2000

Federalism's Old Deal: What's Right and Wrong with Conservative Judicial Activism

Peter M. Shane

Follow this and additional works at: http://digitalcommons.law.villanova.edu/vlr

Part of the Constitutional Law Commons

Recommended Citation

Peter M. Shane, Federalism's Old Deal: What's Right and Wrong with Conservative Judicial Activism, 45 Vill. L. Rev. 201 (2000). Available at: http://digitalcommons.law.villanova.edu/vlr/vol45/iss2/1

This Lecture is brought to you for free and open access by Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Law Review by an authorized editor of Villanova University Charles Widger School of Law Digital Repository. For more information, please contact Benjamin.Carlson@law.villanova.edu.
Reuschlein Lecture

FEDERALISM'S "OLD DEAL":
WHAT'S RIGHT AND WRONG WITH CONSERVATIVE JUDICIAL ACTIVISM*

PETER M. SHANE**

I. INTRODUCTION

OUR federal courts are currently undergoing "[t]his century's third and final era of judicial activism." The animating impulse of this "contemporary activism is an interest in reviving the structural guarantees of dual sovereignty," that is, in protecting the vitality of "states as entities having residual sovereign rights." The judicially targeted threat to these "residual sovereign rights" is the regulatory power of Congress.

This characterization of the modern era is not my own. It belongs to J. Harvie Wilkinson III, Chief Judge of the United States Court of Appeals for the Fourth Circuit. It appears in his concurrence to an en banc Fourth Circuit decision, Brzonkala v. Virginia Polytechnic Institute & State University, which invalidated the civil damages remedy for gender-based violence that

* © 1999. Peter M. Shane. All rights reserved. This Article was originally delivered as the Harold Gill Reuschlein Distinguished Lecture on October 29, 1999 at the Villanova University School of Law. I am grateful to audience members at both the Villanova lecture and at a Washington University in St. Louis School of Law faculty workshop based on this lecture for comments and suggestions that sharpened my thinking. I benefited also from the research assistance of Pittsburgh law student Trisha Williams '01.

** Harold Gill Reuschlein Distinguished Visiting Professor of Law, Villanova University School of Law (Fall, 1999), and Professor of Law and former dean, University of Pittsburgh School of Law.

2. Id. at 893.
3. See id. (noting use of term "residual sovereign rights").
Congress enacted as part of the Violence Against Women Act ("VAWA").

Chief Judge Wilkinson's opinion is remarkable because he not only discerns candidly the current era of judicial activism—he embraces it. "[T]he present jurisprudence," he writes, "holds the promise to be an enduring and constructive one . . . "

Pragmatist that he is, Chief Judge Wilkinson cautions that the potential of the current era will be lost unless the courts "temper" their role in second-guessing federal legislation "by the maxims of prudence and restraint." If modern activism accelerates to a gallop," Chief Judge Wilkinson warns, "then this era will go the way of its discredited forebear," namely, the widely deplored heyday of economic substantive due process following *Lochner v. New York.* Chief Judge Wilkinson's cautionary notes aside, it is worth beholding his opinion as among the very few ever written in which the author actually welcomes the title, "Judicial Activist."

Chief Judge Wilkinson's opinion has done American constitutionalism a favor. For a conservative judge to admit that judicial activism can make an enduring and constructive contribution to our constitutional jurisprudence may significantly change the framework within which judicial activism and restraint are usually debated. His perspective should promote a genuine and thorough reevaluation of that debate. And, on this most general of levels, I endorse Chief Judge Wilkinson's acknowledgment that at least some versions of judicial activism can, in principle, be constructive.

Chief Judge Wilkinson is unjustified, however, in his optimism for the current conservative project of devising new doctrinal tools for cutting back Congress' commercial regulatory powers in order to protect the states' sovereign rights. These doctrinal tools, I believe, are overwhelmingly likely to prove unworkable. They are likely to be employed in the invalidation of national legislation that, in terms of the values of federalism, will be indistinguishable from other legislation that even current conservative judicial activists concede to be plainly constitutional. They are not justified by the current circumstances of our federal system. And, be-

---

7. *Id.* at 897 (Wilkinson, C.J., concurring). Chief Judge Wilkinson has written: Legal reason represents the process of applying impersonal principles of law to varying facts. Thus conceived, reason may chart the course between the subjective dangers of the pragmatic and the ideological. The great danger of pragmatic judging is that it is divorced from underlying legal principle; the danger of the ideologic, that it is severed from the subtleties of real life facts.
cause they are likely to be employed by judges less willing than Chief Judge Wilkinson to acknowledge their activist role forthrightly, these doctrinal maneuvers will often be dressed up in discussions of history or precedent that will be wrongheaded and misleading. All of this is well illustrated by the Fourth Circuit opinion to which Chief Judge Wilkinson concurs, an opinion whose rhetoric is a kind of negative model of how judges should not write important opinions.

II. THE SUPREME COURT’S NEW COMMERCE CLAUSE ACTIVISM: A BRIEF OVERVIEW

Delineating the respective spheres of national and state regulatory authority has been one of the Supreme Court’s most enduring preoccupations. Two of Chief Justice John Marshall’s three foundational opinions, *McCulloch v. Maryland* 10 and *Gibbons v. Ogden*, 11 focused on just this problem. 12 To a significant degree, the Court’s ensuing federalism jurisprudence can be regarded as the collective attempt of later generations to wrestle with the very same issues that Marshall so famously confronted.

Between 1937 and 1964, the Supreme Court decided a series of cases that, in brief, came to embody an “800-pound gorilla” theory of Congress’ authority to legislate regarding “commerce . . . among the several States.” 13 If asked what Congress might regulate pursuant to this most important of its enumerated domestic powers, a competent lawyer or law student by the mid-1960s could sensibly offer the answer, “anything it wants.” 14 This development occurred, of course, during a period of generally expanding national regulatory authority at the expense of the states. Judicial activism in enforcing the Fourteenth Amendment during the 1950s and 1960s significantly displaced state and local decisionmaking on

---

12. The third leg of the triumvirate is, of course, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), which established much of the framework for the future of separation of powers law with regard to judicial review of both Congress and the Executive.
14. This remained the conventional answer among law students for some time to come. See Deborah Jones Merritt, *COMMERCE!*, 94 MICH. L. REV. 674, 674 (1995) (“When I graduated from law school in 1980, my classmates and I believed that Congress could regulate any act—no matter how local—under the Commerce Clause.”).
matters of criminal procedure, civil rights, public education, election design and social welfare.

Hints of a different direction clearly emerged, however, with the ascension to the Court of then-Associate Justice William H. Rehnquist in 1972. Justice Rehnquist was hardly the first modern Justice to show sensitivity to federalism issues, either in interpreting constitutional restrictions on state political authority or in evaluating the centralizing impact of national legislation. He revealed, however, an early penchant for crafting ambitious judicial opinions that creatively limited the reach of federal lawmaking with regard to the states. Perhaps most notable in his first two terms were opinions narrowing the concept of state action reachable by the Fourteenth Amendment, expanding the immunity of state officers for liability under the Eleventh Amendment and limiting the implications of the Court’s reapportionment decisions.

Justice Rehnquist’s most important opinion of the mid-1970s in terms of constraining the authority of the national government vis-à-vis the states was, of course, National League of Cities v. Usery. In National League of Cities, the Court, by invalidating the application of federal minimum wage/maximum hour laws to state employees, turned its back on a chain of precedent holding that state sovereignty per se was not a limitation on otherwise permissible exercises of Congress’ commerce powers. Writing for a five-Justice majority, including a hesitant Justice Blackmun, Justice

15. See, e.g., Miranda v. Arizona, 384 U.S. 436 (1966) (limiting conditions under which confessions would be deemed voluntary and admissible at criminal trials under Fifth and Sixth Amendments).


20. See generally Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972) (holding that state-conferred liquor license did not implicate state sufficiently in race discrimination by private club to render club state actor liable to suit under Fourteenth Amendment).

21. See generally Edelman v. Jordan, 415 U.S. 651 (1974) (holding that Eleventh Amendment bars retroactive monetary awards without state consent even in suits against state officials brought under Ex parte Young, 209 U.S. 123 (1908), if award can be satisfied only from general revenues of State).

22. See generally Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (holding “one person, one vote” requirement inapplicable to election scheme for water storage district that permitted only landowners to vote and in which votes were weighted according to size of landholding).


24. See id. at 852.
Rehnquist announced that states could henceforth not be subjected even to Commerce Clause legislation that would be valid if applied to private parties, if such legislation: (1) purported to regulate the "States qua States"; (2) would "displace the States' freedom to structure integral operations in areas of traditional governmental functions"; and (3) was not justified by an exceptionally strong federal interest that overbalanced the States' interest in autonomy.25

Justice Rehnquist's opinion was elusive on the source of this principle; although he mentioned the Tenth Amendment, he hardly discussed it.26 He seemed instead to rest on a background understanding of state sovereignty from late Eighteenth Century political thought, a version of state sovereignty that could not be impaired by federal legislation.27 Unfortunately for his thesis, the late Eighteenth Century political thought most consistent with Rehnquist's view of state sovereignty belonged to the Anti-Federalists, for whom the Constitution was a significant political defeat precisely because it did not embody their political philosophy.28

Whatever its jurisprudential merits, National League of Cities ultimately generated more law review commentary than immunity from federal regulation. Four cases exploring the scope of National League of Cities reached the Supreme Court between 1976 and 1982, and, in each of them, the Court upheld Congress' regulatory powers.29 In 1985, Justice Blackmun abandoned his allegiance to National League of Cities when he authored Garcia v. San Antonio Metropolitan Transit Authority.30 That decision overturned National League of Cities on the ground that Justice Rehnquist's articulated test had proved unworkable in practice,31 inconsistent with a proper understanding of federalism principles32 and superfluous in the

25. Id.
26. See id. at 842-43 (discussing limits on Congress' power over states stemming from Tenth Amendment).
27. See id. at 843-44 (discussing constitutional division of power between states and federal government).
31. See id. at 539-44 (discussing difficulties in defining protected government functions under National League of Cities).
32. See id. at 545-47 (explaining how "problem is that neither the governmental/proprietary distinction nor any other that purports to separate out important governmental functions can be faithful to the role of federalism in a democratic society").
actual protection of state decision making authority. In a dissent that could be read as a not-so-veiled reference to Justice Blackmun's advanced age, Justice Rehnquist wrote, "I do not think it incumbent...to spell out further the fine points of a principle that will, I am confident, in time again command the support of a majority of this Court."  

By this time, however, the cause of federalism had picked up an important new ally on the Court. In 1981, Justice Stewart, himself a considerable defender of state autonomy, was succeeded by Justice Sandra Day O'Connor. O'Connor brought to the job not only a strong interpretive predisposition to respect the states' political authority, but also a sophisticated intellectual perspective on the value and practice of federalism. Her dissent in *Garcia* is more compelling than the Rehnquist opinion in *National League of Cities* precisely because it at least hints at the creativity necessarily entailed in the judicial task she advocates. Unlike Justice Rehnquist, she does not write exclusively as if the Constitution itself expresses a doctrinal test of state immunity from regulation that the Court can uncover archaeologically. She explicitly acknowledges that modern economic conditions have created a world different from late Eighteenth Century America, implying that the Court must construct ways of giving enforceable content to the Tenth Amendment in order to protect any possibility for a meaningful diffusion of power between national and state governments. 

If ever there were an example of losing a judicial battle but winning the war, or at least a larger battle, *Garcia* is it. Since *Garcia*, the Court has launched into a three-pronged attack on congressional regulatory power that goes well beyond the scope of *National League of Cities* and suggests at least a potential return to what I would call the "Old Deal" with regard to the Court's treatment of federalism. Under this Old Deal, the Court

33. *See id.* at 551-54 (discussing instances in which States have successfully safeguarded their interests, gaining federal support and obtaining exemptions from Congress' imposed obligations under Commerce Clause).

34. *Id.* at 580 (Rehnquist, J., dissenting).


36. *See id.* at 581, 587-88 (O'Connor, J. dissenting) (suggesting that "proper resolution...lies in weighing state autonomy as a factor in the balance when interpreting the means by which Congress can exercise its authority on the States as States").

