect state sovereignty from nonconsensual suits:

¹¹¹ *Id.* at 565, 558–59.

¹¹² *Id.* at 564.

¹¹³ *United States v. Morrison*, 529 U.S. 598, 617 (2000).

¹¹⁴ *Id.* at 611.

¹¹⁵ *Id.* at 613. Thus, the Court held that the civil damages provision of the Violence Against Women Act exceeded the scope of the Commerce Clause. *Id.* at 617–19.

¹¹⁶ *Id.* at 617–18.

¹¹⁷ *Id.*

¹¹⁸ *Grey*, *supra* note 35, at 497.

¹¹⁹ *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 59 (1996) (rejecting the assertion that Congress, through its Article I powers, could subject the states to private federal suits).

¹²⁰ 527 U.S. 706 (1999).

¹²¹ *Id.* at 758–60.

The federal system established by our Constitution preserves the sovereign status of the States in two ways. First, it reserves to them a substantial portion of the Nation's primary sovereignty, together with the dignity and essential attributes inhering in that status. . . .

Second, even as to matters within the competence of the National Government, the constitutional design secures the founding generation's rejection of "the concept of a central government that would act upon and through the States" in favor of "a system in which the State and Federal Governments would exercise concurrent authority over the people—who were, in Hamilton's words, 'the only proper objects of government.'"¹²²

Justice Kennedy's majority opinion relied heavily on the general state sovereignty principle, which he argued pervades the constitutional text: "[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."¹²³

In *Kimel v. Florida Board of Regents*,¹²⁴ the Court continued this expansion of state immunity. Addressing the issue of whether states can be sued by their employees under federal laws prohibiting age discrimination, the Court held that Congress exceeded its powers when it abrogated the states' immunity from suits brought under the Age Discrimination in Employment Act.¹²⁵ And in a later case, the Court ruled that Congress again intruded upon state sovereign immunity when it enacted Title I of the Americans with Disabilities Act of 1990.¹²⁶

The Court has also used the Eleventh Amendment to immunize states from suits in federal court. In *Seminole Tribe of Florida v. Florida*¹²⁷ the Court overruled *Pennsylvania v. Union Gas Co.*, which gave Congress broad powers to override the Eleventh Amendment.¹²⁸ In *Seminole Tribe*, the Court substantially restricted the power of Congress to authorize suits against state governments.¹²⁹ Relying heavily

¹²² *Id.* at 714 (quoting *Printz v. United States*, 521 U.S. 898, 919–20 (1997)).

¹²³ *Id.* at 728.

¹²⁴ 528 U.S. 62 (2000).

¹²⁵ *Id.* at 91.

¹²⁶ *See Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001).

¹²⁷ 517 U.S. 44, 66 (1996).

¹²⁸ 491 U.S. 1, 7 (1989).

¹²⁹ 517 U.S. at 65–66. *Seminole Tribe* held that Congress did not have the power to abrogate state sovereign immunity when legislating pursuant to its Article I powers. *Id.* at 72.

on the Eleventh Amendment, the Court referred to it as the textual embodiment of the principle of state sovereign immunity.¹³⁰

These sovereign immunity decisions indicate the Court's belief that such immunity is critical to protecting the states as autonomous sovereigns.¹³¹ According to Professor Althouse, the real concern "is to protect the states as independently functioning government institutions by sparing them the impact of accumulated liability for their past violations of law."¹³² In a more recent expansion of the sovereign immunity doctrine, the Court held that sovereign immunity also applied to adjudications in federal administrative agencies.¹³³

IV. THE CONSTITUTIONAL ROLE OF FEDERALISM

A. A Structural Provision

Through its recent federalism decisions, the Court is "resurrecting and restoring a [constitutional structure] that it erroneously abandoned in the years after 1937."¹³⁴ A diverse and decentralized governmental structure, divided between the layers of state, local and nation, offers an array of benefits, the most compelling of which is the protection of individual liberty.¹³⁵ The Constitution's embodi-

¹³⁰ *Id.* at 64. In *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, the Court held that state governments cannot be sued for patent violations in federal court. 527 U.S. 627, 630 (1999).

¹³¹ Grey, *supra* note 35, at 500.

¹³² Ann Althouse, *On Dignity and Deference: The Supreme Court's New Federalism*, 68 U. CIN. L. REV. 245, 265 (2000). But not all Court decisions on state immunity have gone in favor of the states. See *Nevada v. Hibbs*, 538 U.S. 721 (2003) (upholding the ability of state employees to sue under the Family and Medical Leave Act); *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding the application of the Americans With Disabilities Act to state courthouses). By ruling that states could be sued for failing to make their courthouses accessible, the Court rejected the states' claim of constitutional immunity from suit. Also, in *Alaska Department of Environmental Conservation v. Environmental Protection Agency*, 540 U.S. 461 (2004), the Court affirmed the authority of the federal Environmental Protection Agency over state regulators, despite the dissent of Justice Kennedy on federalism grounds. *Id.* at 502; *id.* at 502-03 (Kennedy, J., dissenting).

¹³³ See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751-53 (2002) (using the *Alden* reasoning to derive sovereign immunity from the general principle of state sovereignty).

¹³⁴ Kramer, *supra* note 9, at 290.

¹³⁵ Historically, it has been believed that individual liberty would be served by dividing and decentralizing government power. As the Court explained in *New York v. United States*: federalism "secures to citizens the liberties that derive from the diffusion of sovereign power." 505 U.S. 144, 181 (1992) (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)). The Court also stated that a "healthy balance of power between the States and the Federal Government will re-

ment of the structural principles of federalism is designed not just to create a workable government but to create one that protects individual rights.¹³⁶ Federalism works in combination with another structural provision of the Constitution—the separation of powers—to produce a system with two different levels of checks and balances: one existing between the national and state governments, and the other between the three branches of the federal government. This system reflects what Madison called the Constitution’s “double security” for individual rights.¹³⁷

Federalism reflects a structural aspect of the constitutional scheme because it deals not with a specific power or right enjoyed by a specific actor, but with the organization of the American republic and the relationship between governmental units.¹³⁸ Federalism represents those limitations on government power that are both explicit in the text of the Constitution and implicit in the structure of the Constitution—a structure based on the different spheres of federal and state authority.¹³⁹ The system of dual sovereignty between national and state governments was designed largely to create a government that would protect the liberty of its citizens.¹⁴⁰

duce the risk of tyranny and abuse from either front.” *Id.* (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)).

¹³⁶ Amar, *supra* note 2, at 1426. An advantage of federalism is that people of different views can gather in different states with different policies. In a way, federalism can be seen as conducive to or even responsible for the revolution in sexual rights, because people have been able to move to the locales most hospitable to their particular orientations or proclivities.

