Contemplating Brazilian Federalism: Reflections on the Promise of Liberty

Bruce A. Antkowiak

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I. INTRODUCTION

As someone for whom a trip “south” generally means an excursion across the West Virginia border, and as one whose next successfully articulated sentence in Portuguese would be his first, I was surprised and honored to have been asked by Professor Robert Barker to comment on the presentation made on Brazilian Federalism by perhaps the nation’s leading authority on the subject, Professor Keith S. Rosenn of the University of Miami. Reading Professor Rosenn’s brilliant piece on Brazilian Federalism humbled me even further since, while I am likely incapable of great law review writing, I am at least one who knows it when he sees it.

I thus approach the daunting task of commenting on Professor Rosenn’s article as I do so many things in this lately acquired career as a law professor: I accept it as a chance to learn by reflecting on the insights of one wiser than myself.

Professor Rosenn’s work on Brazilian federalism has the most wonderful effect of holding up a mirror from which we may reflect on our own concept of federalism and its ongoing importance in the jurisprudence of the United States Supreme Court. While issues of gay rights, free speech, and complexities of the right to trial by jury consistently grab headlines in the popular media coverage of the Supreme Court, I have a growing sense that the next ten years of Court opinions will most profoundly affect the contours of our understanding of the structural framework of our government particularly, but not exclusively, insofar as it relates to federalism.

In a few critical respects, Professor Rosenn’s analysis of Brazilian federalism allows us to draw a sharp contrast with our own at a time when such contrasting, and the insights it may yield, are of critical importance.
II. THE MIRROR OF THE BRAZILIAN MODEL

Brazilians have accepted federalism in an evidently practical effort to find a way to govern a nation of “enormous size and distinct regions with quite different traditions.”¹ The heritage of Brazilian federalism is one of reaction against the Portuguese Empire’s centralized control of the nation. Still, it appears not to be a complete rejection of the notion of centralization, perhaps paying homage not only to the remnants of monarchial control but also to the strong and ongoing influence of the Roman Catholic Church and to its own highly centralized unitary structure.²

The structure of Brazilian federalism is much more defined in the body of its Constitution than our form of federalism is in ours. Compared with the United States Constitution, the Brazilian document is enormous, specifying in multiple passages the powers of the central government as they are juxtaposed with those of the other components of the Brazilian federal model.³

Perhaps the most intriguing consequence of the depth, complexity, and specificity of the Brazilian Constitution is its effect on the role of the Brazilian courts in enforcing the principles of federalism delineated there. As Professor Rosenn has noted,

the Brazilian judiciary has not really served as the ultimate arbiter of the balance of power between the states and the national government. That balance has usually been determined by complex political negotiations among the executive, the state governors, and the state’s representatives in the national Congress.⁴

The role of the Courts in Brazilian federalism is directed more toward enforcing the equivalent of the Brazilian Supremacy Clause, with local ordinances and statutes commonly struck down when in conflict with federal legislation. But, as Professor Rosenn points out, what is absent in Brazil is “case law invalidating federal legislation for invading powers reserved to the states.”⁵ Unlike the United States, there is no Brazilian equivalent of the Eleventh Amendment to protect states’ sovereign immunity, and

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². Id. (manuscript at 3, 4).
³. Id. (manuscript at 8-11). The Constitution of the Federative Republic of Brazil, as amended through 1997, fills 211 pages in modest handbook form.
⁴. Id. (manuscript at 12).
⁵. Id. (manuscript at 13).
there appears to be no faction of Brazilian Supreme Court Justices "who have assumed the role of protecting states' rights from infringement by the federal legislation."6

In short, Brazilian federalism appears heavily weighted to creating a more efficient overall national government, one that can effectively manage a huge land mass filled with culturally diverse factions. Its goals are primarily those of political structure, insuring that national and local governments act in a synchronized manner to avoid a cacophony of conflicting political standards while avoiding a return to a monarchial system too geographically and politically distant from its diverse populace.

Given these goals, the principles and practices of federalism in Brazil are most logically left in the hands of those political actors whose negotiations over the contours of the system may regularly tweak it to achieve the political ends for which it was created. Courts may provide a reminder that the federal power is to be paid deference if the tweaking process fails, but the courts are not parties in that negotiation.

The purpose of federalism thus dictates the nature of this part of the judicial function. This principle is not only true in the great nation of Brazil. The role our courts play is fundamentally dictated by our perception of what good federalism is supposed to achieve for us. As I hope to show, that role is more than a hemisphere apart from the one played by the judicial branch of the former crown jewel of the Portuguese empire.

So, our initial questions are as follows: Why did we adopt federalism? Is the Supreme Court's role as the principle enforcer of those federalist principles consistent with that purpose? The answer to these questions is worth a moment's reflection. We first need, however, to spend a minute understanding our brand of federalism and appreciating why we proclaim to love it so.

III. WHAT WE SEE IN THE BRAZILIAN MIRROR: WE DO LOVE OUR FEDERALISM

We certainly think we had a great reason for settling on federalism as a governmental structure. We extol it. We revel in it. We wear it as a dowager wears her heirloom broach, an act not only of family pride, but a bold assertion that it does indeed enhance

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6. Rosenn, supra note 2 (manuscript at 14).
whatever outfit we are gracing it with at the moment, even if outside observers seem to question our taste in accessories.

We see federalism as arising as part of the core act of genius of the Constitutional scheme. Madison led the chorus of these cheers in Federalist Paper No. 39. The Framers, he said, were not satisfied with simply adopting a republican form of government but also sought a national government through a union (a consolidation) of the states, an act of “bold and radical innovation” that required him to posit under what authority “this was undertaken.’’7 The answer was simple but profound for an Enlightenment thinker: this innovation came from the people acting through their delegates in the states, making the establishment of federalism itself not “a national but a federal act.”8 We acted federally, it seems, even before we were born.

We have perceived our “bold and radical innovation” as a form of federalism unique unto itself, part of an American DNA.

