
CORNERSTONES OF AMERICAN DEMOCRACY:

A PRIMER ON JUDICIAL RESTRAINT, FEDERALISM, AND NOMINATIONS TO THE FEDERAL BENCH

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A fully-staffed, balanced, and independent judiciary is necessary for the protection of our safety, freedom, and civil rights. Yet today the American justice system is imperiled by an extraordinary number of federal judicial vacancies and by the efforts of some to prevent the confirmation of qualified judicial nominees and thereby politicize what Alexander Hamilton once referred to as our government's "least dangerous" branch.

Of course, political battles over judicial nominees are nothing new. But unlike previous judicial confirmation fights, where special interest groups sought to defeat a particular candidate for the federal bench, the current assault is being waged not simply against a specific individual but against certain judicial philosophies.

By painting a number of current judicial nominees with a broad brush, the critics hope to avoid having to challenge a particular nominee's qualifications. The strategy is simple: convince the American public that judicial restraint and federalism imperil the rights of women and minorities and then label adherents to these philosophies as "hostile to civil rights" and unfit for federal judicial service.

This paper will examine briefly the role of the courts in American law and provide context for the current debate over federalism and judicial restraint. Defining these principles helps shed some light on the constitutional context for the current confirmation battles. And it demonstrates judicial adherence to principles of restraint and federalism is critical to the preservation of democracy, liberty, and freedom for all Americans.

I. Judicial Restraint

In announcing his first group of judicial nominees on May 9, 2001, President George W. Bush explained his criteria for selecting federal judges. He stated: "Every judge I appoint will be a person who clearly understands the role of a judge is to interpret the law, not to legislate from the bench. To paraphrase James Madison, the courts exist to exercise not the will of men, but the judgment of law. My judicial nominees will know the difference." The President, in other words, promised to nominate to the federal bench men and women who will exercise judicial restraint.

A. "Restraint" Defined

The term "judicial restraint" refers to the idea that the role of a judge is not to make policy or establish new legal rights, but to interpret the law as written in the United States Constitution or in statutes passed by the legislature. Because the will of the people is best expressed through legislative bodies, judges must strive to adhere to the law as written even if, at times, the law is insufficient to deal with certain circumstances or conflicts with the judge's personal political views.¹

"Judicial activism," by contrast, refers to results-

oriented judging, whereby a judge decides the outcome of a case based not on the law as written, but on his or her conception of what is just or fair. "Judicial activism" is often improperly confused with the power of "judicial review," which is the power of the judiciary to invalidate statutes that are in conflict with the United States Constitution. The fact that a judge frequently invalidates unconstitutional laws may make him "active" in the dictionary sense of the term, but it does not necessarily make him a "judicial activist." To the contrary, a "judicial activist" is a judge who creates new rights not expressly granted by the Constitution or by statute, or who invalidates laws, not because they conflict with express textual mandates, but because the judge views them as bad public policy.

Although the term "judicial restraint" is often associated with political conservatism, and "judicial activism" often associated with political liberalism, they are not properly categorized as such. "Judicial restraint" and "judicial activism" refer to the process or method a judge uses to reach a particular decision, not to the political ramifications of that decision. Political liberals and political conservatives are, at least theoretically, equally capable of exercising restraint on the bench. By the same token, judicial activists may use their authority to achieve either conservative or liberal results. As such, the terms "judicial restraint" and "judicial activism" are neither inherently "conservative" nor inherently "liberal."

Consider the following examples of judicial *restraint*:

- A state legislature passes a "right-to-die" law that is challenged in federal court by religious groups who argue that the statute conflicts with the fundamental right to "life, liberty, and the pursuit of happiness." The judge, who is known to be a supporter of pro-life causes, puts aside his personal opinions and upholds the law on the ground that the United States Constitution does not mention, let alone guarantee, the "right to life."
- The United States Congress passes a statute prohibiting flag-burning. An individual prosecuted for burning a flag at a political rally challenges the law, arguing that it violates his constitutional right to free speech and expression. The judge hearing the case is a political conservative and a war veteran who is greatly offended by any desecration of the flag. Nevertheless, the judge puts aside his personal convictions and strikes down the statute as contrary to the First Amendment of the United States Constitution.
- A state legislature passes a law that prohibits "discrimination against, or preferences in favor of, any individual or group on the basis of race in the operation of public employment, public education, or public contracting." Special interest groups file a lawsuit arguing that