¹³⁷ THE FEDERALIST NO. 51, at 67 (James Madison) (Lester DeKoster ed., 1976). The interstate competition fostered by federalism can also promote liberty. The ability of citizens to move from one state to another, to “vote with their feet . . . will discipline government in the same way in which consumer choice . . . disciplines producers.” MICHAEL S. GREVE, REAL FEDERALISM: WHY IT MATTERS, HOW IT COULD HAPPEN 3 (1999). In this same way, the competitive system of federalism devised by the Framers “leads to the protection of liberty” by allowing citizens to move from a state where they feel tyrannized to one with less tyrannous laws. Calabresi, *supra* note 20, at 776.

¹³⁸ Federalism, in other words, describes the type of governmental structure laid out in the Constitution—a structure of state-retained powers later codified in the Tenth Amendment. Amar, *supra* note 2, at 1440. The Tenth Amendment is not about reserving power to the states so that they can administer themselves as governments, but an amendment expressing a relationship among the federal government, the states, and the people. Bybee, *supra* note 15, at 561.

¹³⁹ See *Alden v. Maine*, 527 U.S. 706, 713–14 (1999) (citing both the constitutional text and the implications of the “constitutional design” as the legal basis for federalism).

¹⁴⁰ See *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); see also *Printz v. United States*, 521 U.S. 898, 921 (1997) (“This separation of the [federal and state governments] is one of the Constitution’s structural protections of liberty”); THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) (noting that governmental

To the Framers, the primary justification of federalism was not diversity or state competition, but the role of the states as guardians against possible federal tyranny.¹⁴¹ By diluting the power of the centralized national government, federalism restricts the opportunities for the abuse of power. Furthermore, by maintaining a separate governmental watchdog layer in the states, federalism provides a built-in mechanism to combat any overreaching by the national government.¹⁴² The Framers believed that the states could mount popular uprisings against any tyrannical abuses by the national government.¹⁴³ Alexander Hamilton argued that individuals who felt their rights violated by the central government could use the state governments “as the instrument of redress.”¹⁴⁴ Indeed, the prevailing expectation during the constitutional period was that “when one’s rivals or enemies were in control of the central government, one was prone to savor states’ rights”¹⁴⁵

In *The Federalist Nos. 9 and 51*, Hamilton makes a clear distinction between a free government and a republican government.¹⁴⁶ Whereas free government focuses exclusively on securing specified individual rights, republican government tries to achieve political freedom as a

power “is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people.”)

¹⁴¹ See, e.g., THE FEDERALIST NO. 28, at 179–180 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (arguing that the states “will in all possible contingencies afford complete security against invasions of the public liberty by the national authority”); see also AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION xiii (1998) (arguing that bolstering the states as bulwarks against federal tyranny was the primary motivation behind the adoption of the Bill of Rights).

¹⁴² The Framers believed that the states would serve to check any encroachments by the national government on the liberties of the people. See, e.g., THE FEDERALIST NO. 51, at 322–23 (James Madison) (Clinton Rossiter ed., 1961).

¹⁴³ Kramer, *supra* note 9, at 215. Similarly, the modern Court’s resurgent interest in preserving federalism is driven by a “concern for individual liberty.” William H. Pryor, *Madison’s Double Security*, 53 ALA. L. REV. 1167, 1177 (2002). As Justice O’Connor stated, the Constitution “does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities,” but rather “for the protection of individuals.” *New York v. United States*, 505 U.S. 144, 181 (1992).

¹⁴⁴ THE FEDERALIST NO. 28, at 179 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

¹⁴⁵ FORREST McDONALD, STATES’ RIGHTS AND THE UNION: IMPERIUM IN IMPERIO, 1776–1876, at 48 (2000).

¹⁴⁶ See, e.g., THE FEDERALIST NOS. 9, 51 (Alexander Hamilton) (referencing the distinction between free governments and republican governments).

means to securing individual freedom.¹⁴⁷ In choosing the latter, the Framers saw the structure of government as the best protection of individual rights.¹⁴⁸ Their objective was to design the proper governmental arrangements that would preserve liberty.¹⁴⁹ To the Framers, “the primary safeguards against government tyranny were architectural.”¹⁵⁰ Infringements on liberty caused by a potentially tyrannical national government could best be prevented by state governments standing “ready to rally their citizens and lead them in opposition.”¹⁵¹

For a century and a half, the Framers’ commitment to federalism persevered in constitutional doctrine. But the Framers’ view of protecting liberty through a limited and divided government was largely abandoned by the New Deal reformers, who called upon a powerful and activist central government to combat the problems of the Great Depression.¹⁵² Unlike the Framers, the New Dealers believed they could preserve liberty strictly through the judiciary’s enforcement of specified individual freedoms.¹⁵³

As a result of the transformations brought on by the New Deal, a constitutional compromise or settlement was reached. In order to sustain the sweeping New Deal legislation, judicial review of federalism issues more or less ended.¹⁵⁴ Congress was given great deference to enact the kind of legislation that would have previously been judged a violation of the federalism doctrine.¹⁵⁵ However, this abandonment of federalism undercut one of the most fundamental requisites of individual liberty. To compensate for this erasure of constitutional protection, the Court made a compromise: although it would retreat from reviewing federalism issues, it would intensify its review of individual rights issues. Larry Kramer calls this the New Deal “settlement,” in which the Court decided to enforce rigorously a selective set of substantive individual rights while deferring to Congress in

¹⁴⁷ Bradford P. Wilson, *Separation of Powers and Judicial Review*, in SEPARATION OF POWERS AND GOOD GOVERNMENT 63, 68 (Bradford P. Wilson & Peter W. Schramm eds., 1994).

¹⁴⁸ *Id.*

¹⁴⁹ WALKER, *supra* note 1, at 56. A federalist structure would help protect “the rights of every class of citizens.” *Id.* at 57.

¹⁵⁰ Levinson, *supra* note 25, at 919.

¹⁵¹ *Id.* at 938. But this ability was possible only if courts preserved the constitutional structure that gave state governments considerable influence and leverage over federal officials to prevent federal overreaching. *Id.*

¹⁵² See Stephen Gardbaum, *New Deal Constitutionalism and the Unshackling of the States*, 64 U. CHI. L. REV. 483, 483–84 (1997).

¹⁵³ See Sunstein, *supra* note 13, at 424.

¹⁵⁴ See cases and discussion *supra* notes 52, 59, 60.

¹⁵⁵ See cases and discussion *supra* notes 52, 59, 60.

structural matters, such as federalism and separation of powers.¹⁵⁶ Judicial passivity in one area would be offset by activism in another.¹⁵⁷ Thus, a deferential posture in connection with federalism and separation of powers coincided with the rise of a new version of substantive due process underlying a new judicial assertiveness in civil liberties cases.