In Younger v. Harris,9 Justice Black argued for federal restraint from interference with state court prosecutions out of the notion of comity, a notion predicated on fundamental federalist principles.10 He observed “that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways,” the essence of what he called “Our Federalism.”11 He conceived of “Our Federalism” as a system in which there was a “sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States.”12 The notion of “Our Federalism” was, he said, one that occupied “a highly important place in our Nation’s history and its future” and deserved our dedicated efforts.13

8. Id. The Anti-federalists, in The Letters from the Federal Farmer, also praised this federal notion as “the only one that can secure the freedom and happiness of this people.” Id. at 269.
10. Younger, 401 U.S. at 44.
11. Id.
12. Id.
13. Id. at 45. Justice Scalia has expressed considerable nationalistic pride in our form of federalism. In Printz v. United States, 521 U.S. 898 (1997), in chastising Justice Breyer for asking the court to consider the federal systems of the European union, Justice Scalia found such a comparative analysis inappropriate to the task of interpreting a constitution,
The Court took time in *United States Terms Limits v. Thornton*\(^\text{14}\) to discuss many of the features of that brand of federalism that we declare to be our own. Writing for the majority, Justice Stevens declared the character of the government that the Framers conceived to be "revolutionary,"\(^\text{15}\) one that, unlike the one created under the Articles of Confederation, did not simply form an alliance of otherwise autonomous state entities. Rather, the new National Government was one that forged "a direct link between the National Government and the people of the United States."\(^\text{16}\) Those who would serve as representatives to that national government owed their "primary allegiance not to the people of a State, but to the people of the Nation."\(^\text{17}\) Those representatives had specific duties to perform, duties the states could not usurp.\(^\text{18}\) In many ways, the two governments were free standing entities, with the space between them intentionally left a tense battleground.

In concurrence, Justice Kennedy was poetic about the nature of the national government and its origins in the doctrine of federalism. He stated,

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. The resulting Constitution created a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it. It is appropriate to recall these origins, which instruct us as to the nature of the two different governments created and confirmed by the Constitution.\(^\text{19}\)

though it was of course quite relevant to the task of writing one.\(^\text{10}\) *Printz,* 521 U.S. at 921, n 11. In the final analysis, he concluded, "Our federalism is not Europe's,"\(^\text{11}\) it is rather uniquely our own. *Id.*

16. *Id.*
17. *Id.*
18. *Id.* at 806.
19. *Id.* at 838-39 (Kennedy, J. concurring).
Each government looked to the people as the common source of their legitimacy. They were admonished by their common source, however, to respect their respective spheres of authority:

That the states may not invade the sphere of federal sovereignty is as incontestable, in my view as the corollary proposition that the Federal Government must be held within the boundaries of its own power when it intrudes upon matters reserved to the States.

We citizens enjoy the dual citizenship of state and nation, something necessary to maintain a respect for the republican origin of the nation and preserve its federal character.

By our own declaration, then, "Our Federalism" is a grand innovation. But so also, of course, was the "New Coke" and the Edsel. Why did we choose to use this radical innovation of government structure, and have its results merited the praise we have lavished upon it?

At first blush, it hardly seems like the most efficient way to run a railroad or a country. The Brazilian brand of federalism is oriented to the practical concerns of governing a huge and widely diverse population over a land mass that would make complete central control difficult at best. The America of 1787 would have presented at least some of the same factual bases for the institution of a federal system as did Brazil, particularly in terms of religious diversity of population and a land mass that would make central control difficult.

But America did not come to federalism from a priori state of monarchy. We had state governments and a system trying to function under the Articles of Confederation. That system was creaking, however, and it became clear that something of a stronger national government, one broader based, was necessary.

A national government with local offices in various regions could have theoretically done the job of governing the nation with efficiency and a degree of uniformity consistent with what some may consider good business management techniques. However,

20. U.S. Term Limits, 514 U.S. at 841. Even in dissent, Justice Thomas declared that the overriding principle of our government is that "[a]ll power stems from the consent of the people." Id. at 846. Where his analysis diverged, was that the consent of the people was, in his view not given as the "consent of the undifferentiated people of the nation as a whole" but as the consent of the people of each state, acting as a state. Id. at 846. He admonished the majority to remember the warning of Chief Justice Marshall in McCulloch v. Maryland, 17 U.S. 316 (1819), that no political scientist or "dreamer" should ever engage in thoughts so wild as "to think of breaking down the lines which separate the states, and of compounding the American people into one common mass." Id. at 849.
we chose a federal system, in which that atom of sovereignty was
split and two governments were formed. Presumably, as in the
splitting of any atom, we would expect that a considerable degree
of energy we could harness for a positive use would occur. To
what end did we seek to put that energy?

IV. WHY WE CHOSE FEDERALISM

Overall, what we have consistently said about federalism in the
United States is that its principle function is the protection of in-
dividual liberty -- protection, that is, from the very government(s)
a federal system creates. This being its raison d'etre, courts cannot
play the role of sideline observers to political negotiations involv-
ing the more active political players. They must play an active
role in enforcing federalism. Leaving federalism in the hands of
the legislatures and executive officials would be to entrust to those
who we fear may usurp the liberty we seek the protection of the
very device we have created to deter that usurpation.

What the evidence I will set forth below suggests is that the
American experience with federalism proceeded from an attempt
to delicately improve upon, but not reject, an a priori system in
which individual states existed, had considerable political author-
ity, and enjoyed the popular support of at least their free citizens.
When an initial attempt to confederate those states proved un-
workable, however, and it was clear that a central government
was needed to do more than the Articles of Confederation allowed,
the specter of the return of an American George III haunted the
calls for reform.

When the nation sat down to write the rules for its new national
government, fears of tyranny were palpable. The a priori system
had its flaws, but those flaws did not include rule by divine right.
So, while, on the one hand, it appeared necessary for those who
would create a new life form of a national government to set loose
on the world a more powerful creature, the lessons of Dr. Frank-
enstein (as much as those of John Locke) had to be recalled. In
constructing the beast, some internal mechanisms needed to be
installed to insure that at some point the beast did not turn
around and enslave its master.

The history of our political and judicial thinking on these sub-
jects is replete with direct statements that separation of powers
and federalism were the two internal mechanisms built into the
newly created national government for this purpose. Far from be-
ing devices to improve that government's efficiency, they were
meant to operate as checks upon it in the service of the preservation of the individual liberty of the people whose consent brought that government about.