37. The Supreme Court's doctrinal efforts on behalf of federalism go beyond its three-pronged attack on Congress' Commerce Clause authorities. For example, in interpreting statutes that only arguably impose obligations on the states, the Court has evolved a "plain statement" rule that requires Congress to "make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States." *Gregory v. Ashcroft*, 501 U.S. 452, 473 (1991) (holding that federal Age Discrimination in Employment Act of 1967 does not prohibit imposition of mandatory retirement age on state judges). Unlike the Court's doctrinal innovations that would limit congressional authority, this doctrine reflects a careful balancing of judicial deference and concern for federalism. The Court, in essence, is instructing Congress that state autonomy values are of sufficient importance that the Court will not infer that they have been superseded absent evidence—in the
prior to 1937 had shown itself willing in the name of federalism to second-guess the justifiability of national legislation and to impose categorical limits on Congress' capacity to control interstate commerce. What made the return to this Old Deal possible, of course, was not merely the intellectual leadership of Chief Justice Rehnquist and of Justice O'Connor; it was also the appointment in 1992 of Clarence Thomas to succeed Justice Thurgood Marshall. Unlike other appointments of the previous two decades in which the old and new Justices tended to resemble one another in their devotion to Tenth Amendment values, the appointment of Justice Thomas reflected a discernible change in the Court's approach to the exercise of federal power.

The Court has also declined opportunities to read expansively Congress' authority to use its Fourteenth Amendment enforcement power to control state action that would not itself be deemed by the Court to be unconstitutional. See Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 629 (1999) (invalidating Patent and Plant Variety Protection Remedy Clarification Act); City of Boerne v. Flores, 521 U.S. 507, 512 (1997) (invalidating Religious Freedom Restoration Act); Kimel v. Florida Bd. of Regents, 120 S. Ct. 631, 637 (2000) (declining to recognize Fourteenth Amendment as authorizing enactment of Age Discrimination in Employment Act). I do not focus on these developments here for two reasons. First, despite the potential expansiveness of Justice Brennan's majority opinion in Katzenbach v. Morgan, 384 U.S. 641 (1966) (suggesting that § 4 of Voting Rights Act might be sustainable as independent determination by Congress that imposition of English literacy test on Spanish-literate voters in New York was unconstitutional), the Court had already rejected the more extravagant of his theories in Oregon v. Mitchell, 400 U.S. 112 (1970) (rejecting federal statutory reduction in state voting age from 21 to 18 on ground that Congress lacked power to determine that state age qualifications constituted unconstitutional discrimination against 18-to-21-year-olds). Second, in addition to policing the federalism implications of interpreting § 5 of the Fourteenth Amendment broadly, the Court—in delimiting Congress' powers—is also attending to the separation of powers, namely, to the Court's own role in delineating the operational scope and meaning of the constitutional rights that are the targets of Congress' remediation under the Fourteenth Amendment.


39. Successive appointments that tended to continue the likelihood that a particular "seat" on the court would be deferential to Congress include the succession of Justice Fortas by Justice Blackmun in 1970 (at least in his post-National League of Cities period), who in turn was succeeded by Justice Breyer in 1994; the succession of Justice Brennan by Justice Souter in 1990; and the succession of Justice White by Justice Ginsburg in 1993. I would also include the succession in 1975 of Justice Douglas by Justice Stevens, although Douglas, based on his dissent in Maryland v. Wirtz, 392 U.S. 183, 201 (1968), overruled by National League of Cities v. Usery, 426 U.S. 833 (1976) (Douglas, J., dissenting) (dissenting from judgment upholding extension of Fair Labor Standards Act to public schools and hospitals), might well have joined the Rehnquist opinion in National League of Cities. Successive appointments that tended to continue the likelihood of pro-federalism sensitivity included the succession of Justice Harlan by Justice Rehnquist in 1972; the...
practice Thomas replaced a reliable champion of congressional authority with a Justice willing to rethink Commerce Clause doctrine all the way back to Gibbons. 40

The first prong of this attack has been the erection of a categorical "anti-commandeering principle" that precludes Congress from compelling state legislatures or state executive functionaries from enforcing federal law. In one case, the Court rebuffed Congress for its attempt to force states either to regulate nuclear waste disposal consistent with federal statutory requirements or to take ownership of all such waste within the state itself. 41 In another, the Court overturned legislation requiring local police to cooperate in determining whether proposed firearms sales would be lawful until such time as the federal government could complete the implementation of a computerized National Instant Check System to facilitate immediate determinations on the eligibility of would-be gun owners to buy weapons. 42

The second prong of the attack has been the breathtaking expansion of the immunity from suit that states enjoy under the Eleventh Amendment. Under recent decisions, even if Congress may legitimately exert its regulatory powers with regard to the states, litigants may not enforce in either state or federal court the legal obligations thus imposed on the states, unless a defendant state consents to suit. 43


43. See generally Kimel v. Florida Bd. of Regents, 120 S. Ct. 631 (2000) (because Fourteenth Amendment does not authorize Age Discrimination in Employment Act, states are immune to private suits to enforce provisions authorized only by Commerce Clause); Alden v. Maine, 119 S. Ct. 2240 (1999) (Eleventh Amendment bars congressional exercise of Article I regulatory power from abrogating states' sovereign immunity from suit in state court); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 119 S. Ct. 2219 (1999) (abrogation of state sovereign immunity by Trademark Remedy Clarification Act cannot be upheld under section 5 of Fourteenth Amendment because trademark infringement is not deprivation of property; states do not waive immunity by participating voluntarily in federally regulated activity); Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 119 S. Ct. 2199 (1999) (Congress may not rely on its enforcement powers under section 5 of Fourteenth Amendment to abrogate state sovereign immunity from suit unless tailored as remedy for identified conduct transgressing substantive prohibitions of the Fourteenth Amendment); Seminole Tribe v. Florida, 517 U.S. 44 (1996) (Eleventh Amendment bars congressional exercise of Article I regulatory power from abrogating states' sovereign immunity from suit in federal court).
Both these attacks on federal regulatory power are farther reaching than National League of Cities. National League of Cities would limit Congress' Commerce Clause authority only if its exercise would "displace the States' freedom to structure integral operations in areas of traditional governmental functions" and would do so without an overbalancing federal interest. In contrast, under the anti-commandeering principle and recent Eleventh Amendment cases, state autonomy is protected even where the federal mandate has no bearing on traditional governmental functions, and even when it would have no impact on the capacity of states to structure or finance their integral operations.

It is the third prong, however, that harks back to the Old Deal of federalism most emphatically. In United States v. Lopez, the Court resurrected the notion that there is a discrete category of activity that, even if it affects interstate commerce, may not be regulated pursuant to Congress' commerce power unless a court independently determines that the effects on commerce are substantial enough to justify national legislation. The Court voided the originally enacted version of the Gun-Free School Zones Act, which had made it a federal crime knowingly to possess a firearm within 1,000 feet of a school.

The Lopez decision merits discussion, especially in light of its progeny. But three preliminary points about the Supreme Court's new activism for states' rights bear noting in brief beforehand. First, the federalism cases of the 1990s can hardly be defended as straightforward interpretations of the constitutional text. Second, like National League of Cities, they are based on historical interpretation that is dubious at best. Third, their public policy consequences—especially with regard to the Eleventh Amendment cases—are truly regrettable.

Consider the textual point: the Eleventh Amendment expressly prohibits only suits against states in federal court prosecuted "by citizens of another state, or by citizens or subjects of any foreign state." Were we to rely on plain text, the obvious implication would be that states may be sued in federal court by their own citizens and that the Constitution does not guarantee sovereign immunity in state court at all. With regard to the regulation of activities affecting commerce, Congress enjoys express authority "[t]o regulate Commerce... among the several States," as well as

47. See id.
48. For a further discussion of the Lopez decision and its progeny as bad law and misguided activism, see infra notes 63-116 and 117-98, respectively.
49. U.S. Const. amend. XI.
authority to "make all Laws which shall be necessary and proper for carrying into Execution" the Commerce Clause power and all of Congress' other regulatory capacities.\(^5\)\(^0\) Nothing in the Constitution limits the sweep of this language by articulating the test of *National League of Cities*, the so-called anti-commandeering principle, or a distinction between Congress' competence to regulate commercial versus non-commercial activity.\(^5\)\(^1\)

With regard to history, as I have already mentioned, *National League of Cities* suffers the conspicuous defect of interpreting the Constitution as if it embodied chiefly the political intentions of its opponents. The anti-commandeering and Eleventh Amendment cases suffer the equally apparent problem of relying on historical analyses of inapposite issues. For example, the anti-commandeering cases seek to establish an historical foundation for the proposition that the national government was to have the power to regulate American citizens directly, rather than through the states. Proving this, however, is very different from establishing that Congress was precluded from regulating American citizens indirectly and through state governmental apparatus when it should choose to do so. With regard to the "commandeering" of state administrative authority, the evidence that does exist is chiefly in support of Congress' discretion to rely on such authority when it deems it appropriate.\(^5\)\(^2\)

The Eleventh Amendment cases try to get around the obvious textual difficulties by arguing that the amendment was not intended to embody all of the state sovereign immunity from suit that the Framers recognized. Rather, the Court has argued, there was a background understanding that states would retain immunity from suit following the ratification of the Constitution; the Eleventh Amendment merely made express the one aspect of that immunity that it was necessary to reiterate because the Marshall Court had erroneously breached that immunity.\(^5\)\(^3\)

\(^5\)\(^0\) U.S. CONST. art. I, \(\S\) 8, cls. 3, 18.


\(^5\)\(^2\) See generally Erik M. Jensen & Jonathan L. Entin, *Commandeering, the Tenth Amendment, and the Federal Requisition Power: New York v. United States Revisited*, 15 CONST. COMMENTARY 355 (1998) (discussing Congress' power). The Court may be on stronger ground in holding that Congress may not compel state legislative action, although the complexities of this position are discussed further below.

\(^5\)\(^3\) See Alden v. Maine, 119 S. CT. 2240, 2246-47 (1999). The *Alden* decision stated that:

\[T\]he sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today (either literally or by virtue of their admission into the Union upon an equal footing with the other States) except as altered by the plan of the Convention or certain constitutional Amendments.

*Id.*
Even if there were something to this general point, it again would be answering the wrong question. We can assume, that is, that the founding generation expected that states would retain after ratification the sovereign immunity that they had enjoyed at common law. The actual issue warranting exploration, however, is whether the founding generation would have thought it unconstitutional to overcome that immunity through federal legislation. On that point, the available evidence again suggests that the Court's reading of congressional authority is unjustifiably narrow.

At least as troubling as these textual and historical points is that the anti-commandeering and Eleventh Amendment cases create perverse public policy outcomes. A direct implication of the anti-commandeering cases, especially with regard to the bar against conscripting state administrative authority, is that Congress should consider enlarging our national law enforcement apparatus whenever it expands the substantive reach of our national regulatory law. This would seem, on its face, to increase the threat to individual liberty stemming from national law enforcement machinery. It would also seem to multiply considerably the potential sources of tension between state and national authorities engaged in law enforcement. It is worth noting that other countries, such as Germany, which is also a federal republic, protect the values of federalism precisely by insisting that only state authorities be charged with the implementation of national law. In the same vein, there may well be contexts in which


55. See Alden, 119 S. Ct. at 2270-2289 (Souter, J., dissenting) (detailing history); Seminole Tribe v. Florida, 517 U.S. 44, 132-42, 160-162, 161 n.55 (1996) (Souter, J., dissenting) (exploring common law); see also Hovenkamp, supra note 54, at 2244-45 (criticizing interpretation of Constitution in Seminole Tribe) 56. The alternative would be to offer funding to the states in return for their voluntary implementation of federal legislation. The breadth with which the Supreme Court has approved such "bargains" casts some doubt on the practical significance of the anti-commandeering and Eleventh Amendment cases. See, e.g., South Dakota v. Dole, 483 U.S. 203, 212 (1987) (upholding conditioning of federal highway funding on state decisions to raise minimum drinking age to 21). Congress, for example, could condition federal funding for state police authorities on their participation in identification checks for would-be gun purchasers, or make federal funds for state universities dependent on waivers of sovereign immunity in lawsuits charging patent violations by those universities.