the measure violates the Equal Protection Clause of the Fourteenth Amendment, which prohibits discrimination by state actors. Plaintiffs argue that the law discriminates against minorities by eliminating state “affirmative action” programs intended to help minorities gain an equal footing with whites. Plaintiffs argue that such racial preferences are constitutionally permissible where the state demonstrates a compelling interest for the program and that, by prohibiting the use of lawful preferences, the new statute runs afoul of the Constitution’s guarantee of equal protection of the laws. The judge hearing the case is a political liberal who favors “affirmative action.” Nevertheless, the judge puts aside her personal convictions and upholds the state law. The judge reasons that a law that prohibits the state from classifying individuals on the basis of race cannot possibly violate constitutional provisions banning race discrimination. Moreover, the judge explains that, while the Constitution may permit “affirmative action” in compelling circumstances, it does not require states to engage in such practices in order to comply with equal protection mandates.

In each of these cases, the judges in question interpret the law without regard to their own strongly-held convictions.

In the first case, the judge may personally disapprove of the law in question, but he recognizes that it is within the power of the state to pass any law not expressly forbidden by the United States Constitution. Since there is no constitutional “right to life,” the so-called “right-to-die” statute passes constitutional muster. In this case, a judge who appears to be politically conservative exercises restraint and obtains a result that might be labeled politically liberal.

The second case illustrates how restraint can be present even when a judge acts to invalidate a democratically enacted law. Here the judge in question invalidates the flag-burning statute because it conflicts with an earlier binding ruling of the United States Supreme Court and an express provision of the United States Constitution—the First Amendment. Significantly, the judge invalidates the law despite his personal political convictions on the matter. In this case, a politically conservative judge exercises restraint and obtains a politically liberal result, but one that is consistent with precedent and the dictates of the Constitution.

Unlike the first two examples, the third case illustrates how a politically liberal judge might exercise restraint and end up with a politically conservative result. The judge personally favors racial preferences. Yet she puts her own views aside in ruling that individual states may choose to prohibit even those preferences that are permissible under the Constitution.

Now consider the following two examples of judicial activism:

- The United States Congress passes a law requiring that airport security personnel be paid at least \$3.00 above the federal minimum wage and limiting the number of daily and weekly hours that such employees may work.

A federal court invalidates the law as an interference with the “freedom of contract.”

- A state legislature passes a law requiring local authorities to issue a permit to carry a concealed weapon to any law-abiding citizen who is at least 21 years of age. A lawsuit is brought challenging the statute, and a federal judge invalidates the statute on the grounds that the indiscriminate issuance of gun permits violates the “right of the citizenry to be safe.”

In the first of these two cases, the judge relies improperly on the general principle of “freedom of contract”—which is nowhere expressed in the text of the Constitution—to strike down a federal labor law, thus achieving what might be called a politically conservative result.

In the next example, the judge relies on another so-called “right” not found in the Constitution—the “right to safety”—in striking down a statute that expanded the rights of gun owners. This judge thus employs judicial activism to achieve what might be called a politically liberal result. Although the political implications of these latter two cases point in opposite directions, both decisions are based on improper considerations of non-constitutional theories and thus lack legitimacy.

B. The Need For Legitimacy

Why is it important for our courts to maintain institutional legitimacy? Why should judges refrain from invalidating unsound laws and upholding sensible ones irrespective of constitutional dictates? Simply put, judicial activism is undemocratic and threatens America’s system of representative selfgovernment.² Our government is based on a separation of powers outlined in the United States Constitution. Under this system, the legislative branch enacts the law; the executive branch enforces the law; and the judicial branch interprets the law and applies it to particular circumstances. Democratically elected legislatures, responding to the will of the people, are entitled to pass any law not expressly forbidden by the Constitution. The fact that a particular law might be bad public policy, economically unwise, or even morally offensive is no justification for judicial invalidation. As Alexander Hamilton wrote in the Federalist Papers: “It can be of no weight to say that the courts, on the pretense of a repugnancy, may substitute their own pleasure to the constitutional intentions of the legislature” (Federalist 78).