Madison's Federalist Paper #51 is the clearest articulation of this principle in the literature at the time. Were we to be governed by angels, he observed, "neither external nor internal controuls on government would be necessary." But angels almost never run for public office. The stuff of government was all too human and, thus, the creature under construction would have a less than angelic nature. In creating the Frankenstein monster of government to "controul the governed," then, it was necessary at the same moment for the creators to oblige that monster to control itself.

Relying on the people who would be the government to restrain themselves was never going to work. A plan with certain "auxiliary precautions" was necessary, and it was in federalism that one of those precautions was to be found.

Madison's view was as follows:

In the compound republic of America, the power surrendered by the people, is first divided between two distinct governments, and then the portion allotted to each, is subdivided among distinct and separate departments. Hence a double security arises to rights of the people. The different governments will controul each other; at the same time that each will be controulled by itself.

Controlling governments by governments would operate in a uniquely positive way in the American experiment to free the people from tyrants and, as Madison saw it, from each other. The system created would not simply guard against the coming of the despot, but it would guard "one part of the society against the injustice of the other part." The breaking down of the American political structure into many parts, even though each of those parts would look to its legitimacy from the common source of the body of the people, would deter an overarching majority from imposing their will on the rights of individuals or minority groups. In this sense, federalism would embrace the notion of a pluralistic

21. ORIGINS, supra note 8, at 203.
22. Id.
23. Id. 204-05.
24. Id. at 205.
society. It would establish a system in which minorities would find places to flourish and, by their healthy survival, stand as ready deterrents to a tyrannical majority otherwise facilitated by its ability to dominate a unitary system of government.

In the extended republic of the United States, and among the great variety of interests, parties and sects which it embraces, a coalition of a majority of the whole society could seldom take place on any other principles than those of justice and the general good; and their being thus less danger to a minor from the will of the major party, there must be less pretext also, to provide for the security of the former, by introducing into the government a will not dependent on the latter; or in other words, a will independent of the society itself.25

Federalism would invite diversity; diversity would promote the idea that when consensus was achieved, it would be achieved only on those matters upon which each individual and each group had, at least at minimum, a level of political comfort.26

The courts have consistently echoed Madison’s view that the fundamental benefit of federalism is not simply the achievement of some interesting structural nuance which sets us apart from other nations, but the protection of individual liberties. A selection of these opinions will make the point adequately.

In his dissenting opinion in Garcia v. San Antonio Metropolitan Authority,27 Justice Powell bemoaned the majority’s diminishment of the importance of the Tenth Amendment as an action that threatened to “substantially” alter “the federal system embodied in the Constitution.”28 More specifically, he argued:

A unique feature of the United States is the federal system of government guaranteed by the Constitution and implicit in the very name of our country. Despite some genuflecting in the Court’s opinion to the concept of federalism, today’s decision effectively reduces the Tenth Amendment to meaningless rhetoric when Congress acts pursuant to the Commerce Clause.29

Reducing the Tenth Amendment was tantamount to ignoring federalism, something he pegged as a structural guarantee of in-

25. Id. at 206.
26. ORIGINS, supra note 8, at 206. It is perhaps in the same spirit that Jay wrote in Federalist #2 that the type of national government wisely framed was one that would appeal to those intelligent people who were no less attached to the union, than enamored of liberty. Id. at 132.
29. Id. at 560.
individual rights evident from the composition of the Constitution itself.

Powell points out a feature of the Tenth Amendment that is sometimes lost on the casual student, who considers it only in the context of those sections of his or her Constitutional Law course dealing with the always scintillating topics of congressional power to tax, spend, and regulate commerce.

In fact, the Tenth Amendment is one of the Bill of Rights, the nine preceding articles of which either delineate the ways in which government may not intrude into our lives or remind the reader that that delineation was not meant to be exhaustive. The Tenth Amendment is an article wholly germane to the principle purpose of the Bill of Rights. It was one of the provisions that was insisted upon, as Justice Powell points out, by those whose vote for ratification of the Constitution hinged upon the obtaining of a guarantee that the national government would not become too powerful and render civil liberties meaningless. Indeed, “eight states voted for the Constitution only after proposing amendments to be adopted after ratification,” and each of those eight proposals included “a provision reserving powers to the States.” The Tenth Amendment thus plays an “integral role . . . in our Constitutional theory,” to wit:

The Framers believed that the separate sphere of sovereignty reserved to the States would ensure that the States would serve as an effective ‘counterpoise’ to the power of the Federal Government. The States would serve this essential role because they would attract and retain the loyalty of their citizens. The roots of such loyalty, the Founders thought, were found in the objects peculiar to state government. 34

To disregard that separate sphere of sovereignty and to make those objects not so peculiar to the state governments would, in Powell’s argument, result in problems that were “not simply a matter of dollars and cents”:35

Rather, by usurping functions traditionally performed by the States, federal overreaching under the Commerce Clause undermines the constitutionally mandated balance of power between

30. Id. at 568.
31. Id. at 569.
32. Id.
33. Garcia, 469 U.S. at 570 (Powell, J., dissenting).
34. Id. at 571.
35. Id. at 572.
the States and the Federal Government, a balance designed to protect our fundamental liberties."\(^{36}\)

Powell’s argument is that the Tenth Amendment seeks to do indirectly what the other articles of the Bill of Rights seek to do directly. All are meant to protect personal liberty, but the Tenth achieves its level of protection not by drawing external boundaries around government power but by internally crippling the government's ability to spread the wings of its authority over that province of human choices individuals reserve to themselves.

Justice O'Connor made the same point in non-Tenth Amendment terms in *Gregory v. Ashcroft*.\(^{37}\) There, she provided us with perhaps the most concise listing of the advantages of federalism that our political theory seeks to grant us.