57. See Printz v. United States, 521 U.S. 898, 976-77 (1997) (Breyer, J., dissenting) (noting that some countries implement federal law through constituent states). Justice Breyer's dissenting opinion states: The federal systems of Switzerland, Germany, and the European Union . . . all provide that constituent states, not federal bureaucracies, will themselves implement many of the laws, rules, regulations, or decrees enacted by the central "federal" body. They do so in part because they believe that such a system interferences less, not more, with the independent authority of the "state," member nation, or other subsidiary government, and helps to safeguard individual liberty as well. Id. (citations omitted).
American states would prefer to shoulder some of the burdens of national law enforcement if that responsibility also entailed the prospect of coordinating federal law enforcement activity with state priorities and reducing interagency friction.

The normative consequences of the Eleventh Amendment cases are even more obviously troubling. One is hard pressed to identify any public policy reason why we would prefer a constitutional regime in which the national government is permitted to impose legal obligations on the states, but in which the states are constitutionally entitled to violate those obligations with relative impunity. The holding in *Alden v. Maine* \(^{58}\) deprives state employees who are unlawfully denied federally mandated overtime pay the opportunity to seek a judicial remedy. \(^{59}\) Under *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank*, states may, free from private challenge, violate the patent rights of private parties even when such infringement is willful. \(^{60}\) *Kimel v. Florida Board of Regents* \(^{61}\) insulates state universities from private suits based on unlawful age discrimination. Far from advancing two of the values most often associated with federalism—protecting citizens from the over-concentration of power and promoting the accountability of political authority—these decisions denigrate them. Enlarging the prospects for oppressive state government hardly seems a project worthy of judicial solicitude.

### III. *Lopez* and Its Progeny As Bad Law

Of the three prongs of the Supreme Court's recent activism on behalf of the states, the one that is potentially most radical is the crafting of judicially imposed constraints on the commerce power itself, as embodied in *United States v. Lopez*. \(^{62}\) *Brzonkala*, the case that elicited Chief Judge Wilkinson's defense of federalism-based judicial activism, is an attempt to implement such constraints. \(^{64}\) *Lopez* and *Brzonkala* most pressingly pose the

---

58. 119 S. Ct. 2240, 2246 (1999) (holding that Congress cannot "subject non-consenting States to private suits for damages in state courts").
59. See id. at 2269 (dismissing case on basis of sovereign immunity).
60. 119 S. Ct. 2199.
62. 120 S. Ct. 631 (2000).
64. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 830 (4th Cir. 1999) (en banc) (declaring portions of VAWA outside scope of Congress' Commerce Clause power), cert. granted sub nom. United States v. Morrison, 120 S. Ct. 11 (1999). The majority in *Brzonkala* also rejected the argument that the VAWA could be upheld under Congress' authority to enforce the Fourteenth Amendment. See id. at 861-89. Although the argument in favor of congressional power is not frivolous, there is plainly no body of well-established precedent establishing Congress' power to provide civil remedies against private individuals acting independently of state authorities as a way of enforcing the states' obligation of equal protection. Thus, the *Brzonkala* Fourteenth Amendment holding—despite the aggressiveness of Judge Luttig's prose—ought not be viewed as involving the same kind of activism as is embodied in the Commerce Clause holding. The
question whether judicial activism in the name of state sovereignty is well justified. But they also deserve to be analyzed with regard to their soundness as plausible legal doctrine.

Chief Justice Rehnquist's opinion for the five-member majority in _Lopez_ overturned the Gun-Free School Zones Act, but did not offer any precise formulation of the constitutional limit Congress transgressed in enacting that legislation. This is not surprising. As Justice Breyer's dissent amply shows, even the original Gun-Free School Zones Act would seem to have been self-evidently valid under the usual pre- _Lopez_ doctrinal formulation of Congress' Commerce Clause authority. Because government reports indicate that a disturbing percentage of high school students have been threatened with guns or have even had guns fired at them in school, Congress could have rationally concluded that the presence of guns in or near schools interferes with the educational process, resulting in the schools' reduced capacity to prepare students for effective participation in the national economy.

Chief Justice Rehnquist determined, however, that Congress had overstepped its regulatory authority. His opinion identifies three subject areas that the Supreme Court has historically permitted Congress to regulate pursuant to the Commerce Clause, "the channels of interstate commerce," "the instrumentalities of interstate commerce, or persons or things in interstate commerce" and "activities having a substantial relation to interstate commerce." National control of these categories, presumably, does not obliterate the distinction between national regulatory competence and the general police power of the states. The third of these categories is the only one relevant to _Lopez_, but Chief Justice Rehnquist argues that the Court, within this category, has routinely upheld the regulation only of economic activities having a substantial relation to interstate commerce. Because the 1990 Gun-Free School Zones Act did not explicitly narrow its purview to guns that, on a case-by-case basis, were shown to have either traveled in commerce or affected commerce, Chief Justice Rehnquist implies that the statute should not enjoy the nearly automatic imprimatur that the Court attaches to statutes regulating economic activities.

_Bronkala_ dissent, which argues for upholding the VAWA on commerce clause grounds, does not reach the Fourteenth Amendment question. See id. at 911 n.1 (Motz, J., dissenting).


66. See id. at 615-18 (Breyer, J., dissenting) (outlining pre- _Lopez_ Commerce Clause jurisprudence).

67. See id. at 618-25 (applying rational basis analysis).

68. Id. at 558-59.

69. See id. at 560 (noting Court's history of routinely upholding statutes under Commerce Clause as long as statutes regulate economic activity).

70. See id.
Chief Justice Rehnquist specifically rejects the Government's proffered justifications for the Gun-Free School Zones Act. He declines to sustain the Act on the ground that guns near schools are threats in general to interstate commerce either because of their collective contribution to crime or because of the risks they pose to an educational process, which, in turn, is critical to the success of interstate commerce. He does not deny that guns threaten interstate commerce in these ways. Rather, he offers the following observations:

The possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce. Respondent was a local student at a local school; there is no indication that he had recently moved in interstate commerce, and there is no statutory requirement that his possession of the firearm have any concrete tie to interstate commerce. To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the states.

The last quoted sentence echoes his earlier observation: "[I]f we were to accept the Government's arguments, we [would be] hard pressed to posit any activity by an individual that Congress is without power to regulate."

Chief Justice Rehnquist's precise argument is not altogether clear from these passages. A relatively modest interpretation of his position would argue that, based on the actual record presented, the Court found the connection in fact between gun possession near schools and interstate commerce to be too tenuous to sustain a confident conclusion that Congress' judgment in regulating gun possession on interstate commerce grounds had been rational. Even if it is rational to treat guns near schools as posing a significant risk to the educational process, and even if the national economy depends on effective education, it may simply not have been self-evident, at least to the *Lopez* majority, that the particular damage inflicted by the appearance of guns in schools is of the quality or quantity that bears a likely relationship to the future capacity of present-day students to be productive participants in interstate markets and enterprises. Because this view of Rehnquist's argument would emphasize the degree of care that courts should exercise in ascertaining an empirical basis for Congress' judgments, let us call this the "fact sensitivity interpretation" of *Lopez*.

71. See id. at 564-68 (discussing traditional control of education by States and assertedly limitless reach of government's interpretation of Commerce Clause power).
72. Id. at 567.
73. Id. at 564.
On the other hand, it may be that what provoked the majority's anxieties about the Gun-Free School Zones Act was not really the empirical speculation embodied in the inferences that would sustain Congress' judgment. After all, the majority does not assert that the inferences adduced by the government are untrue. Rather, it may be that what bothers Chief Justice Rehnquist about the Government's inferences is that equally sound inferences of an almost identical kind would go very far towards sustaining virtually any national regulation of any local activity, including all material aspects of K-12 schooling. In other words, it is not "piling inference upon inference" per se that is constitutionally problematic, but rather the accumulation of inferences that are qualitatively of a sort that would justify a great deal of other far-reaching regulation as well. I would call this the "dual federalism interpretation" of *Lopez*, because it would attribute to the case not so much a sensitivity to contextual facts as a categorical intention to evict federal legislators from some exclusive domain of state policy making.

The concurring opinion by Justice Kennedy, joined by Justice O'Connor, seems to embrace the less ambitious fact-sensitivity approach to *Lopez*, and to imply a new Commerce Clause "test" more clearly than does the Rehnquist opinion. Justice Kennedy writes that, "unlike the earlier cases" in which the Court has deferred to Congress, "neither the actors [regulated by the Gun-Free School Zones Act] nor their conduct has a commercial character, and neither the purposes nor the design of the statute has an evident commercial nexus." A logical inference is that Justices Kennedy and O'Connor would have voted to uphold the Gun-Free School Zones Act if the conduct or actors regulated were commercial or if the nexus between the conduct or actors and interstate commerce were somehow more "evident." They would seem to require only an extra level of empirical grounding to satisfy the Court's implementation of rationality review regarding the national regulation of non-commercial activities.

In explicating the doctrinal shortcomings of *Lopez*, it is helpful to consider the case in tandem with *Brzonkala*, its predictable offspring. It is an offspring that the Supreme Court may yet disown—the Court has granted certiorari in the case under the name *United States v. Morrison*. But, whether or not the Fourth Circuit's reasoning survives Supreme Court review, it amply illustrates the doctrinal problems *Lopez* creates, especially if accorded a "dual federalism" interpretation.

As noted earlier, the issue in *Brzonkala* was the constitutionality of creating a federal damages remedy for victims of gender-based violence. The VAWA established a federal substantive right in "[a]ll persons within the

---

74. See, e.g., id. at 580 (Kennedy, J., concurring).
75. Id. (Kennedy, J., concurring).
76. 120 S. Ct. 11 (1999).
United States . . . to be free from crimes of violence motivated by gender." 77 Under the VAWA:

A person (including a person who acts under color of any statute, ordinance, regulation, custom, or usage of any State) who commits a crime of violence motivated by gender . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages, injunctive and declaratory relief, and such other relief as a court may deem appropriate. 78

In deliberating on the VAWA, "Congress carefully . . . documented the substantial effect that gender-based violence has on interstate commerce and the national economy." 79 Congress determined that:

[C]rimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved, in interstate commerce . . . , by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products. 80

A key set of findings pertains to the economic costs of domestic violence against women. Congress found that "[o]ver 1 million women in the United States seek medical assistance each year for injuries sustained by their husbands or other partners." 81 This phenomenon was "estimated to cost employers $3 to $5 billion annually due to absenteeism in the workplace," as well as imposing additional burdens of "$5 to $10 billion a year [spent] on health care, criminal justice, and other social costs of domestic violence." 82 This accounting does not even include what Congress noted as the additional "costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems" resulting from domestic violence. 83

Putting aside for the moment Congress' other relevant findings in support of the Act, the foregoing facts standing alone would seem to sustain the VAWA readily under pre-Lopez doctrine. In enacting the VAWA, Congress rationally concluded that acts of gender-based violence, viewed cumulatively, place a substantial burden on interstate commerce and that the availability of a civil damages remedy would both reduce the resulting

80. Id. (quoting H.R. CONF. REP. No. 103-711, at 385 (1994)).
81. Id. at 914 (quoting S. REP. No. 101-545, at 37 (1990))
82. Id. at 913-14 (citations omitted).
83. Id. at 914 (quoting S. REP. No. 101-545, at 33).
economic costs for the victims of violence and deter some degree of gender-based brutality.

This is just the basis on which the Fourth Circuit dissenters would have upheld the VAWA. Embracing what I have called the fact sensitivity approach to *Lopez*, they distinguish the earlier case on the plausible ground that Congress' deliberations leading to the VAWA provided the very link between regulated conduct and interstate commerce that the Court was unable to discern in *Lopez*. Although they do not quote Justice Kennedy's dissent as precisely setting the relevant standard, the contrast the dissenters draw between the VAWA and the Gun-Free School Zones Act implicitly addresses the concurring Justices' concerns. The dissenters recount the extensive documentation offered by Congress to substantiate the nexus between gender-based violence and the economy—documentation of a kind that Congress did not provide for the original version of the Gun-Free School Zones Act.