As early as 1937, the Court articulated a “preferred-freedoms” approach calling for heightened constitutional protection of individual rights “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”¹⁵⁸ A year later, in footnote four to his opinion in *United States v. Carolene Products Co.*,¹⁵⁹ Justice Harlan Fiske Stone argued that the Court should protect the personal rights outlined in the Bill of Rights more zealously than property or economic rights.¹⁶⁰ It was this doctrine, which suggested a greater protection of individual rights than of any other constitutional provisions, that provided the foundation on which the Court would later construct the right to privacy.¹⁶¹ This heightened protection of individual rights also provided a substitute for judicial review of structural issues, and led to a gradual incorporation of the Bill of Rights guarantees into the Due Process and Equal Protection Clauses of the Fourteenth Amendment, thereby generating a new body of substantive due process in the civil liberties area.¹⁶²

¹⁵⁶ LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* 219–20 (2004). Because of this “settlement,” federalism became a dead doctrine until the Rehnquist Court. WALKER, *supra* note 1, at 96.

¹⁵⁷ WALKER, *supra* note, 1 at 97.

¹⁵⁸ *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

¹⁵⁹ 304 U.S. 144 (1938).

¹⁶⁰ *Id.* at 152–53 n.4 (“There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth.”).

¹⁶¹ Donald H.J. Hermann, *Pulling the Fig Leaf Off the Right of Privacy: Sex and the Constitution*, 54 DEPAUL L. REV. 909, 945 (2005).

¹⁶² WALKER, *supra* note 1, at 96. The preferred status given to individual rights over structural matters, however, is not accorded to property rights. The court seems concerned with individual rights only when they arise within the context of some kind of prohibited discrimination. Thus, courts have allowed the expansion of instances in which the government can commandeer private property through the process of eminent domain. See, e.g., Mary Massaron Ross, *Public Use: Does County of Wayne v. Hathcock Signal a Revival of the Public Use Limit to the Taking of Private Property?*, 37 URB. LAW. 243 (2005). Immigration and naturalization cases present yet another example of the preferred position given review of individual rights issues. Normally, the Court grants deference to Congress on immigration and naturalization matters, which fall within the field of foreign affairs, but an exception is made in

The civil rights movement solidified the transformation in constitutional approaches to the preservation of liberty: from relying on the structural provisions of the Constitution to using the courts to enforce substantive individual rights.¹⁶³ But this transformation essentially turned majority rule and individual liberty into antagonists. It exalted the protection of individual rights as the primary purpose of constitutional law.¹⁶⁴ Lost was the notion that if government power was constrained it could not infringe on liberty. Lost was the belief that a limited government of checks and balances could provide a lasting and supportive environment for individual liberty. Instead, the Court focused near exclusively on protecting specific, substantive rights, carving them out of and immunizing them from the political process.

In the legal culture of the late twentieth century, judicial review by an undemocratic court came to be seen as the only way to protect civil liberties.¹⁶⁵ Individual rights required judicial supremacy and exclusivity. But it was only after the New Deal and the judicial activism of the Warren Court that America came to rely only on the judiciary for the protection of individual rights.¹⁶⁶ “Only during the past two generations have lawyers and judges succeeded in placing judicial review at the center” of the protection of individual liberty.¹⁶⁷

The bifurcated pattern of judicial review that resulted from the New Deal “settlement”¹⁶⁸ was revealed in a 1978 study conducted by Professor Arthur Hellman.¹⁶⁸ Professor Hellman found that during the six terms from 1971 through 1976, forty-three percent of the Supreme Court’s cases involved the principal issue of individual

cases involving individuals asserting various types of due process challenges to Immigration and Naturalization Services orders. *See generally* Melissa A. Flynn, Case Comment, *Separation of Powers: Permissive Judicial Review or Invasion of Congressional Power?: Zadvydas v. Davis*, 533 U.S. 678 (2001), 54 FLA. L. REV. 989 (2002). In such cases, the courts again tend to ignore separation of powers issues and rule in favor of specific individual rights.

¹⁶³ Levinson, *supra* note 25, at 971.

¹⁶⁴ *Id.* at 972.

¹⁶⁵ Hulsebosch, *supra* note 84, at 658. Much of the legal academy favors the relatively recent norm of expansive readings of the Bill of Rights. Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL’Y 543, 546 (2003). Substantive individual rights appear to be the only place where the legal academy favors limitations on government.

¹⁶⁶ Hulsebosch, *supra* note 84, at 660.

¹⁶⁷ *Id.* at 662.

¹⁶⁸ Arthur D. Hellman, *The Business of the Supreme Court Under the Judiciary Act of 1925: The Plenary Docket in the 1970’s*, 91 HARV. L. REV. 1711 (1978).

rights.¹⁶⁹ Compared with the 383 decisions involving individual rights during this period, the Court handed down only eight decisions in which the principal issue was either a question of federalism or whether Congress had exceeded its constitutionally delegated powers.¹⁷⁰

Other scholars and commentators have documented this skewed focus of the Court that greatly favors individual rights cases over federalism or separation of powers cases.¹⁷¹ Mary Ann Glendon argues that prior to the 1950s the principal focus of constitutional law was not on personal liberty, but on the division of authority between the states and the federal government and the allocation of powers among the branches of the federal government.¹⁷² A half-century ago, the Court saw far fewer cases involving individual rights claims; today, however, those kinds of cases make up the bulk of the Court's constitutional workload.¹⁷³

The judicial preference for substantive individual rights over structural matters can presently be seen through cases involving the due process rights of alleged enemy combatants. In *Rasul v. Bush*,¹⁷⁴ the Court addressed the issue of whether habeas corpus should be available to foreign nationals detained abroad in connection with the U.S. war on terror.¹⁷⁵ This inquiry, however, triggered the larger issues of what due process rights are possessed by those accused of being enemy combatants and whether the detention of enemy combat-

¹⁶⁹ *Id.* at 1741. The number of individual rights cases was nearly double the number the Court had heard during the 1959–1964 period. *Id.* at 1750.

¹⁷⁰ *Id.* at 1761.

¹⁷¹ This skewed focus is evident in the Court's handling of deportation orders of the Immigration and Naturalization Service. *See, e.g., Zadvydas v. Davis*, 533 U.S. 678 (2001). Even though Congress has exclusive power to legislate in the area of immigration and naturalization, U.S. CONST. art I, §8, cl. 4, and even though Congress has delegated some of those powers to the executive branch (the INS), the Court has taken a judicially active and intrusive stance to immigration matters that affect or involve issues of individual rights. Rather than showing deference to Congress and to separation of powers concerns, the Court has actively reviewed and scrutinized congressional laws dealing with the INS's detention of deportable aliens. *See Zadvydas*, 533 U.S. at 682.

¹⁷² MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 4 (1991) (arguing that the traditional theory was that individual freedom was protected mainly through these structural features of our political regime).

¹⁷³ *Id.* at 5. As the Supreme Court began in the 1950s to expand the constitutional protection of a broad range of personal rights, judicial review was used, instead of democratic processes, to protect individual rights and check majoritarian rule. *Id.* at 38. The great expansion of personal liberties and civil rights began in the post-World War II period. *Id.* at 163.

¹⁷⁴ 542 U.S. 466 (2004).