On the other hand, when a legislature passes a law which conflicts with our Constitution, or which the legislature is not constitutionally authorized to enact, the judiciary *must* invalidate the law, even if the law is a good one. Indeed, the failure to do so can also rob the courts of institutional legitimacy. As Judge Diarmuid F. O’Scannlain of the U.S. Court of Appeals for the Ninth Circuit has written, “if [a democratically enacted law] affronts the federal Constitution—the Constitution which the people of the United States themselves ordained and established—the court merely reminds the people that they must govern themselves in accordance with the principles of their own choosing.”³

Judges who fail to anchor their decisions in Constitutional or statutory text are legally adrift, guided only by

their own personal morals and world-view. If judges refuse to abide by the elementary principle of restraint, and operate as philosopher kings, our constitutional system becomes both unpredictable and unstable. A system in which a judge can decide any case however he or she sees fit—where the outcome of the case then depends not on the law but on the judge assigned to hear the case—puts everyone’s freedom at risk.

In sum, it is not the province of the judiciary to set public policy or create new legal rights. Yet this is exactly what some special interest groups would like the judiciary to do.

C. Special Interest Groups and Opposition to Nominees Committed to Judicial Restraint

Special interest groups exist for the purpose of promoting specific public policies consistent with their organization’s core values and mission. They do this legitimately by trying to persuade the public and members of the legislative branch of government as to the merits of their positions on certain issues and through grass-roots campaigns in support of particular policies. Unfortunately, however, some special interest groups are not content to plead their case to the American people and to their elected representatives. Fearing that they might fail to persuade a majority of the public or elected legislators to adopt their views, these groups turn to the courts to enact their agenda by judicial fiat.

Because many special interest groups rely on the courts to mandate social policies that cannot be enacted democratically and to strike down those laws with which they disagree, many such groups oppose the nomination and confirmation of judges who do not have a public record which passes their political litmus test. Moreover, they will oppose any nominee with a record of personal opposition to any of their pet issues—even if the nominee in question is perfectly capable of setting aside her personal political views in order to apply the law as written.

Although liberal special interest groups have been most active in the fight to politicize the judiciary, some conservative groups have also inappropriately sought to politicize the federal bench by supporting only those judges who agree with their political agenda. The abortion issue illustrates the problem. Suppose, for example, that a left-wing feminist group has decided to make abortion its signature issue. As part of its goal of ensuring universal access to abortion on demand, the feminist group launches a high-profile attack against a judicial nominee who is personally pro-life and who, as a former politician, voted to restrict abortion in his state. The same group also works to defeat the nomination of a state court judge to the federal bench on the ground that, as a state judge, the nominee upheld a parental notification law that fell within constitutional parameters.

In the first of these examples, it is clear that the hypothetical feminist group’s objection to the nominee is based on opposition to the concept of judicial restraint, or, at the very least, a belief that one can never put aside personal opinions when applying the law. If, however, the hypotheti-

cal nominee in fact practices judicial restraint, it should not matter whether he is personally pro-life or pro-choice, so long as he is capable of upholding a constitutionally enacted law protecting access to abortion.

The feminist group’s opposition to the second nominee is grounded on support of judicial activism—that is, approval of judicial policy-making. In this example, the group opposes the judge because she upheld a parental notification law that fell within constitutional parameters. Even though the law was constitutional, the activist group believes the judge should have invalidated the law as an improper restriction on abortion on demand. In other words, the feminist special interest group will endorse only those judges who are willing to legislate from the bench a constitutional right to abortion on demand.