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.\(^{38}\)

But putting all of these benefits to one side, Justice O'Connor recognizes that “the principle benefit of the federalist system is a check on abuses of government power.”\(^{39}\) Quoting from Justice Powell in his *Garcia* dissent, Justice O'Connor agrees that federalism, much like separation of powers, serves “to prevent the accumulation of excessive power [so as to] . . . reduce the risk of tyranny and abuse.”\(^{40}\) While she wonders whether the federalist system “has been quite as successful in checking government abuse” as our founders promised, “there is no doubt about the design.”\(^{41}\) To provide Madison’s “double security” to the rights of the people, each of dual sovereigns must maintain political credibility since it is “in the tension between federal and state power” that “lies the promise of liberty.”\(^{42}\)

\(^{36}\) Id. (emphasis added).


\(^{38}\) *Gregory*, 501 U.S. at 458.

\(^{39}\) Id.

\(^{40}\) Id.

\(^{41}\) Id. at 459.

\(^{42}\) Id. at 459. Both the majority and the dissenters in *New York v. United States*, 505 U.S. 144 (1992), agreed with this proposition. Again writing for the majority, Justice O'Connor quoted herself in the *Gregory* opinion by simply noting that the benefits of federal structure and the assertion that the Tenth Amendment sought to recognize them had been “extensively cataloged elsewhere” and Justice White, dissenting in *New York v. United
Justice Scalia was explicit in *Printz v. United States*, when he deemed “this separation of the two spheres” of governmental authority as “one of the Constitution’s structural protections of liberty.”

Echoing sentiments expressed in the *New York* case, Scalia reiterated that federalism is institutionalized for the reasons most things are institutionalized -- to represent an ongoing judgment about the proper way in which issues are to be decided and difficult matters are to be resolved, so that in times that we are tempted to concentrate power in one location to deal with the exigency of the moment, we will find that the Constitution “protects us from our own best intentions.”

Justice Thomas was similarly blunt in his assessment of the need for federalism in *Federal Maritime Commission v. South Carolina State Ports Authority*, where he observed that while dual sovereignty is hardly “a model of administrative convenience,” its purpose is surely otherwise.

Echoing the sentiments of both the *Gregory* opinion and Justice Powell’s dissent in *Garcia*, Justice Thomas held that an effort by the Court to guard against “encroachments by the Federal Government on fundamental aspects of state sovereignty” is simply an effort to reduce the risk of either government achieving the status of tyrant.

So, the federalist system may indeed portend a variety of collateral, good-government benefits, not the least of which is the encouragement of experimentation and innovation through the establishment of multiple governing crucibles scattered about the nation.

But we did not choose federalism for efficiency’s sake. We chose it, first and foremost, as an act of sublime irony: we created more governments than we seemed to need in order to limit the governments we figured we needed to have. We needed to be governed, but we were paranoid about being oppressed.

*States,* agreed that “the entire structure of our federal Constitutional government can be traced to an interest in establishing checks and balances to prevent the exercise of tyranny against individuals.” *Id.* at 206 (White, J., dissenting).

44. *Printz*, 521 U.S. at 921.
45. *Id.* at 933.
47. *Id.* at 769.
48. *Id.*
49. This notion is certainly envisioned by Justice O’Connor’s rendering in *Gregory v. Ashcroft*, *supra* at note 37, as well as notions reflected in Justice Kennedy’s concurrence in *Lopez v. United States*, 514 U.S. 549, 583 (1995) and the majority opinion in *Garcia*, 468 U.S. at 546 (in which the Court indicates that the states may serve as laboratories for social and economic experiment†).
V. THE NECESSARY ROLE OF THE COURTS

If this true, if this is in fact the underlying theory of why we chose federalism, it is not surprising that our courts are called upon to play a much greater role in enforcing it than the courts of the great nation of Brazil. One of those truths that are self evident is that if one is structuring a governmental system to try to keep the main political players (the executive and legislature) from invading that province of individual choices that individuals have left for themselves, it will be necessary for some other branch of government to be the effective tool of that enforcement. As we have yet to dream up an effective fourth branch of government to do the job, it is obvious that it is to the judiciary that the task must fall to enforce those provisions of individual liberty which our Bill of Rights both explicitly and implicitly seek to preserve.

Accordingly, while there has been some back and forth in the Supreme Court on the essence of the notion, the Supreme Court has now firmly established that it must take a proactive role in enforcing the principles of federalism in the name of the protection of individual liberties. Just as it cannot escape the demands of provisions of the Bill of Rights that specify conduct protected from governmental intrusion, the Court has concluded that the principles of federalism (whether in the form of the Tenth Amendment or otherwise) equally compel it to provide protection for conduct that the structure of our government also places outside the reach of political entities.

Federalism has motivated the Court to act in a variety of contexts, as shown below.

A. Limiting Congress’ Power Under the Commerce Clause

While numerous cases could be discussed to illustrate the Court’s role in defining Congress’ power under the commerce clause, for purposes of this brief note, reference to *Lopez v. United States* is all that is necessary.50

In *Lopez*, the Supreme Court shocked a substantial portion of the Federal Criminal Defense Bar and, perhaps, many others everywhere, by striking down a federal statute that made it a crime to possess a gun in a school zone. Justice Rehnquist did not find that some external passage in the Constitution (such as the Tenth

Amendment) constrained congressional power to reach this activity; rather, he found that the commerce clause itself was insufficient to support this Act.

Among the "first principles" he invoked to demonstrate this insufficiency was the understanding that the Constitution delegates to the federal government powers that "are few and defined." In a theme borrowed from Gregory, this specific enumeration of a limited number of delegated powers was a device that served the goal of the protection of individual liberty. How this would operate to protect individual liberty was a matter at the heart of federalism. If the Court disregarded the principle that federal powers are few and defined, and continued its previous practice of allowing the expansion of commerce clause power by piling "inference upon inference" to support a connection between conduct regulated and commerce, such a process "would bid fair to convert congressional authority under the commerce clause to a general police power of the sort retained by the states." Unchecked expansion of such power by inference would, in the Chief Justice's view, force the Court ultimately to conclude that the Constitution's process of enumerating powers was a pointless exercise, leaving what is truly national and what is truly local to nothing more than the whim of Congress.

Someone within the system would have to forestall such a development in the name of the protection of individual liberty that federalism promised. Justice Rehnquist announced that it was the Court that would fulfill that role. Allowing the line between the national and the local to be blurred was something "we are unwilling to do."