The Fourth Circuit majority, however, rejects not only this reasoning, but also the fact sensitivity orientation to *Lopez*. In the majority view, *Lopez* is a dual federalism opinion, which creates a more ambitious and more categorical rule. Namely, Congress may regulate a non-economic activity that substantially affects interstate commerce only if the activity is "sufficiently related to interstate commerce to satisfy the substantially affects test" without relying "upon arguments which, if accepted, would eliminate all limits on federal power and leave [a court] 'hard pressed to posit any activity by an individual that Congress is without power to regulate.' " According to the majority, the VAWA fails this test because gender-based violence is non-economic activity and because the defense of its regulation relies upon arguments that "pile inference upon inference" to connect gender-based violence to interstate commerce in a manner that, if indulged, could justify federal regulation of virtually all human activity.

As it happens, I believe that *Lopez* was incorrectly decided, even if deemed to stand only for the fact-sensitivity approach that the *Brzonkala* dissenters advocate. On certiorari, the Supreme Court may overturn *Brzonkala* on factual grounds, following the Kennedy-O'Connor approach. A majority could persuasively determine that Congress' deliberative record draws a sufficiently compelling connection between the conduct regulated and interstate commerce to verify the rationality of Congress' approach, even under a heightened standard of rationality review. That approach to *Lopez* is subject to the obvious criticism that what it demands from Congress, and what it is likely to elicit, is too much in the nature of a formality. It has generally been the Court's position that the constitutionality of stat-

84. *See id.* at 912-17 (detailing Congress' deliberations).
85. *See id.*
86. *See id.* (recounting Congress' documentation).
87. *Id.* at 837 (quoting *United States v. Lopez*, 514 U.S. 549 (1995)).
88. *Id.*
letes does not depend upon a set of statutory findings or on evidence that Congress' deliberations were especially thorough.\textsuperscript{89} Asking judges to make fine distinctions between just how much evidence is necessary to convert plausibility into sufficient rationality for constitutional purposes is also inviting judges, in the guise of neutral decisionmaking, to challenge the wisdom of legislative choices they are not authorized to make. Nonetheless, \textit{Lopez} and \textit{Brzonkala} are plainly distinguishable on this ground. And, the fact-sensitivity approach to \textit{Lopez} at least has the attractive feature of not rendering that case an open-ended invitation to the federal judiciary to second-guess Congress on the justifiability of legislation whose foundations are better assessed by legislators than by judges.

Presumably, the Fourth Circuit believes it has a more accurate reading, if not of \textit{Lopez} as written, then at least of the doctrine Chief Justice Rehnquist might have advocated if he were not burdened by the necessity of attracting the votes of Justices Kennedy and O'Connor. If so, the fate of \textit{Brzonkala} in the Supreme Court will depend on the willingness of Justices Kennedy and O'Connor to take a more categorical stance regarding Congress' authority to regulate non-economic activity.

Under the Fourth Circuit interpretation of \textit{Lopez}, lawyers cannot save the VAWA even by verifying the quantitative impact of gender-based violence on the economy.\textsuperscript{90} Even if such a connection were demonstrated, it would provide the sort of rationale for the VAWA that would threaten to validate the "essentially limitless nature of congressional power."\textsuperscript{91} If factual investigation is the key to constitutionality, "the only conceivable limit on congressional power to regulate an activity would be the significance of that activity, because any significant activity or serious problem will have an ultimate, though indirect, effect upon the economy, and therefore, at least presumptively, upon interstate commerce as well."\textsuperscript{92} The majority purports to recognize that "\textit{Lopez} undoubtedly preserves a healthy degree of judicial deference to reasonable legislative judgments of fact."\textsuperscript{93} But \textit{Brzonkala} effectively treats that deference as irrelevant if the pertinent "legislative judgments of fact" would, in fact, sustain any significant breadth of federal regulation with regard to local non-economic activity. The majority's concern is not with ascertaining Congress' reasonableness, but in insulating some part of the world of local health, safety and morals regulation from congressional participation.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{89} See \textit{Turner Broad. Sys., Inc. v. FCC}, 512 U.S. 622, 666 (1994) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review.").
\item \textsuperscript{90} See \textit{Brzonkala}, 169 F.3d at 845 (rejecting "a purely quantitative view of the substantially affects test" that could "extend federal control to a vast range of problems falling within even the most traditional areas of state concern").
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\item \textsuperscript{93} Id. at 857.
\end{itemize}
\end{footnotesize}
Even if this were a justifiable judicial project, a subject to which I will turn shortly, the interpretation of *Lopez* advocated by the *Brzonkala* majority would result in doctrine so arbitrary that it cannot have much of a future.\(^\text{94}\) It is a doctrine vulnerable to at least four fundamental challenges.

### A. The Jurisdictional “Red Herring”

The arbitrariness of *Brzonkala’s* reading of the Commerce Clause is evident from the Fourth Circuit’s express acknowledgment that, even under *Lopez*, non-commercial acts with a specific interstate nexus are comprehensively subject to national regulation, so long as such regulation is minimally rational.\(^\text{95}\) The VAWA, for example, authorizes criminal punishment for “any person who travels across a State line . . . with the intent to injure, harass, or intimidate that person’s spouse or intimate partner, and who, in the course of or as a result of such travel, intentionally commits a crime of violence and thereby causes bodily injury to such spouse or intimate partner . . .”\(^\text{96}\)

But why should the addition of this interstate “jurisdictional element” make any difference to the justification for Congress’ intervention? Notwithstanding the jurisdictional requirement, the criminal provisions of the VAWA still overlap with the states’ police powers. It is not likely that any one act of traveling across a state line to commit domestic violence has a substantial impact on interstate commerce. Nor is there necessarily any commercial character to the act of moving interstate itself. Yet, the *Brzonkala* majority concedes “that the legislative record . . . supports the wisdom and legitimacy of many of the measures Congress enacted in the Violence Against Women Act, such as . . . the criminalization of violence against women with an explicit interstate nexus . . .”\(^\text{97}\) From the standpoint of protecting either federalism or interstate commerce, the majority can give no reason why the same documentation that provides normative support for the “wisdom and legitimacy” of creating a federal felony does not equally support the “wisdom and legitimacy” of creating a federal damages action. Nothing about the jurisdictional element changes the normative underpinnings of the law.\(^\text{98}\)

\(^{94}\) For a discussion of the propriety of limiting of congressional power, see *infra* notes 117-98 and accompanying text.

\(^{95}\) See *Brzonkala*, 169 F.3d at 851 (noting that Congress had presented sufficient evidence that violence against women affects interstate commerce to justify portions of the VAWA).


\(^{97}\) *Brzonkala*, 169 F.3d at 851.

\(^{98}\) Indeed, from the standpoint of federalism, the creation of a federal criminal offense—resulting in a seeming competition between state and federal officials to control criminal conduct—would appear to be more problematic, even with a jurisdictional limitation, than the creation of a private damages remedy. A private damages remedy does not augur the kinds of harm that have been attributed to the “inappropriate federalization” of criminal law. See AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW,
In this respect, it is noteworthy that, prior to the Supreme Court's decision in *Lopez*, Congress had already revised the Gun-Free School Zones Act to proscribe gun possession near schools only if the firearm in question "has moved in or . . . otherwise affects interstate commerce."99 This amendment presumably entails an extra element of proof for federal prosecutors, but it hardly seems to limit the number of potential prosecutions or the consequent presence of the federal government in the policing of local firearms possession. Again, from the standpoint of federalism or congressional regulatory authority, the jurisdictional element adds nothing in principle to the justifiability of Congress' initiative.

**B. The Irrelevant Distinction Between Commerce and Non-Commerce**

Second, and just as basic, it is impossible to formulate a plausible normative basis for a distinction between commercial and non-commercial activity in assessing Congress' regulatory powers from the perspective of federalism.100 It is conventionally understood that the reason Congress is authorized to regulate local commerce is because local commercial activity can have a substantial relation to interstate commerce, and Congress is appropriately empowered to attend to this substantial relationship when necessary and proper either to promote interstate commerce or to prevent interstate commerce from becoming the vehicle of some social harm.101

But, whatever reason justifies national regulation of local *commerce* as it affects interstate commerce, the same reason will pertain just as persuasively to national regulation of local *non-commerce*. If attending to a substantial relationship between local non-commercial activity and interstate commerce helps to promote interstate commerce, then Congress should be allowed to regulate. If attending to that relationship would help prevent interstate commerce from becoming the vehicle of some social harm, then Congress should be empowered to act on that basis.


100. *See Hovenkamp*, supra note 54, at 2229-232 (discussing various interpretations of "commerce"). There is a linguistic reading of "commerce among the several states" that would include purely local commerce within that category. *See id.* On that reading, a local commerce/non-commerce distinction with regard to the Commerce Clause itself could perhaps be justified on the formal ground that this particular clause explicitly authorizes the regulation of local commerce, but not the regulation of local non-commerce. *See id.* Even so, Congress still enjoys the power to make "all laws necessary and proper" for the execution of its commercial regulatory powers; under this authority, removing all impediments to interstate commerce, whether commercial or non-commercial in their origin, would appear to be equally valid. *See Lessig*, supra note 51, at 129 (discussing expansiveness enabled by "necessary and proper" clause).

101. *See Lessig*, supra note 51, at 129-30 (discussing textualist and originalist readings of "necessary and proper" clause).
Lopez and Brzonkala suggest this is a dangerous move because federal regulation of non-commercial activity would "bid fair," to recall Chief Justice Rehnquist's flowery phrase, to convert national regulatory power to a general police power. But the regulation of local non-commercial activity is no more or less a threat to state police power than the regulation of local commercial activity. The power of states to promote the health, safety and morals of the people has always been understood to embrace the power of states to regulate their own economies. When federal commercial regulation preempts, limits or even supplements state commercial regulation, it is interfering every bit as much in local police power as would federal regulation of local non-commercial activity.

The commercial/non-commercial distinction likewise cannot be justified on the ground that it is a reasonable tool for differentiating Congress' authentically economic motives from congressional motives grounded in concerns of public welfare or morality that are traditionally the focus of state non-economic regulation. Compare, for example, a national anti-prostitution statute with a hypothetical federal law purporting to mandate compulsory education in some East Asian language as a prerequisite to high school graduation. The first regulates economic activity and the second not. Yet, the second law is obviously grounded in economic motivations that probably do not animate the first. There is no reason consistent with the Commerce Clause why Congress' commerce-driven compulsion of Asian language education should be more suspect than its morally driven regulation of prostitution, which is clearly what Lopez and Brzonkala suggest. Or to take a more homely example, we should be more suspicious of a hypothetical federal law that would regulate what a parent may give his or her child as a weekly allowance than of the actual statute making it a crime to possess a gun within 1,000 feet of a school. Yet, because of the plainly economic character of a monetary allowance, Lopez and Brzonkala point the opposite way.

In fact, the distinction between commercial and non-commercial activity does not map onto any value commonly associated with federalism. Whether we value the diffusion of political authority, respect for diversity, the capacity of states to innovate in making public policy, or the promotion of government accessibility and accountability, federal preemption of state authority to regulate non-economic activity is no more and no less

103. Cf. City of New Orleans v. Dukes, 427 U.S. 297, 303 (1976) ("States are accorded wide latitude in the regulation of their local economies under their police powers . . . .").
104. See Hoke v. United States, 227 U.S. 308, 323 (1913) (upholding federal Mann Act, which prohibited transportation of women in interstate commerce for immoral purposes).
threatening to those values than federal preemption of state authority to regulate economic activity.\textsuperscript{105}

C. Hyper-Formalism and the Slippery Slope

The third problem with \textit{Lopez} and \textit{Brzonkala} is their implication that federal regulation of non-economic activity ought to be more suspect to the extent its supporting rationale would also justify a great many other regulations of non-economic activity. It is in this vein that the \textit{Brzonkala} majority is careful to distinguish its disapproval of the VAWA from a 1997 Fourth Circuit opinion upholding the Freedom of Access to Clinic Entrances Act of 1994.\textsuperscript{106} Unlike the VAWA, which is based on the pervasive economic effects of gender-based violence, the Clinic Entrances Act was upheld, the \textit{Brzonkala} majority says, because blocking abortion clinics is related to a discrete and identifiable interstate economic enterprise, namely, the interstate market in reproductive health services.\textsuperscript{107} The justification for upholding the Clinic Entrances Act is not a justification that would sustain every other regulation of non-economic activity, but only a justification that would sustain other regulations of non-economic activity that affect the interstate market in reproductive health services. It is thus a permissible form of justification under the analysis of \textit{Lopez} and \textit{Brzonkala}.