Suppose, further, that a conservative special interest group seeks to prohibit abortion. They are thwarted in their efforts to do so by the Supreme Court’s 1973 ruling in *Roe v. Wade*, which legalized abortion in most circumstances. The group actively seeks the appointment of judges who are not only willing to overturn *Roe v. Wade*, thus returning the abortion question to the democratically elected branches of government, but who will find a constitutional “right to life,” even though the United States Constitution is silent on the question of abortion. The group vows to defeat one nominee who is on record as being personally pro-choice and launches an attack against another nominee who, as a state court judge, upheld a law under which the state paid for abortions for poor women. In this example, the hypothetical conservative group has rejected judicial restraint in favor of judicial activism. Like the feminist group, the conservative group rejects the notion that a judge can put his personal opinions regarding abortion aside in ruling on a matter involving that issue. And, like the feminist group, it promotes judicial activism by supporting only those judges who will legislate a certain political position from the bench.

In these examples, both groups are supporters of judicial activism, even though they seek to use that activism for different ends. And both seek to apply (different) political litmus tests to federal judicial nominees. Although the above are just hypothetical examples, there are in fact many special interest groups which lack confidence in their ability to win at the ballot box, and are thus willing to undermine the integrity of the judicial process by supporting the nomination and confirmation of only those judges who agree with the group’s political agenda and who are willing to ignore the law and use the power of the judiciary to impose that agenda on the American people.

II. Federalism

A. “Federalism” Defined

Federalism is a theory of government embodied in the United States Constitution that refers to the apportionment of power between the national government and the states.

Our Founders believed that establishing competing governmental power centers would impose discipline on gov-

ernment at both levels and thereby help to preserve individual liberty. Accordingly, the framers of our Constitution created a federal government of limited powers: Under our Constitution, the federal (or national) government may exert only those powers that are expressly enumerated; all other powers are reserved to the states. Article I, Section 8 of the Constitution provides a list of the powers of the federal government. The Tenth Amendment to the Constitution states that, “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”

American federalism represents the normative determination that the powers of government should remain “few and defined” (James Madison, *Federalist* 45), so that no centralized authority can use its power to unduly limit American freedom. Federalism acts as a constraint on government—preventing the national bureaucracy from becoming all powerful, and preserving individual liberty by keeping government power close to the people. As Chief Justice of the United States William H. Rehnquist has explained, one of the first principles of our constitutional republic is that the national government is a government of limited power. As such, the “Constitution requires a distinction between what is truly national and what is truly local.”⁴ This is the essence of our federal system.

In one sense, then, federalism (like judicial restraint) is about political legitimacy. It is about demonstrating respect for the rule of law by conducting the business of government in accordance with the framework established in the United States Constitution. And it is about keeping the power to resolve purely local concerns as close to the people affected by the decisions as possible.

But American federalism is about more than legitimacy: it is also about good government. As Justice Louis Brandeis famously noted more than seventy years ago, “It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”⁵ In other words, by allowing states to experiment with different solutions to social problems, we can view the comparative costs and benefits of each state’s approach to particular issues before deciding whether a national solution is warranted or what form a national solution might take.

Our federal system not only allows states to serve as “laboratories of democracy,” it fosters competitive enterprise.⁶ Under our constitutional regime, states must compete for citizens and businesses in a way that causes each to try and maximize the returns. As Michael Greve of the American Enterprise Institute has noted, the variations in the “regulatory packages” offered by different states create options for both the citizens and businesses, both of which can vote with their feet if they do not like the public policies offered by the state where they are currently located.⁷ This competition between states for citizens and businesses acts as a check on state power—it makes government more responsible and, indeed, more responsive to the concerns of the public.⁸

As Greve explains, federalism helps to reduce government’s inefficiencies and spur public policy innovation, while at the same time allowing our large and complex nation to “manage our differences—on economic and especially social issues—in a sensible manner.”⁹

B. Federalism’s New Critics

The propositions outlined above are not especially controversial—indeed, they are the stuff of basic texts on U.S. government. Unfortunately, however, “federalism” has recently become a term that some activists use with hostility and contempt.

Federalism’s new critics charge that the theoretical bases for federalism fail to consider the actual “real world” consequences of the doctrine.¹⁰ They note, accurately, that in invoking basic principles of federalism, the U.S. Supreme Court has recently invalidated federal laws prohibiting guns near schools¹¹ and laws aimed at protecting women from domestic violence.¹² The new critics of federalism claim that such decisions represent a concerted effort to “imperil” civil rights, and they describe a parade of horrors that will befall America if federal courts continue to adhere to federalist principles.¹³ Yet even a brief look at some of the cases complained of by the opponents of federalism reveal such claims to be hollow.