¹⁷⁵ *Id.* at 475.

ants falls under the sole authority of the President and Congress—hence falling outside the scope of judicial review.¹⁷⁶ Even though the great weight of constitutional precedent indicated that military detainees did not possess due process rights¹⁷⁷ and that military detainees could not use habeas corpus, the Court in *Rasul* held that U.S. courts do have jurisdiction to hear such petitions.¹⁷⁸ Thus, *Rasul* provides an embodiment of the post-1937 judicial trend: rigorously reviewing matters of substantive individual rights, while largely ignoring structural issues. In essence, the conflict in *Rasul* was a separation of powers dispute between the executive's authority in military affairs and the judiciary's interest in protecting substantive individual rights, with the Court elevating the latter over the former.

In *Hamdi v. Rumsfeld*,¹⁷⁹ the Court likewise held that a U.S. citizen detained as an enemy combatant (captured in Afghanistan while fighting with a Taliban military unit) could not only challenge the circumstances of his detention before a court, but could present arguments against his detention.¹⁸⁰ In dissent, Justice Thomas argued that the constitutional authority of the President to wage war and protect the security interests of America took priority over the perceived authority of the courts.¹⁸¹ According to Justice Thomas, decisions regarding detained enemy combatants are decisions given ex-

¹⁷⁶ See *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 486 (1989) (Kennedy, J., concurring) ("Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself."). The Bush administration argued that the power to detain enemy combatants was inherent in the commander-in-chief's power and thus should not be subject to a balancing of the competing constitutional interests of other branches. *Rasul*, 542 U.S. at 475.

¹⁷⁷ See, e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding that the U.S. civil courts have no jurisdiction over non-citizen enemy fighters captured and held in foreign territory); *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (denying leave to file petitions for habeas corpus when several suspected saboteurs (including one U.S. citizen) sought review of their detentions). As Justice Jackson explained in *Eisentrager*: "Executive power over enemy aliens, undelayed and unhampered by litigation, has been deemed, throughout our history, essential to wartime security." *Eisentrager*, 339 U.S. at 774; see also *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) (holding that the President should have broad latitude in the context of foreign policy).

¹⁷⁸ *Rasul*, 542 U.S. at 473.

¹⁷⁹ 542 U.S. 507 (2004).

¹⁸⁰ *Id.* at 509 (holding that due process demands that "an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker").

¹⁸¹ *Id.* at 579 (Thomas, J., dissenting) (stating that the subject "detention falls squarely within the Federal Government's war powers, and we lack the expertise and capacity to second-guess that decision. As such, petitioners' habeas challenge should fail . . .").

clusively by the Constitution to Congress and the President; nowhere does the Constitution give authority to the courts over war-related matters.¹⁸²

B. *Judicial Balancing of Structure and Individual Rights*

Within the constitutional scheme, there has emerged an inverse relationship between the enforcement of substantive individual rights and that of structural provisions such as federalism and separation of powers. As the courts have abandoned the latter, they have had to intensify the former. In the words of one commentator, “[t]he decline of federalism and the rise of judicial supremacy, in short, are the opposite sides of a single coin.”¹⁸³

When the Court ceases to protect the kind of governmental structure designed to guard individual liberty, then only the judiciary is left to act as the guardian of liberty—and it does so by carving out and rigidly enforcing individual substantive rights. This practice of strict review of individual rights cases and lenient review of structural cases came into full flower during the 1960s,¹⁸⁴ when the Warren and Burger Courts effected a constitutional revolution in many areas of substantive individual rights, including criminal justice,¹⁸⁵ race discrimination,¹⁸⁶ the First Amendment,¹⁸⁷ abortion,¹⁸⁸ the rights of women,¹⁸⁹ the death penalty,¹⁹⁰ and procedural due process.¹⁹¹

¹⁸² *Id.* Justice Scalia argued that the Court’s decision took the Court out of the modest and limited role it held in a democratic society. *Id.* at 577 (Scalia, J., dissenting).

¹⁸³ Michael Uhlmann, *Wretched Judicial Excess*, FIRST THINGS, Nov. 2002, at 49 (reviewing ROBERT F. NAGEL, *THE IMPLOSION OF AMERICAN FEDERALISM* (2001)).

¹⁸⁴ Michael B. Rappaport, *It’s the O’Connor Court: A Brief Discussion of Some Critiques of the Rehnquist Court and Their Implications for Administrative Law*, 99 NW. U. L. REV. 369, 375 (2004) (“[T]he two-tiered approach of vigorous judicial review concerning individual rights, but deferential review of structural matters, is of relatively recent vintage.”).

¹⁸⁵ *Miranda v. Arizona*, 384 U.S. 436 (1966) (creating new procedural safeguards for criminal defendants subjected to custodial interrogation).

¹⁸⁶ *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down Virginia’s ban on interracial marriage).

¹⁸⁷ *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (limiting the liability of defendants in a defamation action).

¹⁸⁸ *Roe v. Wade*, 410 U.S. 113 (1973) (recognizing a constitutional right to abortion).

¹⁸⁹ *Craig v. Boren*, 429 U.S. 190 (1976) (striking down gender-based discrimination).

¹⁹⁰ *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (ruling that the death penalty as applied under the Alabama statute at issue was unconstitutional), *superseded by statute*, ALA. CODE § 13-11-9 (1975), *repealed by* ALA. CODE § 13A-5-57 (1982).

Today, the Supreme Court is widely viewed as the sole guarantor of individual liberties.¹⁹² But in the Framers' view, the primary security for rights lay in the Constitution's structural features, such as federalism. Contrary to the claim that individual rights should be enforced more strictly than structural provisions,¹⁹³ other scholars have shown that the Framers did intend significant review of structural matters.¹⁹⁴ During the constitutional period, the protection of individual liberty through judicial review of substantive individual rights was rarely mentioned, primarily because the Framers relied more on the structural provisions of the Constitution to check government abuses than on judicially created rights that serve as trump-cards on the democratic process.¹⁹⁵

Contemporary conventional wisdom in constitutional law holds that individual rights are more in need of judicial protection than are the structural provisions of the Constitution. But there is good reason to think that just the opposite is true. Because citizens are often more immediately focused on their substantive liberties than on federalism, "judicial review may be more necessary to restrain government agents from violating the Constitution's structural provisions than provisions relating to individual rights."¹⁹⁶ For this reason, courts should enforce the federalism provisions of the Constitution "no less than they do the Constitution's individual rights provisions."¹⁹⁷ As one commentator has recognized, democratic freedoms are "inevitably conditioned by the entire institutional structure within which these [freedoms] exist."¹⁹⁸ Indeed, the way in which federalism acts as a guardian of individual rights was illustrated by Jonah Goldberg, using the analogy of college dorms:

Imagine you've got ten dorms on a campus and a student population divided up into the usual coalitions: stoners, partiers, jocks, and so forth on one side, and study geeks, exchange students . . . on the other. A purely democratic system where all students get

¹⁹¹ *Goldberg v. Kelly*, 397 U.S. 254 (1970) (holding that a termination of welfare benefits requires a due process hearing).