This logic is wonderfully perverse. It implies that national legislation is arguably most suspect precisely where the problems it addresses are most pervasive. But the analysis suggests also just how easily the \textit{Brzonkala} version of the \textit{Lopez} holding can be evaded. Instead of enacting what might have been called the \textit{All Violence Against Women Act}, Congress should have enacted the Violence Against Women on College Campuses Act, the Violence Against Women in Public Accommodations Act, the Violence Against Women in Automobile Factories Act, and so on, each to prevent gender-based violence from burdening not commerce as a whole, but rather the interstate markets for education, hotel rooms and automobiles, respectively.

\textsuperscript{105} It has similarly been argued that the distinction between “commandeering” states and preempting state law also fails to map onto any important value ordinarily associated with federalism. \textit{See generally} Matthew D. Adler & Seth F. Kreimer, \textit{The New Etiquette of Federalism}: New York, Printz and Yeskey, 1998 \textit{Sup. Ct. Rev.} 71, 71 (discussing anti-commandeering doctrine).

\textsuperscript{106} 18 U.S.C. § 248 (1994); \textit{see also} Hoffman v. Hunt, 126 F.3d 575, 587 (4th Cir. 1997) (holding that obstruction of abortion clinic entrances “is closely connected with, and has a direct and profound effect on, the interstate commercial market in reproductive health care services”).

\textsuperscript{107} Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, at 840 n.9 (4th Cir. 1999) (en banc) (“It is plain that we did not uphold the statute in Hoffman because the regulated conduct affected the national economy, but rather because it directly affected a specific interstate market and was also ‘closely and directly connected with an economic activity.’”) (quoting Hoffman, 126 F.3d at 587), \textit{cert. granted sub nom.} United States v. Morrison, 120 S. Ct. 11 (1999).
Indeed, a moment’s reflection on this approach reveals how a more ingenious Congress might have provided for gun-free school zones. First, Congress should have enacted the Gun-Free Private School Zones Act to protect the interstate market in K-12 educational services (and, of course, to protect private schools as efficacious and robust participants in interstate markets for books and educational supplies). Congress should then have followed this statute with the Gun-Free Public School Zones Act. Having realized that its first statute might give private schools an unfair advantage in recruiting students, Congress would now assure the same level of protection to public schools, not to address the much too general concern of keeping children safe, but to prevent interstate commerce in private education from becoming a burden to the effective recruitment of students by public schools. Congress could formalize its economic conclusions in formal statutory findings, and words like “violence,” “health” or “public safety” need never appear.

If all this sounds too cute by half, it is nonetheless the kind of hyperformal rationalization that Lopez and Brzonkala would invite. Our courts would do better to recognize that, once Congress has reasonably identified a national problem with pervasive economic effects, requiring Congress to address that problem one economic sector at a time serves no federalism value.

D. Usurpation of the Legislative Role

And this leads to the fourth fatal difficulty of our latest resurrection of “old federalism.” Because the commercial/non-commercial distinction is so easily evaded on formal grounds, the Brzonkala reading of Lopez can only be implemented in a serious way by courts willing to go beyond the artificial formality of the distinction to something more substantive. But whatever that “something” may be, the courts will find themselves either second-guessing legislative motivation—a highly dubious form of adjudication when a law is fully defensible without reference to legislative motive—or usurping the legislative role in making policy.

For example, should Congress enact my hypothetical commercially driven prohibitions on gun possession, a court might be tempted to see past the formal niceties and reject the legislation on the ground that, regardless of Congress’ commercial discourse, the statute “in its effect...aims” to protect children from gun violence, thus “exert[ing] a power as to a purely local matter to which the federal authority does not extend.” The Supreme Court employed this very formulation to invalidate Congress’ 1916 statute purporting to limit the use of child labor, a law whose

108. One yearns here to insert the “emoticon” ubiquitously used on the internet to show that one is joking, namely, :-)).


impact on interstate commerce could hardly have been either more obvious or more direct.\textsuperscript{111} This disgraceful national experience alone ought to caution us against permitting judges to base their assessments of constitutional authority on malleable and often dubious characterizations of the motives or purposes that underlie a statute.

Professor Deborah Merritt, among our most distinguished contemporary commentators on the constitutional law of federalism, has suggested that courts can avoid the artificialities entailed in policing a rigid categorical distinction between commerce and non-commerce.\textsuperscript{112} Rather than focus on whether regulated conduct does or does not categorically belong to a discrete set of activities called “commerce,” courts should employ what mathematicians call “fuzzy logic,” asking instead, “‘\textit{How much} is this conduct \textit{like} commerce?’ and ‘\textit{How much like} commerce must conduct be before Congress can regulate it?’”\textsuperscript{113} The problem with this approach, and an objection that Professor Merritt anticipates, is that a judicial determination of “commerce-likeness” may seem little more than a judicial reassessment of the justifiability of a national statute.\textsuperscript{114} A court would ask itself whether, in light of the competing arguments for national intervention or state exclusivity in a particular area, some contested activity should be deemed to resemble interstate commerce sufficiently to warrant congressional action. Congress, however, when it enacts a statute, has already answered this question, at least implicitly. Critics may distrust Congress’ answer because they perceive Congress to be an “interested party” in disputes over the boundary between state and national regulatory authority.\textsuperscript{115} But, so long as a statute is rationally designed either to promote interstate commerce or to prevent interstate commerce from inflicting social harms, any deeper inquiry into the legitimacy of Congress’ response would be, in Chief Justice John Marshall’s words, “to pass the line which circumscribes the judicial department, and to tread on legislative ground.”\textsuperscript{116} This ought to be done only if there is some genuinely compelling institutional need to enlarge the usual judicial role. As I discuss below, no such need exists.

\begin{itemize}
\item[\textsuperscript{111}] See \textit{id.} (“[A] prohibition against the movement in interstate commerce of ordinary commercial commodities, to regulate the hours of labor of children in factories and mines within the States . . . exerts a power as to a purely local matter to which the federal authority does not extend.”
\item[\textsuperscript{113}] \textit{Id.; see Merritt, supra note 14, at 745} (applying “fuzzy logic” analysis to \textit{Lopez}).
\item[\textsuperscript{114}] \textit{See Merritt, supra note 14, at 744 n.305} (discussing use of fuzzy logic).
\item[\textsuperscript{115}] \textit{See id.} (arguing that policing this boundary should not be left to interested parties).
\item[\textsuperscript{116}] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 423 (1819).
\end{itemize}
IV. *Lopez and Its Progeny as Misguided Activism*

**A. Are Lopez and *Brzonkala* Activist?**

The unsoundness of the doctrinal maneuvers emanating from *Lopez*, especially as interpreted by *Brzonkala*, are enough to belie Chief Judge Wilkinson's claim that the current activist jurisprudence on federalism "holds the promise to be . . . enduring and constructive . . ."\(^{117}\) Even if judicial activism on this subject were warranted, we should hardly applaud activism that takes the form of doctrinal incoherence.

Before assessing the justifiability of any activist project for federalism, however, it may be helpful to consider what observers of the judiciary mean, or should mean, in labeling particular instances of judicial decision as examples of "judicial activism." For example, I recently wrote a short essay on the *Brzonkala* case for an electronic political journal, which elicited one reader's reaction that Chief Judge Wilkinson was wrong in calling the *Brzonkala* decision activist because the Fourth Circuit was attempting only to implement faithfully an originalist understanding of the Commerce Clause and the Tenth Amendment.\(^{118}\)

One might offer in response to this argument Judge Richard Posner's definition of judicial activism as the use of judicial power to second-guess the policy determinations of the non-judicial branches of government.\(^{119}\) On this understanding, *Lopez*, *Brzonkala* and every other decision that overturns a statute or executive action is activist. That definition, however, seems conspicuously both over- and under-inclusive.

For example, it hardly seems activist for a judge to overturn the initiative of a non-judicial branch if there already exist relevant legal texts that, conscientiously interpreted, more or less dictate such a result. Some theorists of interpretation seem to deny the existence of such cases, but the judge for whom I clerked, the late Alvin B. Rubin of the United States Court of Appeals for the Fifth Circuit, once expressed to me, in terms I think many judges would recognize, a contrary attitude. "Every judge," he said, "with any genuine intellectual capacity at all knows that there are some decisions that just ‘won’t write.’" If, following conventional norms of judicial decisionmaking, an opinion upholding the disputed initiative of a non-judicial branch "just ‘won’t write,’" then to label as "activist" the judicial opinion that "will write" seems to obscure more than it clarifies.

On the other hand, if a judge is self-consciously creative in generating a largely unprecedented constitutional outcome, it hardly seems to be less

---


activist if the outcome favors, rather than overturns, the initiative of a non-judicial branch. In *Paul v. Davis*, to take a Rehnquist-authored example, the Court distorted relevant precedent beyond recognition in order to uphold the discretion of city authorities to include individuals in public postings of habitual shoplifters without affording such individuals a prior hearing. The Court's inventiveness fairly screamed its activist mind-set, even though the result in this particular case was to expand, rather than contract non-judicial administrative authority.

In the effort to analyze judicial behavior, it would seem to be the quality of conscious inventiveness, rather than the direction of a case outcome, that sets judicial activism apart from judicial restraint. When my cyberspace reader challenged Chief Judge Wilkinson's claim of activism, he was trying to argue this point—that cases like *Lopez* should not be deemed activist because the Court, in my reader's view, is not inventing new constitutional meaning, but returning to old constitutional meaning. But even if there is some sense in which a constitutional decision uses the "interpretive model," to use Professor Thomas Grey's words, or is "originalist," to use a word that others prefer, it may well entail a degree of innovation that deserves the "activism" label.

The recent federalism cases illustrate this point beautifully. Professor Larry Lessig has used the word "translation" to describe what he discerns as the Court's effort to restore, through new judicial doctrines, a set of limits on government power that were inherent in social, economic political or technological conditions that prevailed when the Constitution was framed, but that have more or less evaporated under changed circumstances. He speaks of *Lopez* as "an act of interpretive fidelity," and as

120. 424 U.S. 693 (1976).
121. See id. at 694. In *Paul*, the Court concluded that the Louisville Police Department did not deprive the plaintiff below of due process in erroneously including him, without prior hearing, on a widely circulated Police Department poster of "Active Shoplifters." See id. To reach this result, the majority had to distinguish *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), in which the Court held that Wisconsin had denied due process by permitting local officials to post summarily the names of individuals determined to be engaged in "excessive drinking." See *Paul*, 424 U.S. at 708. Although the *Constantineau* decision rested explicitly on the impact of state-imposed disgrace on the plaintiff's reputation, the Court, in *Paul*, denied that damage to reputation was the gravamen of the holding in the earlier case. See id. The *Paul* majority said that the Wisconsin scheme implicated the Due Process Clause only because citing Constantineau as an habitual drunk imposed a state legal obligation on liquor merchants not to sell her liquor. See id.
122. Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 705 (1975). The point has been made that all plausible theories of constitutional interpretation are "interpretivist." See Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. Rev. 204, 204 n.1 (1980) (discussing constitutional interpretation). As Grey himself has written: "We are all interpretivists; the real arguments are not over whether judges should stick to interpreting, but over what they should interpret and what interpretive attitudes they should adopt." Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 1 (1984).
123. See Lessig, supra note 51, at 131-135.
"an effort to reconstruct something from the framing balance [of state and federal power] to be preserved in the current interpretive context." 124 Lessig is absolutely clear in describing this project as one of invention, a "constructivist" effort, and so, I presume, he would accept that acts of judicial "translation" are activist. 125 Yet, like jurists who self-consciously speak in similar terms, Professor Lessig portrays this activism as significantly constrained because it seeks to create a balance of rights or powers that is "equivalent" to "the original balance." 126

I think this formulation greatly underestimates the inventiveness in which modern courts engage when they purport to translate founding commitments into contemporary doctrines. Lessig uses the notion of translation metaphorically, to imply that once the act of judicial construction is completed, the translator has produced something equivalent to the intended meaning of the founding generation. 127 Even translators, however, do not speak of their work as producing equivalents. As legal comparativist Vivian Curran puts the matter:

Translations from formal language to formal language, from discourse to discourse, and from connotation or referential sources of concepts from one legal culture to another, all involve categorization. When translating, one discovers that one transmits only a portion of the original. Generally one selects among various possible subsets of the original, making value judgments as to which aspects of the original sign should be preserved through triage. The text in translation will trigger associations based on those selections, but they will be associations often not present in the original text, triggered by the signifiers used in the translation, such that a transmutation occurs from the original, making the translation a new and distinct product. 128

Professor Curran also points out, "divergences of meaning" between the original language and its translated version are most likely to occur when the language being translated does not correspond to "objects amenable to visible or tactile perception." 129 Legal categories like "federalism" are especially amenable to divergences of meaning.