- *United State v. Morrison* (2000)¹⁴—In *Morrison*, the Supreme Court struck down as unconstitutional a provision of the Violence Against Women Act (VAWA) which provided a federal civil remedy to victims of domestic abuse. The case stemmed from a lawsuit filed in 1996 by a female college student against her school and two male students over an incident that allegedly had occurred in the male students’ dormitory room in September 1994. In rejecting the student’s claim, the Supreme Court held that Congress lacks authority under the Commerce Clause of the U.S. Constitution to regulate conduct that is neither “interstate” nor “commerce.” The Court reasoned that, while domestic violence might have an economic impact, such crimes do not substantially affect interstate commerce so as to fall within the regulatory power bestowed on Congress by the Constitution. The Court rejected plaintiff’s argument that the aggregate, long-term, economic affect of crime on interstate commerce made VAWA a valid exercise of Congressional power. And with good reason. Had the Court accepted such an argument, it would have given Congress the green light to regulate any and all areas of American life—for surely any activity, when aggregated, can be said to affect interstate commerce. Upholding the civil remedy portion of VAWA would have eliminated all limits on federal power and intruded upon traditional state prerogative: the regulation of local crime. The Court also found no constitutional authority for VAWA in Section 5 of the Fourteenth Amendment of the U.S. Constitution, because the statute sought to regulate purely private conduct, and not the state action contemplated by that Amendment.

- *United States v. Lopez* (1995)¹⁵—*Lopez* involved a chal-

lenge to the Gun-Free School Zones Act of 1990, which made it a federal crime to possess a gun within 1,000 feet of a school. The Supreme Court invalidated the law, holding that “the Act exceeds the authority of Congress ‘to regulate Commerce... among the several States.’”¹⁶ Writing for the Court, Chief Justice William H. Rehnquist stated that the decision was grounded in the constitutional “first principle” of enumerated powers. The law in question exceeded those powers because it “neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce.”¹⁷

Contrary to outraged criticisms by some liberal and feminist special interest groups, the *Morrison* and *Lopez* decisions were not defeats for victims of crime. Local crimes, of the sort Congress addressed in the statutes described above, are, by definition, inherently local problems, which state officials prosecute day in and day out. Victims of crime have available to them a variety of state civil and criminal remedies, none of which were eliminated or eviscerated by the cases at issue here, and there is simply no credible evidence that the states lack the will or the institutional competence to address these social ills. Considered in context, then, *Morrison* and *Lopez* represent, not a threat to civil rights, but rather important victories for the principles of institutional legitimacy and limited government.

C. Do the Supreme Court’s Federalism Decisions Undermine the Principle of Judicial Restraint?

Federalism’s new critics are fond of arguing that the Supreme Court’s recent federalism decisions represent a departure from accepted constitutional jurisprudence and that such decisions are examples of judicial over-reaching, of judicial activism at its worst. For example, Simon Lazarus has recently argued that “a new constitutional philosophy has attracted numerous adherents on the political right In the name of an elaborate if quirky theory of ‘federalism,’ this group targets the [power of] Congress itself.”¹⁸ Likewise, an article on the website of the NOW Legal Defense and Education Fund equates federalism with “unprecedented judicial activism.”¹⁹ As explained previously, however, this critique confuses the concepts of judicial activism with that of judicial review.

“Judicial review”—that is, the power of federal courts to review laws to determine their consistency with the United States Constitution—is an essential element of our constitutional order. Under our constitutional system, courts are required to police the boundaries established by the Constitution. As Alexander Hamilton explained in the *Federalist Papers*, the “courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments” (*Federalist* 78). The Supreme Court of the United States is the ultimate authority on the constitutionality of Congressional acts.²⁰