Justice Kennedy, concurring in Lopez, made an even more forceful argument for the Court's intervention. While expressing the view that the Court should not readily reject established commerce clause jurisprudence, Kennedy cautioned that the Court should not deem itself lacking in the authority and responsibility "to review congressional attempts to alter the federal balance." Federalism, he said, was a critical, significant structural feature of the Constitutional system, one of importance equal to others like

51. Lopez, 514 U.S. at 551 (quoting THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961)).
52. Gregory, 501 U.S. at 458.
53. Lopez, 514 U.S. at 567 (Kennedy, J., Concurring).
54. Id. at 568.
55. Id. at 574.
56. Id. at 575.
separation of powers, and, just as the Court developed ways to enforce the other principles, Kennedy was confident that the Court could effectively enforce federalism through its normal processes.\(^{57}\)

It is in his concurrence that Kennedy extolled federalism as "the unique contribution of the framers to political science and political theory."\(^{58}\) He found that federalism was a counter-intuitive concept, involving the notion that freedom of individuals was more properly enhanced by "the creation of two governments, not one."\(^{59}\) Those two governments afforded the individual more liberty as long as there was a realization that two lines of "political accountability" exist for citizens, one to the federal government and one to the states.\(^{60}\) To blur those lines of accountability, to render the people unable truly to hold either house of their government answerable, is a circumstance, he believed, "more dangerous even than devolving too much authority to the remote central power."\(^{61}\)

In the first instance, Kennedy believed that the political branches of government have a distinct responsibility to ensure that those lines of accountability are kept open. He felt it "axiomatic" that Congress has substantial discretion and control over the system of federalism. Concurrent with that was the notion that the political branches have "the sworn obligation to preserve and protect the Constitution in maintaining the federal balance" and adopt this as a most grave responsibility "if democratic liberty and the federalism that secures it are to endure."\(^{62}\)

But, certainly, political branches cannot be entrusted fully with the maintenance of their own borders of power. In the "absence of structural mechanisms to require those officials to undertake this principle task, and the momentary political convenience often attendant upon their failure to do so," there lies the necessity for the Court to enforce the principles of federalism.\(^{63}\) Federalism is simply "too essential a part of our constitutional structure and plays too vital a role in securing freedom" for the Court to wash its hands of federalist concerns or to defer to the political branches the issue of where the lines of federalism should be drawn.\(^{64}\) The

\(^{57}\) Id.  
\(^{58}\) Id. at 575.  
\(^{59}\) Id. at 576.  
\(^{60}\) Id.  
\(^{61}\) Id. at 577.  
\(^{62}\) Id. at 578-79.  
\(^{63}\) Id. at 578-79.  
\(^{64}\) Id.
Court's obligation to enforce this critical device for the protection of individual liberties may be invoked reluctantly, but it must be invoked nonetheless.\(^6\)

\( B. \) **Resurrecting the Tenth Amendment**

Having already analogized the structure of our government to the monster of Dr. Frankenstein, the intelligent reader might suspect that I have exhausted the supply of horror movie references allotted to me for one law review article. In this, the intelligent reader would be wrong.

The Tenth Amendment is the vampire of the really great but really bad sequels of our youth. Whether played by immortals (I choose the term with specific intent) like Bella Lugosi or Christopher Lee, or by some lesser actor, great vampires and great vampire movies often had to come up with a device to allow the vampire to be resurrected after he had been killed at the end of the first movie. No sequel would be otherwise possible and plausible to those adept at suspending disbelief. The Tenth Amendment has had a similar history of being buried and resurrected, not by stakes through its heart or by being bathed in the light of day, but by the vagaries of the Supreme Court's interpretation of it.

Within the last thirty years or so, it has been resurrected, buried, and resurrected once again. In all respects, the resurrection and burial has been at the instance of a Court determined to define its own role with respect to enforcing the parameters of federalism.

In *National League of Cities v. Usery*,\(^6\) Justice Rehnquist pulled the wooden stake labeled “truism” from the Tenth Amendment’s heart that had been affixed there thirty-five years earlier by

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\(^6\) Justice Souter's dissent in *Lopez* frames the counter argument regarding the Court's role in these matters. He recited the notion that [had been extant] up until *Lopez* that when the Court reviewed congressional legislation under the commerce clause, it had generally deferred to what was sometimes a merely implicit congressional judgment that its regulation addresses a subject substantially affecting interstate commerce.\(^6\) *Lopez*, 514 U.S. at 603 (Souter, J., dissenting). As long as that judgment appeared to be within some reasonable boundary, the Court satisfied itself with simply determining whether the means chosen to implement that finding were otherwise prohibited by a specific portion of the Constitution. *Id.* Souter observed that for the 60 years prior to *Lopez*, the Court had never assumed that Congress was attempting to alter the relationship between state and federal governments and he argued [that as nothing] within the commerce clause mandated judicial activism and that nothing about the judiciary as an institution made it a superior source of policy on the subject Congress dealt with,\(^6\) there was not reason for the Court to re-enter that arena now. *Id.* at 611.

\(^6\) 426 U.S. 833 (1976).
United States v. Darby. While acknowledging that the Amendment may be but a statement of the obvious (that is, that power in a society lies somewhere, with the federal government, the states, or the people), it is a statement of enormous but less than obvious significance.

The National League Court saw the Tenth Amendment as a vital, active shield, carving out a protected sphere of "attributes of state sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." The Court's approach here differed markedly from its efforts in Lopez and cases of that ilk, where the Court sought to define the nature of Congressional power without necessary reference to other parts of the Constitution. The National League conception used the Tenth Amendment in a manner very similar to the way in which other Amendments in the Bill of Rights are utilized, that is, by recognizing that while Congress may have power from a provision in the body of the Constitution to do something, there are external limits on the reach of that power (or the method by which it is implemented) that the people have placed and want to be enforced. The Tenth Amendment did not limit Congress by way of the specific method it chose, but it did limit by way of the result achieved: if a quantum of state sovereignty necessary to the preservation of federalism was imperiled, the Court was bound to act.