The idea that the Court in Lopez is re-creating the Framers' intended balance of state and federal power under changed circumstances isolates, as the one changed circumstance worthy of legal response, the unprecedented interconnectedness of virtually all social and economic activity with the consequence that the national power to regulate commerce among

124. Id. at 129.
125. See id. at 128-31 (describing Lopez).
126. See id. at 134.
127. See id. at 134-35 (discussing Lessig's concept of "translation").
129. Id. at 50.
the states can, if understood literally, become a national power to regulate everything. What this misses, however, is that it is not just the national economy and the national government that would appear unrecognizable to the Framers. So, too, would our state governments, whose powers and competencies have grown over two centuries to something the late Eighteenth Century could hardly have imagined.

Over the past half century, the rates of growth in state expenditure and state employment far outpaced their federal equivalents. It is hardly self-evident that the Framers would have worried anxiously about the self-protective capacities of states that collectively employ over 4.7 million people and engage in expenditures that, together with those of local governments, amount to roughly 1.35 trillion dollars per year.\textsuperscript{130} State licensing authorities now constrain the travel and economic activities of virtually all adults, and, armed with comprehensive data bases of their citizens' whereabouts (and often of their health, income and family status as well), states can reach far more deeply into the lives of individual citizens than any national government would have dreamed of in 1789. At a general level, our founders' fears of tyranny and their belief in the vitality of local community and accessible government remain salient today. But it is fanciful to think that we can somehow recalibrate the formal authorities of national or state regulators and re-create anything meaningfully equivalent to the diffusion of power that the Framers would have recognized in their utterly different world. It is no accident that a hallmark of many activist opinions is bad historical analysis. The contrived attempt to produce a narrative of legal continuity requires the Court either to emphasize historical questions that are irrelevant or to minimize or misinterpret the evidence that matters.\textsuperscript{131}

The task of operationalizing 1789 federalism in a Twenty-first Century America is not a task of translation, but one of renovation. It is a task of redesigning, whether marginally or comprehensively, the legal doctrines, structures and processes that embody old values so that those values are given their most attractive form under the circumstances of our own age. The project of renovation is linked to a dominant tradition in American constitutional law, which I have elsewhere called "aspirationalism."\textsuperscript{132} Aspirationalism views "the Constitution as a signal of the kind of government under which we would like to live," and seeks to interpret the "Constitution over time to reach better approximations of that aspiration."\textsuperscript{133} If

\textsuperscript{130.} See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 331 tbl. 530 (1998) (showing numbers of state employees); id. at 307 tbl. 499 (showing state expenditures).


\textsuperscript{132.} See Peter M. Shane, Rights, Remedies and Restraint, 64 CHI.-KENT L. REV. 531, 550 (1988) (discussing aspirationalism).

\textsuperscript{133.} Id. This article further states that:
that's what our conservative judicial activists are doing, striving for a better approximation based on changed understanding of the constitutionally embedded value of federalism, then I have sympathy with their impulse. The aspirations long linked with federalism—diversity, innovation, political responsiveness, insulation from political oppression—are values worth keeping up to date. The problem, and now I return to *Lopez* and *Brzonkala*, is not only that the doctrinal tools of renovation that they have invented in recent Commerce Clause cases are arbitrary, as I have already argued. It is also that this particular aspirational project is ill-suited to the courts. Judicial activism ought be undertaken only when our constitutional system exhibits a compelling institutional need for the judiciary to second-guess elected political authorities and when the constitutional aspiration in question can be implemented through workable, coherent legal doctrine. Neither of these conditions justifies the current judicial activism on behalf of federalism.

### B. Conservative Judicial Activism as a Misguided Project

According to Chief Judge Wilkinson, the current era of judicial activism is best assessed against the background of two other periods of judicial activism in this century. During the first stage of judicial activism—the *Lochner* era—courts deployed the so-called "liberty of contract" doctrine to strike down laws enacted for the benefit of women, children and labor. That era, he writes, "is still widely disparaged for its mobilization of personal judicial preference in opposition to state and federal social welfare legislation."1

The second stage, animated by the civil-rights movement, saw "more and more citizens turn[ing] to the courts to vindicate a wide variety of

---

This vision treats as essential to constitutional understanding the broad normative purposes that the Constitution invokes: "to form a more perfect Union, establish Justice, insure domestic Tranquillity, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." To use John Marshall's words, those purposes are vindicated by remembering "it is a constitution we are expounding," that in a constitution, "only its great outlines should be marked," and that our constitution was "intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs."... Aspirationalism is not tantamount to regarding the Constitution as perfect, or perfectible through ingenious reading.... Aspirationalism does insist, however, that new or evolving understandings of the Constitution may not require formal amendment for their implementation. Cultural change, that is change in social understanding, may make certain reasoned arguments compelling to later generations that earlier generations did not foresee.

*Id.* at 550-51 (emphasis in original) (citations omitted); see SOTIRIOS BARBER, ON WHAT THE CONSTITUTION MEANS 34-37 (1984) (expressing similar position).

individual liberties."\textsuperscript{135} This period, in Chief Judge Wilkinson's view, was justly criticized for the institutional strains it caused and for its negative impact on state authority.\textsuperscript{136} But "many of its individual decisions were overdue and salutary," including a number of "judicial landmarks" whose "position in the pantheon of our jurisprudence is secure."\textsuperscript{137}

Chief Judge Wilkinson argues that current judicial activism will be "enduring and constructive" like the second era, rather than an "aggressive intrusion into the activities of coordinate branches" like the first.\textsuperscript{138} This is so for three reasons. First, Chief Judge Wilkinson says, current activism does not foreclose all elected officials from dealing with national problems; it requires only that the elected officials be officials of states or localities.\textsuperscript{139} Hence, it is preferable to the \textit{Lochner} period, in which the impact of substantive due process was to remove a variety of pressing social problems from the purview of elected policy makers altogether.\textsuperscript{140} Second, he asserts, current efforts do not aim at "an exceedingly narrow" and artificial definition of commerce, just some understanding of the Commerce Clause that gives the courts a significant role in enforcing its limits.\textsuperscript{141} This effort to find a proper judicially enforceable limitation of the Commerce Clause is imperative because, otherwise, the courts would become "textually selective" in their commitment to judicial review.\textsuperscript{142} This, according to Chief Judge Wilkinson, would result in a "complete abdication" of the judiciary’s "interpretive duty."\textsuperscript{143} Finally, unlike \textit{Lochner}-style activism, current activism does not cater to a single constituency, such as big business.\textsuperscript{144} The first of these points is incomplete. The others are wrong.

It may be consoling to devotees of representative government that \textit{Lopez} and \textit{Brzonkala} disable political initiative only at the federal level, and not at the state and local level. Removing national issues from the national political stage, however, is hardly better than removing them from political resolution altogether if the authorities left to resolve those issues lack the capacity to do so effectively. It is transparent that, on their own, states have not been able to eliminate either threats to school safety from firearms or the plague of gender-based violence.

In this connection, it is worth recalling the origins of the Commerce Clause itself. The Committee on Detail formulated Congress' authority to

\begin{itemize}
  \item \textsuperscript{135} \textit{Id.} at 891.
  \item \textsuperscript{136} \textit{See id.} at 892 (discussing second stage of judicial activism).
  \item \textsuperscript{137} \textit{Id.}
  \item \textsuperscript{138} \textit{Id.} at 893, 895.
  \item \textsuperscript{139} \textit{See id.} at 895 (discussing requirements of current judicial activism).
  \item \textsuperscript{140} \textit{See id.} (discussing current judicial activism).
  \item \textsuperscript{141} \textit{See id.} at 894 (discussing current definition of Commerce Clause).
  \item \textsuperscript{142} \textit{See id.}
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{See id.} at 893 (distinguishing current activism from \textit{Lochner}-style activism).
\end{itemize}
regulate interstate commerce as part of its effort to fulfill the Philadelphia delegates' resolution that Congress be empowered "to legislate in all cases to which the separate states are incompetent ..." 145 From this perspective, it is hardly faithful to the animating impulse behind Article I to incapacitate Congress from addressing problems that can be addressed effectively only with the participation of the national government.

As for his second point, there is no foundation for arguing that the federal judiciary needs to find federalism-based judicially enforceable limits on Congress' Commerce Clause authority in order to avoid abdicating the judicial review power. Chief Judge Wilkinson's argument on this point is, frankly, so odd in light of our constitutional history that I feel compelled to quote him lest it be imagined that I am simply fabricating his position:

[T]he real challenge to courts is to refrain from being textually selective. Yet, . . . it is hard to understand how one can argue for giving capacious meanings to some constitutional provisions while reading others out of the document entirely. Here, appellants suggest that we give a reading that would rob all meaning from the phrase "Commerce . . . among the several States," giving Congress a blanket power simply "To regulate." It seems patently inconsistent to argue for a Due Process Clause that means a great deal and a Commerce Clause that means nothing. How one clause can be robust and the other anemic is a mystery when both clauses, after all, are part of our Constitution. 146

The fact, however—and Chief Judge Wilkinson must surely know this—is that the Court has always been "textually selective" in precisely the way he decries. Among the texts the Court has read in at best "anemic" fashion are the promise to each state of a republican form of government,147 and the acknowledgment in the Ninth Amendment of unenumerated rights still "retained by the people." 148 In similar fashion,
the Court has refused to say whether the textual commitment of treaty approval power in the Senate has any implications for congressional authority to participate in treaty termination. 149 Within this decade, the Court has held that it has no authority to interpret the procedural implications of the Senate’s explicit textual authority to “try” impeachments. 150 These are hardly small matters or trivial bits of constitutional text.

Yet, the American commitment to judicial review has always co-existed with the Supreme Court’s acknowledgment that some portions of the constitutional text are exclusively left to the elected branches of the national government for their authoritative interpretation and enforcement. Marbury v. Madison, 151 the very decision that first asserted the federal courts’ power of judicial review, states that there are constitutional powers vested in the President for which he is accountable “only to his country in his political character, and to his own conscience.” 152 In short, the idea that textual selectivity is inconsistent with judicial review is totally at odds with the tradition of judicial review as it has evolved in the United States.

Moreover, the kind of deference to Congress embodied in the Court’s post-New Deal, pre-Lopez case law merely reduces, rather than eliminates the courts’ opportunities to enforce limits on Congress’ authority. For example, no one argues that the Framers intended Congress to use its commercial regulatory powers to destroy state governments as significantly autonomous governments. I presume, therefore, that it would be unconstitutional for Congress to deprive states of certain authorities or capacities that, in the words of Justice Thurgood Marshall, are “indisputably ‘attributes of state sovereignty.’” 153 For example, however rational it might be to do so, Congress could not eliminate bicameral state legislatures, insist that states locate their capitals in their most convenient ports or abandon property taxation in favor of income taxation. 154 One hopes that this

149. See Goldwater v. Carter, 444 U.S. 996, 1005-06 (1979) (plurality opinion) (holding Senate’s role in treaty abrogation to present nonjusticiable political question).
150. See Nixon v. United States, 506 U.S. 224, 228 (1993) (holding procedural sufficiency of Senate’s procedure for taking evidence in judicial impeachment trial to be nonjusticiable political question).
151. 5 U.S. (1 Cranch) 137 (1803).
152. Id. at 166.
Congress might rationally conclude that the location a State chooses for its capital may affect interstate commerce, but the Court has suggested that Congress would nevertheless be barred from dictating that location because such an exercise of a delegated power would undermine the
principled limitation on Congress’ authority to regulate commerce among the several states is a limitation Congress will hardly ever be tempted to transgress. But it is not much of an argument against a particular interpretation of the Constitution that it will only infrequently afford judges whatever gratification comes from deploying constitutional text to invalidate national statutes.