¹⁹² Uhlmann, *supra* note 183, at 49.

¹⁹³ See KRAMER, *supra* note 156, at 81–82, 125 (arguing that vigorous judicial review can occur with individual rights, but should not occur with structural matters). In Kramer's view, the New Deal settlement was that judicial review was legitimate in individual rights cases, but not in cases involving structural issues. *Id.* at 162–65.

¹⁹⁴ Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887, 927–81 (2003).

¹⁹⁵ Kramer, *supra* note 9, at 266.

¹⁹⁶ McGinnis & Somin, *supra* note 39, at 97.

¹⁹⁷ *Id.* at 90.

¹⁹⁸ Pildes, *supra* note 40, at 52.

to decide dorm policy could result in the tyranny of 51 percent of the students over 49 percent of the students. The party-hardy crowd could pass a policy permitting loud music and keg parties at all hours of the night. Or if the more academically rigorous coalition won, they could ban “fun” of any kind, ever. Similarly, if the administration imposed its own policy from above, you could have a system that makes no one happy.

But, if you allowed each individual dorm to vote for its own policies, you could have a system where some dorms operate like scholarly monasteries and other dorms are more fun than a pool party at James Caan’s house. Theoretically, 100 percent of the students could live the way they want.¹⁹⁹

V. THE CONSEQUENCES OF CHOOSING RIGHTS OVER STRUCTURE

A. *A Disconnect Between Individuals and the Democratic Process*

The Framers favored a structural protection for individual liberty because they did not, and could not, envision the kind of activist judiciary needed to ensure liberty through the enforcement of a specified set of substantive individual rights. Yet, aside from this distaste for an activist judiciary, the Framers also hinged the protection of liberty on the structural design of the Constitution because they saw the democratic process, with sufficient checks and balances, as supportive of individual liberty. To the Framers, the design of government, rather than any enumerated right, constituted the individual’s primary protection from tyranny by the majority.²⁰⁰

With federalism and separation of powers providing an internal, structural check on the kind of government abuses that could erode basic freedoms, a consistency and harmony was seen between individual liberty and the workings of the larger democratic society. However, as the belief in this connection eroded over the course of the late twentieth century, individual rights became isolated ends in themselves, disconnected from the structural workings of the constitutional process. Consequently, the modern notion of individual rights tends to be divorced from the larger society. Rights are characterized by an “exaggerated absoluteness, . . . hyperindividualism, . . .

¹⁹⁹ Jonah Goldberg, *Jesusland for Thee, But Not for Me*, WASH. TIMES, Dec. 2, 2004, <http://www.washingtontimes.com/functions/print.php?StoryID=20041201-060033-2541r>.

²⁰⁰ GLENDON, *supra* note 172, at 24.

insularity, and . . . silence with respect to personal, civic, and collective responsibilities.”²⁰¹

By trying to protect liberty solely through the enforcement of specified personal freedoms, the lone individual is elevated to the pinnacle of the American political and constitutional scheme.²⁰² The primary legal drama of recent decades has been the expansion of individual rights. In legal education, for instance, “an intense preoccupation with the Bill of Rights and the courts tends to obscure the important roles that federalism, legislation, and separation of powers still can and must play in safeguarding rights and freedom.”²⁰³ Not only are democratic values downgraded in this process, but the individual is placed in constant conflict with the larger society.²⁰⁴

Individual rights activists adhere to the ideal of imaginary human beings in a “state of nature.” But this is not how the Constitution sees individuals, especially individuals who are members of a democratic society. The Framers did not see human beings as solitary creatures, with no relationships or obligations to society.²⁰⁵ Indeed, by joining a democratic society, the individual is no longer in a “state of nature”; thus, laws should not be crafted as if individuals lived separate from society, disconnected to its democratic process. However, the current individual rights mentality seems to presume that individual freedom cannot truly exist within majoritarian rule, as if majoritarian rule is inherently oppressive. (And indeed, without structural provisions like federalism and separation of powers, it would be.)

The Constitution envisions democracy like a family: there must be processes within the family structure to give each individual some freedom, and yet also to bind each member to the family as a whole. An exclusive focus on the individual simply separates that individual from the larger family, with no concern for what unites the family. That is why the structural framework is so important: to structure the larger unit so as to provide both social cohesion and individual freedom in a balanced dynamic. Similarly, the Constitution is primarily concerned with the workings of the democratic community, not with trying to return individuals to some imaginary “state of nature.”

²⁰¹ *Id.* at x.

²⁰² *Id.* at xi.

²⁰³ *Id.* at 5. According to Glendon, the rights revolution has contributed to the weakening of vital local governments, and to the disdain for politics that is now so prevalent in America. *Id.* Consequently, activists now often set their agendas in the courts rather than in the legislatures.

²⁰⁴ *Id.*

²⁰⁵ GLENDON, *supra* note 172, at 67.

Structural provisions not only protect individual liberty, but create a framework in which duties and responsibilities can be developed and fulfilled. Within the constitutional scheme, that framework is the democratic process, which in turn occurs within the structural confines of federalism and separation of powers. Because these structures allow individuals to integrate within the larger democratic process, they facilitate both individual rights and responsibilities.

If individual rights serve to undermine their structural foundations, then they erode their “surest underpinning.”²⁰⁶ Moreover, the reliance on judicial enforcement of substantive rights can foster the illusion that the rights in question are more secure than they in fact are. Consider, for instance, the history of property rights in constitutional law. To the Framers, one of the primary purposes behind the new constitution was to develop a governmental structure for the protection of private property.²⁰⁷ This was considered the single right most vulnerable to government infringement.²⁰⁸ But as it turned out, property rights were the first casualty of the New Deal transformation in constitutional law; they went from being a fundamental freedom to being merely a social interest.

Ironically, the same kind of judicial scrutiny once given to property rights is now being given to certain personal liberties like the right of privacy. But contrary to the Court’s current approach to this issue, privacy rights are actually better suited to being protected by the Constitution’s structural scheme than by judicial dictate. Structural protections allow for a more flexible and dynamic protection, shaping individual freedoms according to the democratic desires and interests of the people possessing those freedoms. The existing right to privacy, however, reflects a judicial mandate on a matter in which every citizen has an interest and which continually changes as society and social relationships change.

The development and enforcement of a right to privacy reflects the New Deal “settlement” that occurred in constitutional law. Under this settlement, the courts have acquiesced in the shift from a limited to an activist government, as long as there is judicial scrutiny of individual rights. This was the theory underlying that shift: that the only way to have an activist central government *and* individual freedom is to have the latter imposed by the courts, through the individual rights provisions of the Constitution.

²⁰⁶ *Id.* at 138.

²⁰⁷ *Id.* at 24–25.