Federalism is not a made up theory, but one that is deeply enshrined in our Constitution. When courts act to enforce the structural provisions of our Constitution, they

are exercising the power of judicial review and, in so doing, are acting as a check on the legislative branch. Federal courts may properly invalidate a law, or portion of a law, which conflicts with express constitutional provisions, or which the court concludes Congress lacked the constitutional authority to enact. This is not “judicial activism.” To the contrary, the act of invalidating an unconstitutional law represents respect for the existing constitutional order. Courts only act outside the scope of their authority (and, thus, exhibit “judicial activism”) when they create new rights out of whole cloth or invalidate a statute without a colorable basis in the text of the Constitution.²¹

Adherence to federalist principles is essential for at least two important reasons. First, if our Constitution is to mean anything at all, the boundaries between state and national power must be respected. If courts ignore the basic governmental structure enshrined in the Constitution, then there is certainly no reason for courts to respect the rest of text, including the Bill of Rights. Thus, courts must strive to adhere to federalist principles, not out of some nostalgic yearning for “states’ rights,” but in order to preserve the rule of law. As even Professor Laurence Tribe has acknowledged:

The issue is not whether federalism is a popular notion, or whether its proponents are in step with the zeitgeist, but whether principles of federalism are implicit in our national charter. If tacit postulates of federalism are indeed ingrained in the Constitution, courts are not free to dismiss them out of hand as ghosts or spirits in which no one any longer believes.²²

Second, as a substantive matter, federalism expands—rather than limits—American liberty. Although the Constitution and its amendments guarantee certain rights and freedoms (*e.g.*, freedom of the press, freedom of religion, the right to equal protection of the laws), it does not (indeed, cannot) anticipate and guarantee all conceivable liberties. State and local governments, however, are free to expand upon the liberties guaranteed by the federal Constitution and provide additional rights and guarantees to their citizens—rights for which there might not currently be, and indeed may never be, a national consensus.

For example, although the federal government does not guarantee the right to educational choice and opportunity, state and local governments are free to provide expanded educational choices through democratically enacted voucher programs. Likewise, state and local governments may—and, indeed, often do—enact civil rights laws that go well beyond the scope of federal protections. Thus, while the Equal Protection Clause of the U.S. Constitution has been interpreted as prohibiting discrimination on the basis of certain characteristics—primarily race, ancestry, and sex—many state and local governments extend such protections to other categories of citizens. The city of San Francisco, for example, has passed an ordinance prohibiting discrimination on the basis of weight and height.²³ Many state and local jurisdictions have passed laws prohibiting discrimination on the basis of sexual orientation.²⁴ In this way, federalism allows us to resolve complicated issues of social policy in ways that are

most consistent with local mores, while at the same time allowing us to experiment with expansions of liberty that may or may not stand the test of time.

It is simply untrue that federalism remains a code-word for a “pre-Civil War vision of states’ rights”²⁵ in which the national government would be rendered powerless to protect civil rights. The amendments to the United States Constitution passed in the aftermath of the Civil War and the laws enacted thereunder make this impossible. Although our Constitution may not (as certain activists would like) enshrine an ever-expanding notion of “civil rights,” it does empower the federal government to prohibit many forms of government-sponsored and private discrimination. Thus, contrary to critics’ claims that federalism is inconsistent with constitutional protections of civil rights, the more accurate reading of the Constitution, and the one which best preserves American liberty, is the one that harmonizes federalism and the post-Civil War amendments. This reading of our Constitution is the best way to preserve American freedom.

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The Alliance for Justice, through its Judicial Selection Project, has openly urged Senators to block qualified nominees on the basis of political ideology and judicial philosophy—particularly adherence to federalist principles. The NOW Legal Defense and Education Fund has launched a “Project on Federalism” which seeks to discredit any judicial nominee who is committed to preserving our federal system. And, along the same lines, the Democratically controlled Senate Judiciary Committee held hearings in June 2001 entitled “Should Ideology Matter? Judicial Nominations 2001.” The hearings, which were intended to establish a factual and theoretical predicate for opposing the President’s judicial nominees and to provide political cover for Senators who obstruct the confirmation process on the basis of ideology, featured the testimony of Marcia Greenberger of the National Women’s Law Center, who urged the Senate to reject judicial nominees who fail to demonstrate a “commitment on key [women’s] issues.”²⁷

Efforts by special interest groups to derail nominees committed to judicial restraint and federalism and to pack the courts with judges committed to a particular policy agenda do more than just imperil the operations of the federal courts and the rights of individual litigants. They imperil America’s system of representative self-government and undermine our existing constitutional order. In order to prevent any further erosion of our constitutional system, we must insist that judges resist the temptation to wield their judicial power for political ends. Appointing and confirming judges who subscribe to principles of federalism and judicial restraint are the best means of securing all of our liberties.