As for Chief Judge Wilkinson’s final point—that the new activism improves on the Lochner era because “the outcomes of the current era have not consistently favored a particular constituency”—he is, however inadvertently, misleading. First, the problem with Lochner jurisprudence was not that it favored a particular constituency, but rather that it favored a particular constituency that needed no judicial assistance to assure a fair hearing in the arena of electoral politics. Neither “big business,” nor America’s propertied elite more generally, needs systematic court protection against federal and state legislative bodies indifferent to their interests. This stands in marked contrast, of course, to the position of African-Americans, among others, whose treatment with indifference or outright hostility by our elected institutions provided a central justification for judicial activism on behalf of civil rights.

The current era likewise favors a particular constituency. It is not an economic faction, but a cultural and ideological constituency, comprising those who reflexively oppose activist national government. Such opposition is as reliable a feature of contemporary cultural conservatism as is enthusiasm for school uniforms and movie ratings.

Part of what made Brzonkala a predictable en banc decision was its origin in the Fourth Circuit. That court’s current majority very much represents a conservative movement in constitutional jurisprudence that has been catalyzed in no small part by the Federalist Society since the early

---

state sovereignty inherent in the Tenth Amendment. Similarly, Congress in the exercise of its taxing and spending powers can protect federal savings and loan associations, but if it chooses to do so by the means of converting quasi-public state savings and loan associations into federal associations, the Court has held that it contravenes the reserved powers of the States because the conversion is not a reasonably necessary exercise of power to reach the desired end.

Id. (citations omitted).


The author of the majority opinion in Brzonkala, Judge Michael Luttig, is an alumnus of both the Reagan White House Counsel's office and of the Bush Justice Department, which, from 1981 to 1992, were significant sites of conservative ferment in constitutional theory. On the Supreme Court, Chief Justice Rehnquist may be driven to moderate his understandings of constitutional doctrine by his need to woo votes from the instinctively conservative, but largely anti-ideological Justices Kennedy and O'Connor. The Fourth Circuit, however, is often able to


Law schools and the legal profession are currently strongly dominated by a form of orthodox liberal ideology which advocates a centralized and uniform society. While some members of the academic community have dissented from these views, by and large they are taught simultaneously with (and indeed as if they were) the law.

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

This entails reordering priorities within the legal system to place a premium on individual liberty, traditional values, and the rule of law. It also requires restoring the recognition of the importance of these norms among lawyers, judges, and law professors. In working to achieve these goals, the Society has created a conservative intellectual network that extends to all levels of the legal community.

Id. It testifies to the Society's networking success that its current Board of Directors is chaired by former judge Robert H. Bork and Senate Judiciary Committee chair, Orrin Hatch (R-UT). Other members include former Counsel to the President C. Boyden Gray, who served as George Bush's Counsel during the Reagan as well as Bush Administrations, and former Reagan Attorney General Edwin Meese, III. Professor Calabresi's current fellow national co-chair is Rep. David McIntosh (R-IN), an adviser to former Vice President Dan Quayle.

Through publications and symposia, as well as its organizational activities, the Federalist Society has made so constructive a contribution to the development of conservative legal thought (and to the intellectual resources available to the legal community more generally), that it remains an enduring mystery why supporters of a more progressive constitutionalism have not emulated its model. The time for a Brennan-Marshall Society for Law and Public Policy is long overdue.


muster a comfortable majority of judges around an ideologically purer form of conservative constitutionalism. An available method, as exemplified by Brzonkala, is to embrace the most ambitiously conservative version of a Supreme Court precedent that is arguably more moderate, and then to write as if the ambitious rendition is the only faithful interpretation. Not surprisingly, when this happens, the resulting opinion can sound more like a manifesto than a judicial exposition of the law.

The "movement" character of Judge Luttig's opinion in Brzonkala is as evident in its tone as in its substance. Five aspects of his prose are especially worthy of note because they so strongly signal a sense of political mission that inappropriately exceeds conventional understandings of the judicial role.

The most obvious, albeit the least toxic, of these signals is the extraordinary level to which the Brzonkala opinion raises the phenomenon of protesting too much. When a judge requires sixty-four pages of double-columned, single-spaced prose to demonstrate the unconstitutionality of a single non-technical provision of federal law, that alone may well suggest he is reaching too far. In this case, the author's repetitiveness does not strengthen his argument. For example, from the uncontested factual record of widespread violence against women and of the extraordinary economic impacts of such violence, it takes only three implications to connect the VAWA to interstate commerce. The first, which seems self-evident, is that some significant portion of the multi-billion dollar national economic impact inflicted by violence against women implicates interstate commerce. The second is that some non-trivial portion of the adverse economic impact on the interstate economy is traceable to violence "motivated by gender" within the meaning of the VAWA. The third is that the availability of damage actions against perpetrators will either deter


162. See Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820, 825-89 (4th Cir. 1999) (en banc) (discussing issue at length), cert. granted sub nom. United States v. Morrison, 120 S. Ct. 11 (1999). The notable exception is Myers v. United States, which held that Congress could not condition the President's authority to remove Postmasters General on the consent of the Senate to remove an officer to whose appointment it had been required to give advice and consent. See 272 U.S. 52, 176 (1926). Chief Justice Taft might be excused his verbosity on the ground that, as a constitutional scholar and as a former President, he had special interest in definitively resolving the constitutional issue that had also furnished the pretext for the impeachment of Andrew Johnson.
such violence or mitigate the degree to which its victims will be injured in
their capacity to participate in the interstate economy. None of these in-
fferences is remotely counterintuitive, but it is against this reasoning that
Judge Luttig invokes the Rehnquist warning about "piling inference
upon inference." One might reasonably object, I think, that three in-
ferrances is barely a stack, much less a pile. But the rhetorical irony—espe-
cially in light of the piling metaphor—is that Judge Luttig actually employs
the Rehnquist phrase, or quotes it verbatim from other judicial opinions, a
total of eleven times in the course of his opinion.

Less humorously, the majority opinion also combines a manifest arro-
gance with a thinly veiled claim of moral heroism, in which the author
implicitly casts his colleagues and himself as defenders of legal purity
standing firm against a cabal that includes both the appellants and the
dissenters. The arrogance does not go unremarked by the dissent:

As the opening words of its opinion demonstrate, the majority
steadfastly refuses to recognize the constraints placed upon the
judiciary by the separation of powers. In purporting to act on
behalf of "We the People" in striking Subtitle C [of the VAWA]—
an act of the people's duly elected legislature—the majority seeks
to augment its limited judicial authority with a representative au-
thority that it does not in fact possess.

But it is not only the will of "We, the People" that the majority believes
to be at stake in its opinion. Consider the following lines from the major-
ity's penultimate paragraph, which defy paraphrase:

We are not unaware that in invalidating section 13981 today, we
invalidate a provision of a statute denominated the "Violence
Against Women Act." No less for judges than for politicians is
the temptation to affirm any statute so decorously titled. We live
in a time when the lines between law and politics have been pur-
posefully blurred to serve the ends of the latter. And, when we,
as courts, have not participated in this most perniciously machia-
vellian of enterprises ourselves, we have acquiesced in it by
others, allowing opinions of law to be dismissed as but pro-
nouncements of personal agreement or disagreement. The judi-
cial decision making contemplated by the Constitution, however,
unlike at least the politics of the moment, emphatically is not a
function of labels. If it were, the Supreme Court assuredly would

163. See Brzonkala, 169 F.3d at 837 (quoting Lopez v. United States, 514 U.S. 549, 567 (1995)).
164. See id. at 837, 838, 840, 844, 845, 845 n.13, 847, 847, 855, and 858 n.22
(quoting Chief Justice Rehnquist).
165. See, e.g., id. at 889 (contrasting majority opinion with "[a] most perni-
ciously machiavellian of enterprises").
166. Id. at 921 (Motz, J., dissenting).
FEDERALISM’S “OLD DEAL"

not have struck down the “Gun-Free School Zones Act,” the “Religious Freedom Restoration Act,” the “Civil Rights Act of 1871,” or the “Civil Rights Act of 1875.” And if it ever becomes such, we will have ceased to be a society of law, and all the codification of freedom in the world will be to little avail.167

In this hyperbolical and significantly incoherent passage, the Fourth Circuit majority actually casts itself as a heroic force of resistance to the merely superficial appeal of protecting women from violence, and claims a role in saving society from itself.168

It is additionally distressing that Judge Luttig quite clearly takes this battle personally. He scolds the plaintiff, the Justice Department and the dissenters in personal terms as if their advocacy for a moderate reading of Lopez were an act of _lese majesté_ against the forces of constitutional purity.169 He seems to imagine that the appellants and the dissenters share a personal connection, as a result of which the dissent’s arguments will actually have emotional implications for appellants. He writes that the dissent “lay[s] bare appellants’ . . . standard of review to an extent that will surely prove disquieting to appellants,” and that the dissent “stands in what we suspect will be, for appellants uncomfortable testament to this infinite reach of appellants’ argument.”170 It is mysterious why Judge Luttig would advert to the appellants’ supposed reactions to the dissent. One yearns to have been able to assure Judge Luttig that nothing about the dissenting opinion would prove either disquieting or uncomfortable to

167. _Id._ at 889.
168. _See id._
169. _See, e.g., id._ at 880. Although the scolding tone runs throughout the opinion, an especially crystalline example appears in Judge Luttig’s discussion of Brzonka’s Fourteenth Amendment argument:

_In summary, although appellants expressly contend that _Harris_ and the _Civil Rights Cases_ are distinguishable, have tacitly been overruled or modified, and have been repudiated by subsequent authorities, it is apparent from the character of each of these arguments and the “authorities” upon which they rely that appellants really have no argument other than that we should _ignore_ these decisions because they are “too old” to be controlling. To the point of histrionics, in fact, appellants incant that _Harris_ and the _Civil Rights Cases_ are simply “outdated,” “century-old,” from the “1870’s [sic] and 1880’s,” “19th century” cases, and of little interest to “modern courts,” or those with “modern” views about the proper scope of Congress’ powers. Indeed, the government in its principal brief cites _Harris_ and the _Civil Rights Cases_ but once, and that citation is a parenthetical embedded within footnote. As we are confident appellants appreciate, however, especially in light of the Supreme Court’s recent explicit reliance upon both _Harris_ and the _Civil Rights Cases_ in _City of Boerne_, we are not at liberty simply to conclude that these cases do not represent the Court’s current view of congressional power to regulate exclusively private conduct under Section 5._

_Id._ (citations omitted).
170. _Id._ at 857, 859.
the appellants other than its failure to garner six, rather than four votes from an eleven-judge bench.

Moreover, it is troubling to consider the condescending, even insulting tone that Judge Luttig directs against both appellants and dissenters. He describes appellants' "invocations of 'rational basis review'" as "incecant," and their Fourteenth Amendment argument as "maundering" and marked by "incant[ation]" "to the point of histrionics." He chastises them for merely "tepids" acknowledgment of the distinction between economic and non-economic activity and characterizes their paraphrase of Congress' reasoning as manifesting "an understandable—though barely excusable—reluctance to quote it in its entirety." He also suggests that their perspective on \textit{Lopez} verges on unethical misrepresentation. For Judge Luttig, the interpretive disagreement over the reach of the Commerce Clause—or, more accurately, the reach of \textit{Lopez}—is invested with a depth of moral significance more readily associated with religious crusades than with legal interpretation.