Unfortunately for those who advocated this view, the means adopted by National League and its progeny proved unworkable. Indeed, it proved so unworkable that less than a decade later, the Supreme Court took the vampire that is the Tenth Amendment and cast it into the sunlight once more, reducing it to the hapless state of truism in Garcia.

The Garcia majority challenged the fundamental maxim that the courts were even capable of coming up with a conception of the Tenth Amendment that was sensible and rationally enforceable as a principle of federalism. Indeed, the majority ultimately con-

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67. 312 U.S. 100, 124 (1941).
69. Id. at 845.
70. See also, Morrison v. United States, 529 U.S. 598 (2000) and Jones v. United States, 529 U.S. 848 (2000) (additional cases in which the Court either stuck down or noted the limits of Congressional power under the commerce clause).
cluded that methodologies to limit the federal government’s ability
to interfere with state functions would have to be found some-
where else beside the Tenth Amendment. 71

But it found no such ready principle in any other specific prohi-
bition of the Constitution. And it proclaimed the hunt for one
pointless, since the thing to be protected, state sovereignty, was
an amorphous creature at best.

After all, state sovereignty was not, the Court held, a fixed and
definitive commodity which could be defined for all purposes and
all occasions. Rather, state sovereignty was a matter subject to
multiple qualifications and exceptions otherwise contained within
the Constitution,72 and it constantly changed shape over time. It
was not that state integrity was not important; it was simply that
it emerged not from Constitutional fiat but from the ebb and flow
of federal politics itself. The device for preserving that integrity
was one not found in the exact contours of Constitutional limita-
tions but rather “in the structure of the federal government itself,”
a procedural, not substantive protection.73

Federalism was principally a device for structuring the political
landscape, one in which the states were protected by simply being
represented within the same federal government that was the
states’ principle opponent in the fight for a finite quantum of po-
litical power. The Court saw the states as having “indirect influ-
ence over various branches of the federal executive and legislature
and, at least initially, a direct interest in the composition of the
United States Senate.”74 This conception of federalism spoke very
little of the idea that the underlying purpose of the doctrine was
the protection of individual liberty and focused more on its struc-
tural features in the ordering and organization of government.

In short, the Framers chose to rely on a federal system in
which special restraints on federal power over the states in-
hered principally in the workings of the National Government
itself, rather than in discrete limitations on the objects of fed-
eral authority. State sovereign interests, then, are more
properly protected by procedural safeguards inherent in the

71. Garcia, 469 U.S. at 547.
72. Id. at 551.
73. Id. at 550. It may be observed that this is a conception not dissimilar to Professor
Rosenn’s idea that Brazilian federalism is the product of a complex negotiation among
political entities there.
74. Id. at 551.
structure of the federal system than by judicially created limitations on federal power.\textsuperscript{75}

Limitations on federal power were to be ones “of process rather than one[s] of result,”\textsuperscript{76} with the Court essentially relegated to the role of an interested observer of how the political system would define its own contours.

While the \textit{Garcia} majority placed a great deal of faith in the political system to self-correct, its faith was not complete. In a tantalizing paragraph towards the end of the opinion, the Court equivocated somewhat by holding that the cases then before them “do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause.”\textsuperscript{77} The stake in the heart of the Tenth Amendment was not firmly fixed and the members of the majority seemed to anticipate that yet another sequel was in production. They were right.

Only seven years after placing its faith in the political process to preserve federalism, the Supreme Court got back into the business of judicial enforcement of federalism in \textit{New York v. United States}.\textsuperscript{78} Recognizing that some of its most difficult questions lie in the area of defining federal/state power, the Court nevertheless felt fully competent in deciding such a question where the issue was the federal government’s attempt to require the states to legislate under the threat of federal sanction.

The Tenth Amendment re-appears here as a tautology, but hardly a toothless one. The Court found that the Tenth Amendment “directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article 1 power.”\textsuperscript{79} While acknowledging that the political framework of the nation could remain flexible enough to permit significant changes in the balance of governmental responsibilities, the Court nonetheless felt that the Tenth Amendment was a mandate for it to draw specific lines between federal and state power to ensure that state legislatures were neither commandeered nor rendered “mere political subdivisions of the United States.”\textsuperscript{80}

\begin{itemize}
\item \textsuperscript{75} \textit{Id.} at 552.
\item \textsuperscript{76} \textit{Garcia}, 469 U.S. at 554.
\item \textsuperscript{77} \textit{Id.} at 556.
\item \textsuperscript{78} 505 U.S. 144 (1992).
\item \textsuperscript{79} \textit{New York}, 505 U.S. at 157.
\item \textsuperscript{80} \textit{Id.} at 188.
\end{itemize}
This principle also found voice in *Printz v. United States*, where the prohibition against commandeering was extended to state executive officials. Per Justice Scalia, the Court explicitly reasserted itself as a protector of liberties through a vigorous enforcement of the Tenth Amendment, an enforcement that the Court deemed necessary to uphold one of the Constitution's two structural protections of individual liberty.

Today, the vampire that is the Tenth Amendment is alive and well, a creature of power and significance, one that the Supreme Court is not afraid to unleash on a Congress it feels has gone too far.

C. Enforcing Federalism from Both Ends: The Dormant Commerce Clause

An extended discussion of this multi-layered area of the law is beyond the scope of this comment. Still, it is intriguing to note that the Court has adopted for itself a role of enforcing federalism not only by looking at Congress' power (either via its internal limits under the commerce clause or its external limits through the Tenth Amendment), but also by charting the border between the state and federal sovereignties from the perspective of the states. The Court has deemed itself competent to find that there are times when the states, through police power, have tread upon ground reserved for federal legislation, and, even where the federal government has not affirmatively asserted its claim to that ground, to banish the states from it.

The Court has developed a formulation for this inquiry that permits it to strike down a state statute after assessing whether the statute sought to regulate an area even handedly so as to effectuate a legitimate local interest, and where the effects of that regulation on interstate commerce were, on balance, not found to be clearly excessive in relation to the legitimate local interests and otherwise could not reasonably be achieved through means that would have a lesser impact on interstate commerce.