²⁰⁸ *Id.*

B. *A Freedom Better Left to Structural Protections*

1. Judicial Development of Privacy Rights

The Court's recognition of a constitutional right of privacy began in *Griswold v. Connecticut*,²⁰⁹ where the Court struck down a Connecticut law prohibiting the use of contraceptives, even by married couples.²¹⁰ The Court ruled that the statute violated "a zone of privacy" created by the "penumbras" that gave "life and substance" to the specific guarantees in the Bill of Rights.²¹¹ In outlining this zone of privacy, the Court stated that even though some rights are not specifically mentioned in the Constitution, they are nonetheless "peripheral" to various freedoms in the Bill of Rights.²¹²

Although *Griswold* may have initially appeared to link the constitutional protection of sexual activity to married couples, *Eisenstadt v. Baird*²¹³ removed any such linkage. In *Eisenstadt*, the Court extended *Griswold's* holding to include "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."²¹⁴ As Justice Brennan declared: "If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible."²¹⁵ This decision marked a shift from privacy as "freedom from surveillance or disclosure of intimate affairs," to privacy as "the freedom to engage in certain activities" and "to make certain sorts of choices, free of interference by the state."²¹⁶

In 2003, the Court noted how its 1977 decision in *Carey v. Population Services International*²¹⁷ reiterated that "the reasoning of *Griswold* could not be confined to the protection of rights of married adults."²¹⁸ In overturning a statute that banned the distribution of

²⁰⁹ 381 U.S. 479 (1965) (holding that a right of privacy exists).

²¹⁰ *Id.* at 485–86.

²¹¹ *Id.* at 484, 485.

²¹² *Id.* at 483.

²¹³ 405 U.S. 438 (1972) (holding that a law banning the distribution of contraceptives to unmarried persons violates the right of privacy, and hence extending the ruling in *Griswold* to non-married individuals).

²¹⁴ *Id.* at 453.

²¹⁵ *Id.* (arguing for expanding the right of privacy to the individual from the couple).

²¹⁶ Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 527–28 (1989); *Eisenstadt*, 405 U.S. at 453.

²¹⁷ 431 U.S. 678 (1977).

²¹⁸ *Lawrence v. Texas*, 539 U.S. 558, 566 (2003) (citing *Carey*, 431 U.S. 678).

contraceptives to minors as part of a state policy against teen pregnancy, *Carey* extended the right of privacy to minors engaging in consensual sexual behavior.²¹⁹ The *Carey* Court saw the right of privacy, as protected by the Due Process Clause of the Fourteenth Amendment, to include “the interest in independence in making certain kinds of important decisions.”²²⁰

In *Roe v. Wade*,²²¹ the Court held that the right of privacy recognized in the previous contraception cases was “broad enough to cover the abortion decision.”²²² Later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²²³ which reaffirmed *Roe*, Justice Kennedy elaborated on the right to privacy:

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.²²⁴

This “right to define one’s concept of the universe,” linking the right to an abortion to other kinds of intimate choices, thus became the latest evolution of the “emanations from penumbras” that first led to a recognized right to privacy.²²⁵

In *Lawrence v. Texas*,²²⁶ the Court applied the right of privacy to hold that a Texas statute prohibiting people of the same sex from engaging in certain sexual conduct violated the Due Process Clause.²²⁷ Justice Kennedy’s opinion recognized that the Court’s earlier deci-

²¹⁹ *Carey*, 431 U.S. at 693.

²²⁰ *Id.* at 684 (quoting *Whalen v. Roe*, 429 U.S. 589, 599–600 (1977)).

²²¹ 410 U.S. 113 (1973).

²²² *Id.* at 155. Thus, a woman’s right to have an abortion was included within the zone of privacy created in *Griswold*. *Roe* was reaffirmed in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 846–47 (1992), which held that a woman’s right to choose an abortion is grounded in the concept of liberty protected by the Due Process Clause of the Fourteenth Amendment. But to create this zone, the Court had to rule that an unborn fetus was not a “person” under the Fourteenth Amendment. *See id.* at 873.

²²³ 505 U.S. 833 (1992).

²²⁴ *Id.* at 851.

²²⁵ *See* *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (citing *Poe v. Ullman*, 367 U.S. 497 (1961)). A further development in the expansion of privacy rights to cover the abortion decision occurred in *Stenberg v. Carhart*, where the Supreme Court struck down a Nebraska law prohibiting partial-birth abortion. 530 U.S. 914, 929–30 (2000). In his decision, Justice Breyer found the law burdensome on a woman’s ability to choose. *Id.* at 930.

²²⁶ 539 U.S. 558 (2003).

²²⁷ *Id.* at 567.

sion in *Eisenstadt* had established that the right to make certain decisions regarding sexual conduct extended to all adults, regardless of gender or marital status.²²⁸ But in *Lawrence*, the Court gave explicit recognition to a right of sexual intimacy, which it had been unwilling to recognize in previous cases.²²⁹ Seventeen years earlier, the Court in *Bowers v. Hardwick*²³⁰ had refused to find that the right of homosexuals to engage in sodomy was a fundamental right, citing to the lack of history or tradition of protecting such a practice.²³¹ Notwithstanding this previous reasoning the Court in *Lawrence* found just the opposite type of history and tradition, enabling it to rule that sodomy statutes offended an individual's right to privacy.²³² Consequently, in the wake of *Lawrence*, there is no longer any question as to whether a right to sexual privacy exists; the only question is what specific aspects of sexual privacy can or cannot be regulated.²³³ In his dissent, for instance, Justice Scalia predicted that the next logical step in the reasoning of *Lawrence* would be the legalization of same-sex marriage.²³⁴

2. A Liberty That Could Have Been

As the Court has been developing a right to privacy, it has continued to downplay or ignore property rights, which for a century and a half were an explicit and primary focus of constitutional law. In fact, only after the Court ceased treating the right to property as a fundamental right, requiring substantive due process analysis, did it begin to adopt such an analysis for issues involving non-economic individual rights.²³⁵ But the unanswered question resulting from this

²²⁸ *Id.* at 565. Thus, *Lawrence* held that the Constitution permits homosexuals complete freedom in the area of sexual intimacy. *Id.* at 567.

²²⁹ Hermann, *supra* note 161, at 928, 930.

²³⁰ 478 U.S. 186 (1986).

²³¹ *Id.* at 192–94.

²³² *Id.* at 190, 192; *Lawrence*, 539 U.S. at 575, 584.

²³³ An emerging issue, for instance, is presented by a case addressing the constitutionality of an Alabama statute regulating the distribution of sexual devices, including the specific issue of whether the right to sexual privacy includes the right to use sexual devices. See *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232, 1233 (11th Cir. 2004), *cert. denied*, 543 U.S. 1152 (2005).

²³⁴ *Lawrence*, 539 U.S. at 604 (Scalia, J., dissenting).

²³⁵ See *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 41–42 (1937) (refusing to scrutinize, using a substantive due process analysis, legislation regulating labor relations, and instead merely deferring to the congressional finding that there was a rational basis for the regulations and that the regulated activities had a substantial economic effect).