Finally, one must be excused also for concluding that one reason Judge Luttig imagines the appellants and the dissenters to be arrayed against him on a personal level is that \textit{Brzonkala} is a case about the VAWA and both the plaintiff, Christy Brzonkala, and the author of the dissenting opinion, Diana Gribbon Motz, are women. Judge Luttig feels compelled to recite a lengthy passage from Judge Motz's opinion because it is "so startling in its quaint innocence." His scolding for "histrionics" stereotypically attributes to the appellants an excessive emotionalism, which he implicitly contrasts with the court's allegiance to duty and reason. Christy Brzonkala, for her part, along with the Justice Department, seeks to "emasculate the judicial role in the determination of whether Congress has exceeded its constitutional authority." Such truculence is not, to use Chief Judge Wilkinson's phrase, judicial activism that is "measured and

171. \textit{Id.} at 857, 859, 870, 880.
172. \textit{Id.} at 832 n.5, 850 n.16.
173. \textit{Cf. id.} at 854 n.18, 856 n.20 (comparing appellants' interpretation of \textit{Lopez v. United States}, 514 U.S. 549 (1995) with actual text from \textit{Lopez} decision). Judge Luttig also infers from the appellants' strategy of offering alternative theories in support of their position that they are knowingly advancing legally insupportable arguments. \textit{See id.} at 873 (stating appellants are motivated to argue in alternative because they are "[e]vidently aware of the speciousness of these distinctions and, ultimately, of the fundamental premise on which they rest").
174. Although the seven-four \textit{Brzonkala} vote marked a perfect split between the Fourth Circuit's seven Republicans and its four Democrats, one wonders whether the majority opinion might have differed somewhat in tone if authored by the Court's one female Republican appointee, Judge Karen Williams, even though she, like Judge Luttig, is staunchly conservative.
175. \textit{Brzonkala}, 169 F.3d at 860.
176. \textit{Id.} at 880.
177. \textit{Id.} at 858.
FEDERALISM’S "OLD DEAL”  

cautious."178 It is a culture war barrage that masquerades as legal formalism. Contrary to Chief Judge Wilkinson, it very much substantiates the anxiety that the third Twentieth Century era of judicial activism is intended to advance the cultural agenda of a particular ideological constituency.179

But the weakness of Chief Judge Wilkinson’s analysis lies in more than the defects of the arguments he makes. It lies also in the critical point he ignores, namely, that the era of civil rights-oriented judicial activism, unlike the Lochner era, had a weighty institutional justification. As I have already noted, the Court was responding to the systemic difficulties posed for historically disadvantaged groups in eliciting genuine responsiveness from the non-judicial branches of state and federal government. By now embarking on a program of judicial activism for the states, the courts are not filling any comparably compelling institutional need.

In writing the opinion overturning National League of Cities,180 the late Justice Blackmun invoked the argument made famously by Herbert Wechsler, and more recently by Dean Jesse Choper, that the primary constitutional protections for federalism lay in the structure and composition of the national government itself.181 Without rehearsing the details of this

178. Id. at 898 (Wilkinson, C.J., concurring). Judge Luttig writes with objectionable and arguably gendered belligerence that Judge Motz and those who join her are “candid about their prostrate deference to congressional pronouncements.” Id. at 847. Wondering whether I might be springing too quickly to an inference that this phrase is both singularly insulting to a fellow judge and, in context, inappropriately sexualized, I checked on March 10, 2000 to see whether the phrase “prostrate deference” had ever before appeared in any judicial opinion. A search of the "ALLCASES" and "ALLCASES-Old" WESTLAW databases produced no other state or federal judicial opinion in which the phrase appears.

179. A common and disquieting feature of politically motivated diatribes is smearing one’s opponents by attributing to them one’s own behavior. Judge Luttig accuses the appellants of repetition to the point of “incantation,” yet he quotes "pil[ing] inference upon inference” eleven times. Id. at 880. For a further discussion of Judge Luttig’s use of “pil[ing] inference upon inference,” see supra note 164 and accompanying text. He anticipates that the dissent will disquiet the appellants, without apparently wondering how a rape victim might react to being told by the majority that she is trying to “emasculate” the court. Brzonkala, 169 F.3d at 858. He accuses appellants of trying to disguise the true import of Lopez without ever providing his own account of what led Justice Kennedy to a separate concurrence elaborating what he and Justice O’Connor have determined is the “limited holding” of Lopez. See id. at 919 (quoting Lopez, 514 U.S. at 568 (Kennedy, J., concurring)). It is hard to imagine that any “histrionics” in the appellants’ briefs could outdo Judge Luttig’s own over-the-top penultimate paragraph. Id. at 880. And, anticipating that critics might infer a political agenda behind the Fourth Circuit’s view of the law, he offers in that final paragraph a preemptive characterization of any such criticism as “this most perniciously machiavellian of enterprises.” Id. at 889. In every respect, this opinion stands in disconcerting opposition to any recognizable ideal of judicial temperament.


181. See Garcia, 469 U.S. at 547-55 (arguing that state sovereignty is protected by structure of federal government); see, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND
argument, it bears noting that there are today few features of our political life more conspicuous than the consistently growing significance of our state and local governments as centers of policy making and public activity. The size of our states' collective workforce multiplied four-and-one-third times between 1952 and 1992. As of 1995, that workforce was nearly one-and-two-thirds the size of the federal workforce, which, by contrast, has declined steadily throughout the current decade. During the same forty-year period, direct expenditures by state and local governments, held constant for 1992 dollars, multiplied six times to over 1.1 trillion dollars. This is 1.81 times the rate of growth in federal expenditures.

The federal government did not impede the growth of state activity. It fueled it. Between 1970 and 1998, federal grants-in-aid to the states went from just over $24 million to nearly $251 million, which, even

<table>
<thead>
<tr>
<th></th>
<th>1952</th>
<th>1992</th>
<th>Rate of Growth</th>
</tr>
</thead>
<tbody>
<tr>
<td>State employees</td>
<td>1,060,000</td>
<td>4,595,000</td>
<td>433 percent</td>
</tr>
<tr>
<td>Federal civilian employees</td>
<td>2,583,000</td>
<td>3,047,000</td>
<td>118 percent</td>
</tr>
</tbody>
</table>

183. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNIFIED STATES 311 tbl. 550 (118th ed. 1998) [hereinafter CENSUS BUREAU, STATISTICAL ABSTRACT] (indicating 4,719,000 state employees vs. 2,895,000 federal civilian employees). The federal civilian workforce comprised 3,105,000 in 1990, but only 2,895,000 in 1995, slightly under the total of 2,898,000 persons, which the federal government employed in 1980. See id. It should be noted that these figures differ somewhat from those reported in STANLEY & NIEMI, supra note 182, at 255, which are based on the data of a different government agency. The cited trends and comparisons, however, are equally observable in both sets of data.

184. See STANLEY & NIEMI, supra note 182, at 313-14, 390-91.

<table>
<thead>
<tr>
<th>Direct expenditures (millions of dollars)</th>
<th>1952</th>
<th>(B) 1952, adjusted for inflation through 1992</th>
<th>(C) 1992</th>
<th>Rate of growth, C/B (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>State and local</td>
<td>30,863</td>
<td>189,838</td>
<td>1,141,075</td>
<td>601</td>
</tr>
<tr>
<td>Federal</td>
<td>67,700</td>
<td>416,423</td>
<td>1,381,700</td>
<td>332</td>
</tr>
</tbody>
</table>


185. See NASA, supra note 184 (noting that state expenditures grew faster than federal expenditures).

186. See CENSUS BUREAU, STATISTICAL ABSTRACT, supra note 183, at 310 tbl. 504 (listing federal grant statistics).
measured in 1998 dollars, was still a 249% increase. Against this background, any anxiety that individual freedom is threatened in the United States by a national government intent on crippling state sovereignty seems utterly fantastical. This point is all the stronger in light of recent legislation, some proposed, some adopted, that is highly protective of state interests, as well as executive orders emanating from both Republican and Democratic presidents counseling executive agencies to be more attentive to federalism concerns.

The potential perversity of Commerce Clause activism on behalf of the states is evident in New York v. United States, the very case with which the Supreme Court launched its anti-commandeering principle. That case concededly posed a hard question. By mandating that states implement a federal regulatory scheme through legislative action, Congress arguably was impinging upon an indisputable aspect of state sovereignty. Proscribing such a scheme categorically, however, effectively prevents Congress from helping address the states’ collective action problems. The 1985 amendments to the Low-Level Radioactive Waste Policy Act, which the Court partially invalidated in New York v. United States, enacted a set of compromises arrived at and endorsed by the National Governors Association after the states proved unable to comply with the original Low-Level Radioactive Waste Policy Act, which had been enacted in 1980. The original act, which also embodied the legislative recommendations of the

---


188. See, e.g., Federalism Accountability Act of 1999, S.1214, 106th Cong. (promoting principles of federalism); State and Local Government Participation Act of 1999, H.R. 2029, 106th Cong. (requiring that federal agencies consult with state agencies and local governments on environmental impact statements). The power of state governments and their advocates in congressional deliberations is dramatically illustrated by the Federalism Accountability Act; it has made considerable progress in the House despite the combined opposition of business groups, who prefer uniform, national standard-setting, and labor and environmental groups, who fear a weakening of national enforcement efforts. See Ron Eckstein, Federalism Bills Unify Usual Foes, LEGAL TIMES, Oct. 18, 1999, at 1 (discussing interest group opposition to Federalism Accountability Act).


192. See generally id.


National Governors Association, addressed the radioactive waste disposal problem by authorizing the states to form regional compacts to deal with the problem of radioactive waste disposal. Only after this technique failed did Congress leave states with the choice of either regulating radioactive waste consistent with congressional standards or "taking title to and possession of the low level radioactive waste generated within their borders and becoming liable for all damages waste generators suffer as a result of the States' failure to do so promptly." Thus, from start to finish, the animating forces behind the so-called commandeering of state authority were the states themselves. Invalidating this statute frustrated, rather than protected, the states' capacity to fashion their own favored solutions to pressing public problems.

None of this is to deny the importance of the federalism values that lay at the heart of the current era of judicial activism. These values—cultural diversity, government accountability, state experimentation, and the protection of individual freedom—are hardly less important now than at our founding. Of course, the association of these values with the states may embody some degree of romanticization. For example, it is worth considering whether, in some respects, the federal government, although generally more remote from "the People," might actually be easier to monitor and approach effectively, and, to that extent, more accountable to the average citizen than are state and local governments.

V. A CONCLUDING SPECULATION

But there is a bigger point here. Under current economic, social and technological circumstances, Congress may chiefly be the states' necessary partner, rather than their adversary, in protecting values of localism and the states' capacity for experimentation. In some cases, such as waste disposal or, for that matter, the regulation of child labor, the states face "pris-

196. See id. at 190-92 (White, J., dissenting) (discussing gubernatorial recommendations).
197. Id. at 174-75.
198. Readers of this Article might compare, for example, the ease with which any citizen can track and comment on current policy matters before the EPA or FCC by visiting their respective homepages, with the procedures necessary to ascertain comparable information about the structure, processes, and substantive agendas of their county governments. See, e.g., United States Environmental Protection Agency (visited Feb. 23, 2000) <http://www.epa.gov> (EPA homepage); Federal Communications Commission (visited Feb. 23, 2000) <http://www.fcc.gov> (FCC homepage). In my own situation, the web site for Pennsylvania's Allegheny County is unusually rich with information, but it is not searchable. See Welcome to Allegheny County (visited Feb. 23, 2000) <http://www.county.allegheny.pa.us/index.asp> (Allegheny County homepage). There is no obvious reference to "the environment" or "land use" in any guide to the site. See id. The increasing consolidation of mass media in both print and broadcast has also led to the domination of national news coverage over local news, which further increases the effort entailed for citizens trying to remain abreast of local developments in politics and policy making.
“Prisoner’s dilemma” problems that only an external authority can overcome. Public policy experimentation typically requires resources that the states cannot muster entirely for themselves. State accountability may be weakened by the absence of federal monitoring.

At the risk of closing on the briefest mention of a very big and speculative idea, I also wonder whether the greatest risk to localism at the turn of the Millennium is not the accumulation of national governmental power, but rather the burgeoning of private economic power that is largely unaccountable to any polity whatever. As Parisians bristle against what has cleverly been called “McDomination,” it seems clear that the choices among social values and living conditions made available by the states are threatened by economic and technological trends that, if they are worth resisting, cannot be resisted effectively without a sympathetic national legislative authority. If we are to “renovate” or even “translate” our founding commitments to diversity into something equally compelling in the post-industrial age, we will have to rely on political actors more formidable than our judges and acts of creativity more meaningful than the imposition of artificial doctrinal constraints on Congress’ regulatory powers.

199. See generally Anatol Rapoport & Albert M. Chammah, Prisoner’s Dilemma: A Study in Conflict and Cooperation (1965) (describing classic collective action problem in which individuals may profit by self-sacrifice but often choose not to for fear that others will take advantage of their self-sacrifice).