While some members of the Court would be happy to move away from this multi-layered consideration to one that would be even more favorable to the state's ability to legislate, consensus was

reached in 1976 on a profound development in the Supreme Court's enforcement of federalism in this mode that gave the states a freer hand to seize more of the unclaimed frontier of political power that lies at its border with the federal government. The market participant exception, however, first announced in Hughes v. Alexandra Scrap Corporation, has survived unlike the National League doctrine that was born in the same year.

In this area once more, the Court has not allowed the political players to fix the frontiers of their authority by mere political combat. The Court has asserted a Constitutional prerogative to draw those lines even after the political dust has settled.

D. The Ever-Elastic Eleventh Amendment

As Professor Rosenn points out, that Brazilian Constitution has no parallel to our Eleventh Amendment. Our Eleventh Amendment, as written, has only a passing parallel to the current meaning of the Eleventh Amendment as it operates within our Courts. While the superficial language of the Amendment would seem to indicate that it recognizes sovereign immunity only in cases where citizens of a foreign state have sued a state in federal court, the doctrine has substantially expanded to provide for protections of the state against suit by its own citizens in federal court, suits using federal causes of action not grounded upon the Fourteenth Amendment, and suits against the state in federal regulatory agencies.

While exceptions to the Eleventh Amendment's sovereign immunity recognition are not insignificant, the protection offered the states remains palpable. More to the point here, the Eleventh Amendment has provided the Court with yet another forum from which it may play the activist role it seeks to play in enforcing the doctrine of federalism.

86. See Reeves Inc. v. Stake, 447 U.S. 429 (1980), White v. Massachusetts Council of Construction Employers Inc., 460 U.S. 204 (1983), and South-Central Timber Development Inc. v. Wunnickle, 467 U.S. 82 (1984)(upholding the market participant exception but finding that the particular state action there was regulatory and not participatory).
87. See Rosenn, supra note 2 (manuscript at 10).
89. See 1,TRIBE, AMERICAN CONSTITUTIONAL LAW 534-47 (3rd ed. 2000).
VI. EVALUATING FEDERALISM: A PROMISE OF LIBERTY FULFILLED?

If, as I have tried to show, the Supreme Court identifies the protection of individual liberty as the great purpose of federalism, and itself as the prime protector that has, in many different ways, invalidated laws in the name of a federalist crusade, it is worth asking the simple question: how is it all working? In other words, what have we actually received from the device that promised us liberty?

I suppose the easiest way to perform such an appraisal is to consider the commodity the process is supposed to produce: individual freedom. But, as is often the case in the law (or, at least, law school) questions beget questions. What sort of freedom were we after when we picked federalism to achieve it? Freedom from something or someone? Freedom to do something? Freedom is not a one size fits all commodity, after all, and it behooves us to know what we are looking for before we ask if federalism has effectively produced it.

Perhaps speculating on what ways in which we wanted to be free is pointless and we should content ourselves with the text of the Constitution to provide the definitive list of freedoms we wished to place on the highest pedestal of the law. Tragically, beyond a certain point, such a definitive list eludes us.

Conceptually, the first eight Amendments list certain specific freedoms which the people wanted to take out of the political game, conduct and processes we proclaimed could not become bargaining chips in a political back and forth. Had we stopped here, our assessment of federalism could begin in earnest. We would be able to ask in what ways federalism allowed us more freedom to worship, speak, carry guns, and avoid the ever annoying occurrence of soldiers being quartered in our homes, and, having created an effective bar graph of effectiveness, declare the federalism experiment a success or failure.

But, of course, our Bill of Rights is not a closed-ended document. The Ninth Amendment, qualifying the purposes of the preceding eight, reminds us that, while we bothered to list certain rights in the first eight Amendments, we did not mean, by that act of listing, to imply that there was nothing else we wanted to have protected from governmental intrusion. There are more rights out there, we proclaimed, and government must take care not to disparage them.
Grafted onto this ominous but important bit of imprecision is the Tenth Amendment. What sort of freedom is the Tenth Amendment supposed to be protecting? Is it simply a back up provision to the first nine, or does it protect something more or different than the first nine tenths of the Bill of Rights to which it is attached?

The primary text of our Constitution not only proves elusive in guiding us as to what sort of freedom federalism sought to protect, it is downright confounding. For some sense of clarity in this, we need to take a brief flight outside the strict hallways of the law. Philosophy beckons.90

A. A Possible Methodology: Seeing Freedom as a Three-Dimensional Object

As Professor MacCallum has written, an attempt by political philosophers to characterize freedom as either negative (freedom from restriction) or positive (freedom to pursue aspirations) is a failed and ineffectual way of understanding its essential features.91 Indeed, he advises us against asking what he calls the “dreary and unadorned question of when are men free.”92

Men are never simply free, MacCallum argues, and trying to think of freedom just as the absence of restraint or as general liberation to engage in a broader range of human conduct fails to provide a unified analysis that the true nature of freedom demands. This unified analysis is formed in what he calls the triadic relation of variables that must be accounted for in every discussion of freedom. MacCallum's triadic forms the question of freedom in the following terms.

First, freedom is always freedom of an agent, that is, some person or group deemed to be the party whose level of freedom we will measure. Secondly, freedom is from something, that is, some impediment that is placed upon the agent. The third element of the triadic formula is that freedom allows the agent who otherwise faces the impediment to do something, that is, either perform some action or achieve a state of character. MacCallum's triadic

90. I am deeply indebted to my son, Christian Antkowiak, for his insight and research assistance in this portion of the article. His studies of political theory at Oxford and other venues have equipped him well to this purpose, as they will enhance his forthcoming studies of law.
92. Id. at 327.
formula translates into the question of whether “X is (is not) free from Y to do (not do become, not become) Z.”93

MacCallum’s advice to us on how we should evaluate the notion that federalism makes us free would be to consider the following:

Only when we determine what the men in question are free from, and what they are free to do or become, will we be in a position to estimate the value for human happiness and fulfillment of being free from that (whatever it is) to do the other thing (whatever it is). Only then will we be in a position to make rational evaluations of the relative merits of societies with regard to freedom.94

Applying MacCallum’s triadic formula to the Constitution produces interesting results. While it is fairly easy to look at the First Amendment and say that it, in part, relates that persons within the jurisdiction of the United States are to be free from government interference in the practice of their religion, the equation has much more interesting consequences when we pass from the First Amendment to the Tenth.