Prior to 1937, property rights were seen by the *Lochner*-era Court (*Lochner v. New York*, 198 U.S. 45 (1905)) as fundamental to the Constitution's view of a free and independent life. But the New Deal constitutional revolution abandoned the

legacy is whether property rights are more important to individuals than sexual privacy rights.²³⁶ This question, however, would be answered if the Court had pursued a structural path to individual liberty through the workings of the democratic process. Indeed, privacy is not the kind of minority-rights issue on which the courts should possess sole authority. Everyone, regardless of their race, religion, or income status, is interested in privacy; it is not a special concern only of a certain, specified minority. If one is to believe the courts, everyone sees sexual conduct as being essential to their self-definition; thus, everyone has an interest in, for example, the issue of contraception availability. Consequently, privacy can be best protected through the Constitution's structural provisions preventing governmental abuse of the lawmaking process.

Protecting privacy interests through structural provisions would also allow for more flexibility, instead of locking in a particular judge-made version of a particular right.²³⁷ However, because of the way privacy has evolved as a court-created right, there is an arbitrariness to the current constitutional doctrine. Why, for instance, did the Court pick sexual activity as the area covered by privacy rights? And what if there are many people who define themselves not through their sexual activities but through some other activity?²³⁸

doctrine of substantive due process that had been applied exclusively to property rights. Later, with the creation of privacy rights, the doctrine was revived; but this time the nature of liberty that was found essential under the Constitution for individual freedom, and to which the Court gave heightened protection, was not economic liberty but autonomy in intimate relations.

²³⁶ This is particularly evident in the public outrage in response to the public use takings case of *Kelo v. City of New London*, 125 S. Ct. 2655 (2005), where the Supreme Court held that a city's exercise of eminent domain power in furtherance of an economic development plan, even if used to transfer property from one private party to another, satisfies the constitutional "public use" requirement. *Id.* at 2665–66.

²³⁷ Regarding privacy and abortion rights, the Supreme Court has been accused of creating new rights. See TOM CAMPBELL, *SEPARATION OF POWERS IN PRACTICE* 20 (2004). But to apply the right to privacy to abortion, the Court has had to set in motion a whole train of consequences, including the ruling that an unborn child was not a person. Consequently, the right to privacy became a "super-right," which trumps even the interest in protecting potential life. *Id.* at 145, 147. Thus, to arrive at a right to abortion through a general right to privacy, the Court had to find in the Constitution a substantive right of privacy beyond anything that had ever existed before.

²³⁸ Evidence that the Framers did not recognize or even contemplate any kind of right to sexual privacy can be seen in the plethora of eighteenth and nineteenth century laws punishing adultery. See Carolyn B. Ramsey, Book Note, *Sex and Social Order: The Selective Enforcement of Colonial American Adultery Laws in the English Context*, 10 YALE J.L. & HUMAN. 191, 208–13 (1998) (reviewing MARY BETH NORTON, *FOUNDING MOTHERS AND FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* (1996)).

The irony of the privacy right created by the courts is that it exists in a society where every aspect of personal privacy other than sexual conduct is being eroded. Sexual privacy is constitutionally protected, even though identity and informational privacy is under increasing assault from new technologies.²³⁹ Professor Fishman has outlined the host of ways in which technology is invading individual privacy.²⁴⁰ He describes the ubiquity of surveillance technology, the ease with which the internet can disseminate private information, and the ways in which personal data can be acquired through the use of credit cards, email, and even supermarket discount cards.²⁴¹ And even more ironic, especially when one considers the constitutional efforts the judiciary has made to create a right of privacy, the Supreme Court has greatly aided the invasion of privacy by ruling that the media may publish or broadcast with impunity the contents of intercepted communications known to have been unlawfully intercepted, so long as the media did not participate in the unlawful interception.²⁴²

VI. CONCLUSION—THE NEXT STEP: A FULL RESTORATION OF FEDERALISM'S STRUCTURAL PROTECTIONS

Nearly seven decades have elapsed since the Court made its great constitutional compromise of 1937, abandoning the structural protections of the Constitution and choosing to protect individual liberty through the judicial enforcement of substantive individual

²³⁹ See generally PATRICK RADDEN KEEFE, CHATTER: DISPATCHES FROM THE SECRET WORLD OF GLOBAL EAVESDROPPING (2005); ROBERT O'HARROW, JR., NO PLACE TO HIDE (2005) (outlining all the ways in which personal data can be acquired and how people's movements and activities can be followed or recorded); see also generally Rebecca S. Murray, Book Review, 3 J. HIGH TECH. L. 1 (2004) (reviewing CLAY CALVERT, VOYEUR NATION: MEDIA PRIVACY, AND PEERING IN MODERN CULTURE (2000)) (discussing various types of voyeurism made possible by new technologies, as well as how the media uses its judicially-granted constitutional rights to invade individual privacy).

²⁴⁰ See Clifford S. Fishman, *Technology and the Internet: The Impending Destruction of Privacy by Betrayers, Grudgers, Snoops, Spammers, Corporations, and the Media*, 72 GEO. WASH. L. REV. 1503, 1506–15 (2004).

²⁴¹ *Id.* at 1505–11.

²⁴² *Bartnicki v. Vopper*, 532 U.S. 514, 525 (2001) (ruling that the media are immune from civil damages suits brought under the Wiretap Act). Aside from the media, the government also participates in the erosion of personal privacy. For instance, nearly every state employs a data encryption method on their drivers' licenses. John T. Cross, Comment, *Age Verification in the 21st Century: Swiping Away Your Privacy*, 23 J. MARSHALL J. COMPUTER & INFO. L. 363, 372 (2005). However, when the license is swiped through a digital scanner (for age verification purposes for example), the private data stored on the card's magnetic strip is susceptible to theft. Currently, more than seven million Americans are victimized by identity theft; and the driver's license is a frequent means by which this theft occurs. *Id.* at 394.

rights. Given the benefit of hindsight, it can now be seen that much was sacrificed for the sake of upholding the constitutionality of the New Deal legislation. Many scholars claim that this compromise has actually contributed to the erosion of individual liberty in America. In the view of Randy Barnett, it is the broad use of Commerce Clause powers “that has most often been used by Congress to restrict the liberties of the people.”²⁴³ For this reason, Barnett suggests returning to a pre-New Deal understanding, in which the Constitution’s structural provisions were enforced as strictly as its individual rights protections are enforced now.²⁴⁴ Indeed, even though it was a calamitous event, the Great Depression should not continue to haunt constitutional law more than seven decades later.