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Footnotes

1. See generally Alexander Bickel, *The Least Dangerous Branch* (1962) (explaining that judges should exercise the “passive virtues” of restraint and humility and must not impose their own values upon the people); John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980) (judges deciding constitutional cases should limit themselves to enforcing norms that are clearly stated or clearly implicit in the text).
2. See generally Bickel, *supra* note 1 (explaining that the counter-majoritarian impulses of the federal courts threaten the judiciary’s legitimacy).
3. *Coalition for Economic Equity v. Wilson*, 122 F.3d 692, (9th Cir.), cert. denied, 522 U.S. 963 (1997).
4. *United States v. Morrison*, 529 U.S. 598 (2000).
5. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).
6. See Michael S. Greve, “A Federalism Worth Fighting For: Conservatives Should Stop Getting Bugged Down in States’ Rights,” *The Weekly Standard* at 28 (January 29, 2001).
7. *Id.* at 28; see also Michael W. McConnell, “Federalism: Evaluating the Founders’ Design,” 54 *U. Chi. L. Rev.* 1484, 1503 (1987) (explaining that “oppression at the federal level is more dangerous [than oppression at the state or local level because] it is more difficult to escape. If a single state chose, for example, to prohibit divorce, couples seeking a divorce could move [or perhaps merely travel] to other states where their desires can be fulfilled. Oppressive measures at the state level are easier to avoid. Important recent examples of this phenomenon are the migration of homosexuals to cities like San Francisco, where they received official toleration, and the migration of individuals from Massachusetts to New Hampshire to escape high rates of taxation.”).
8. Greve, *supra* note 6; see also McConnell, *supra* note 7 at 1499 (arguing that “state and local governmental units will have greater opportunity and incentive [than will the national government] to pioneer useful changes. A consolidated national government has all the drawbacks of a monopoly: it stifles choice and lacks the goal of competition.”).
9. Greve, *supra* note 6.
10. See, e.g., NOW Legal Defense and Education Fund, “Project on Federalism: The Threat of Federalism,” available at www.nowldef.org/html/issues/fed/simple.htm (visited March 21, 2002) (hereinafter, “Project on Federalism”).
11. *United States v. Lopez*, 514 U.S. 549 (1995).
12. *United States v. Morrison*, 529 U.S. 598 (2000).
13. See e.g., Isabelle Katz Pinzler, “High Court’s Philosophy Imperils Women’s Rights,” *Women’s ENews*, (NOWLDEF, July 11, 2001), available at www.womensenews.com/article.cfm/dyn/aid/611/context/archive (visited July 30, 2002).
14. 529 U.S. 598 (2000).
15. 514 U.S. 549 (1995).
16. *Id.* at 551.
17. *Id.* at 552 & 551.
18. Simon Lazarus, “Don’t be Fooled. They’re Activists Too,” *The Washington Post* at B3 (June 3, 2001).
19. Project on Federalism, *supra* n. 10.
20. See *Marbury v. Madison*, 5 U.S. 137 (1803).
21. See generally Alexis de Toqueville, *Democracy in America* 96 (2000) (Harvey C. Mansfield and Delba Winthrop, eds.) (observing that “In the United States, the Constitution dominates legislators as it does plain citizens. It is therefore just that the courts obey the Constitution in preference to all laws.”).
22. Laurence H. Tribe, *American Constitutional Law* 400 (2d ed. 1988).
23. See “Jazzercise Settles Weight Bias Suit,” *Associated Press Online* (May 8, 2002) (describing the San Francisco ordinance and a lawsuit brought to enforce the law).
24. See e.g., Mass. Gen. L. ch. 151B (prohibiting Massachusetts employers from discriminating on the basis of sexual orientation).
25. See Project on Federalism, *supra* note 10 at 2.