Reviving structural provisions like federalism will not only serve to protect individual liberty, but will also serve to facilitate a more dynamic, flexible and representational democracy.²⁴⁵ The same jurists and scholars who advocate judicial deference on structural matters, combined with judicial scrutiny on individual rights, support the notion of a living constitution. The idea of a living Constitution was articulated by Justice William Brennan: “[T]he genius of the Constitution rests not in any static meaning . . . but in the adaptability of its great principles to cope with current problems and current needs.”²⁴⁶ To advocates of a living Constitution, it is not possible to “lock in” the Constitution’s enduring principles. However, this is just what the courts do when protecting individual liberty through “locking in” their interpretations of substantive individual rights, instead of letting liberty thrive through the organic workings of the Constitution’s structural provisions.²⁴⁷

²⁴³ RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 277 (2004).

²⁴⁴ *Id.* at 278.

²⁴⁵ A criticism often made is that the Constitution does not represent the consent of the governed; indeed, how can present-day society be governed by provisions drafted by a small group of delegates more than 200 years ago? As Professor Barnett asks: “How can a small minority of inhabitants presuming to call themselves ‘We the People’ consensually bind anyone but themselves?” *Id.* at 20. The answer lies in the structural aspect of the Constitution, which sets out the ground rules for a democratic society to continually keep reaching consent on the rules that bind it, not in the judicial enforcement of selected rights which do not even appear in the Constitution and which have never been consented to by the people in any constitutional sense.

²⁴⁶ William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, in *INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT* 23, 27 (Jack N. Rakove ed., 1990).

²⁴⁷ It has been suggested that the courts have had to intensify their scrutiny of individual rights precisely because, in the post-New Deal world, we have moved from a limited federal government with constrained powers to an expansive government

After *Carolene Products*, and certainly after *Griswold*, the Court has been willing to protect individual rights under a revived substantive due process doctrine.²⁴⁸ Perhaps this is because the Court virtually abandoned, until the 1990s, any enforcement of structural provisions like federalism that had long been the Constitution's most effective way of protecting liberty. Thus, during the second half of the twentieth century, the Court intensified its scrutiny of individual rights because it could no longer rely on the structural provisions to guard liberty. But given that those structural provisions were at least somewhat revived by the Rehnquist Court's "New Federalism," the Roberts Court should correspondingly lessen its activism in the individual rights area. This retreat would also relieve the courts of having to decide which rights merit "fundamental" status, as they currently do under the substantive due process doctrine, such as with privacy.

So far, however, the Court has not adjusted its individual rights approach to coincide with its federalism approach. As one scholar has noted, "the Rehnquist Court may well be the most pro-First Amendment Court that has ever sat."²⁴⁹ It has protected the right to burn the American flag.²⁵⁰ It has struck down congressional attempts to regulate Internet pornography.²⁵¹ It has come up with new kinds of substantive individual rights, such as the *Lawrence* right to homosexual sex. With respect to commercial speech, it has overturned regulation on tobacco advertising near schools.²⁵² It has upheld the

possessing broad powers. See Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1240 (2004). For instance, the courts have crafted a detailed and comprehensive Fourth Amendment jurisprudence to respond to an expanded government capable of and willing to conduct suspicionless searches. But such a jurisprudence was unnecessary in the *Lochner* era, when the Court enforced substantive limits on governmental regulatory power, in part because "suspicionless civil search regimes were reduced in absolute terms because of the decreased number of regulatory regimes in existence." *Id.* at 1241. Thus, when the Interstate Commerce Commission was established as an exercise of expanded federal powers, it was "the first federal regulatory agency authorized to police broadly the detailed operations of a significant sector of the U.S. economy." *Id.* (quoting JERRY L. MASHAW ET. AL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC LAW SYSTEM, CASES AND MATERIALS 4 (5th ed. 2003)). This in turn provided more opportunities and occasions for an agent of the federal government to conduct searches of private entities.

²⁴⁸ BARNETT, *supra* note 243, at 232.

²⁴⁹ Steven G. Calabresi, *The Libertarian-Lite Constitutional Order and the Rehnquist Court*, 93 GEO. L.J. 1023, 1048 (2005) (reviewing TUSHNET, *supra* note 81).

²⁵⁰ *United States v. Eichman*, 496 U.S. 310 (1990); *Texas v. Johnson*, 491 U.S. 397 (1989).

²⁵¹ *Ashcroft v. ACLU*, 542 U.S. 656 (2004); *Reno v. ACLU*, 521 U.S. 844 (1997).

²⁵² *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525 (2001).

Miranda rule.²⁵³ And it has ruled against the government and in favor of individual enemy combatants in two of its the most significant cases involving the “War on Terror.”²⁵⁴ The Court’s ruling in *Hamdi* has been called a “strikingly libertarian response for the Court to take during wartime.”²⁵⁵ And yet, *Hamdi* was “nothing . . . compared to the extreme libertarianism the Court displayed, in *Rasul v. Bush*—the Guantanamo Bay detainees case.”²⁵⁶

Contemporary courts, in their focus on individual rights, have also expanded the types of individual interests that qualify for procedural due process protections. In *Hamby v. Neel*,²⁵⁷ the Sixth Circuit held that an individual held a property interest in coverage under Tennessee’s Medicaid Demonstration Project, and hence could not be denied coverage without procedural due process.²⁵⁸ Similarly, the Second Circuit ruled that individuals had a protected property interest in receiving benefits under New York’s Home Energy Assistance Program.²⁵⁹ And in *Greene v. Barrett*,²⁶⁰ the Tenth Circuit found that an officer with the Laramie County Sheriff’s Department had a protected property interest in his rank, and therefore could not be reduced in rank without receiving due process.²⁶¹ Thus, in both a procedural and substantive sense, courts have continued their expansive individual rights jurisprudence—a jurisprudence that might be rendered unnecessary by a revival of the Constitution’s structural protections of liberty.

²⁵³ *Dickerson v. United States*, 530 U.S. 428 (2000).

²⁵⁴ See generally *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).

²⁵⁵ Calabresi, *supra* note 249, at 1055–56.

²⁵⁶ *Id.* at 1056. Calabresi further posited that the Rehnquist Court has “turned out to be strikingly libertarian on a whole host of issues.” *Id.* at 1059.

²⁵⁷ 368 F.3d 549 (6th Cir. 2004).

²⁵⁸ *Id.* at 562.

²⁵⁹ *Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005).

²⁶⁰ 174 F.3d 1136 (10th Cir. 1999).

²⁶¹ *Id.* at 1141. Also, in *Youakim v. McDonald*, 71 F.3d 1274 (7th Cir. 1995), the Seventh Circuit held that foster parents had a protected property interest in foster care benefits. *Id.* at 1289. In *Marincas v. Lewis*, 92 F.3d 195 (3d Cir. 1996), the court held that an illegal stowaway seeking asylum was entitled to the same procedural due process as other asylum applicants. *Id.* at 201. That case law derived in large part from the Supreme Court’s ruling in *Plyler v. Doe*, holding unconstitutional Texas’s policy of excluding illegal aliens from its public schools. 457 U.S. 202, 230 (1982) (stating that “person” within the meaning of the Fourteenth Amendment includes illegal aliens).