While the agent may be the same in this formulation, the nature of the impediment must change from government generally to the federal government more specifically. The really interesting problem, however, concerns the third part of the equation in terms of what action or state of character those agents are now free to do because of federalism. Does the Tenth Amendment operate simply to protect the freedoms specifically identified in the first eight Amendments? Does it only seek to protect the other specific freedoms which are referenced in but not identified by the Ninth Amendment? Or, does the Tenth Amendment deal with something else entirely, not a delineation or specification of identifiable “freedoms” at all? Does federalism have the important but less ambitious goal of securing nothing specifically but everything generally, that is, protecting us not from any particular deprivation of liberty but from the creation of a power broadly capable of that deprivation? Is the triadic equation of federalism that persons within the jurisdiction of the United States are free from the uncertainty and fear attendant to living under the arbitrary rule of a tyrant?

93. Id. at 314-20.
94. Id. at 329.
MacCallum’s thesis helps frame the question of the proper definition of freedom in federalism terms. Professor Pettit’s teachings may lead us to answer that question in the affirmative.

B. Federalism and Antipower

In his seminal article on the concept of freedom, “Freedom as Antipower,” Professor Phillip Pettit describes a kind of freedom that may be the objective our federalism seeks to achieve. Pettit argues that the modern conception of freedom is freedom from the actual influence of an outside force on our capacity to make choices about the course of our lives. The traditional notion of liberty, one he argues was extant in the writings of the American Revolutionaries, however, was something slightly, but importantly, different.

Pettit argues that the original idea of liberty was one bound up in the notion that whether or not one’s freedom was actually being interfered with at the time, true freedom lies in a system in which one was not at the mercy of another’s arbitrary capacity to influence the critical decisions of his or her life at any time. It is this conception of freedom that he calls “Antipower.”

Under the conception of freedom as antipower, I am free to the degree that no human being has the power to interfere with me; to the extent that no one else is my master, even if I lack the will or wisdom required for achieving self-mastery. The account is negative in leaving my own achievements out of the picture and focusing on eliminating a danger from others.

In an Antipower conception of liberty, the focus is “not just on the actual interference that [others] perpetrate;” it is, rather, on their capacity to do so in a system that leaves the individual powerless to resist the arbitrary imposition of the outside will.

Pettit defines subjugation or domination as occurring where a) the dominating agent (either a collective entity or another person) has actual capacity to interfere, b) has the capacity to interfere with impunity and at will, and c) has such capacity in regard to

96. Id. at 576.
97. Id. at 578.
98. Id.
certain choices that the other person is otherwise in a position to make. The actual capacity to interfere may arise from the threat of punishment or other physical force and is typified by an attempt to worsen the situation of choice that the agent would otherwise enjoy. It can occur by either limiting the range of options that the agent may otherwise choose or by changing the outcomes or payoffs that the agent can hope to achieve by making those choices. Pettit describes this capacity to act with impunity and at will as one which occurs where the dominating party can act without penalty and the dominated person can neither assert himself individually in response nor petition a central body to punish the interferences that might occur.

The converse of his view is also enlightening. For Pettit, evidence that one person (or a collective entity) has interfered with another is not proof of domination at all. Rather, interference can occur under a Constitutional authority that does not carry with it the features of arbitrary and at will imposition that are typical of the state of subjugation. It is, however, when the power of such imposition exists that people are not free and Pettit addresses how it is that our society may structure itself so is to avoid that circumstance of oppression.

Petit argues that the elimination of subjugation and the institution of a system of antipower cannot be achieved simply by distributing arbitrary power among various groups. To defeat the conditions under which people are subjugated, he believes that persons must be able to command non-interference from others. This could be accomplished by taking from the powerful the resources they have to wield their power or by giving to the weak additional resources to balance the power equation. A third way, that which he advocates to be the most effective is to consider the introduction of protective, regulatory, and empowering institutions. I do not say that every institution will necessarily increase antipower, of course; some may have indirect, counter production effects, and empirical work will be required to determine which mix of institutions does best. I say only that protective, regulatory, and empowering institutions represent the sorts of options

99. Id.
100. Freedom as Antipower, supra note 96 at 579-580.
101. Id. at 585-86.
102. Id. at 588.
103. Id. at 589.
that we ought to be considering if we are interested in the promotion of antipower in a society.\textsuperscript{104}

These "protective institutions" represent for Pettit "the most salient possibility" to promote antipower and reduce the institutions of subjugation he believes are the antithesis of liberty. These institutions "will serve to reduce the exposure of minorities to majority will," they will operate with a goal of the protection of individual liberty.

The protection of the individual is mainly ensured in our society by the institutions of a non-threatening defense system and non-volunteeristic rule of law. The non-volunteeristic regimen of law - a common law dispensation or a Constitutionally governed one - will involve law that cannot be changed in certain respects at the will of any majority, even a parliamentary majority; in this way it will serve to reduce the exposure of minorities to majority will.\textsuperscript{105}

Pettit seems to be referring directly (if not indirectly) to the notion of federalism. Indeed, he argues that the American colonists saw freedom as antipower, believing that the British government, however benign a dictatorship it may have been, was a dictatorship nonetheless; the solution for such a dictatorship was to make government subject "to proper, Constitutional control; the sort of control that guards against arbitrary power."\textsuperscript{106}

Freedom as antipower \ldots requires a specific sort of law and polity in which the powers that be are denied possibilities of arbitrary interference, and if it is to be a universally enjoyed ideal, it requires a tension to the patterns of domination associated with such context as marriage and workplace.\textsuperscript{107}

If Pettit is right that the Framers shared his conception of the meaning of freedom as antipower, then we should be satisfied to know that the system of federalism is working if it operates to give the individual the chance to assert a challenge to governmental authority that will have a realistic chance of success. That chance will be determined by something other than the whim of the authority so challenged, and be susceptible of enforcement against that central authority by an entity with sufficient authority to balance the power relationship between the individual and the

\textsuperscript{104} Id. at 590.
\textsuperscript{105} Freedom as Antipower, supra note 96 at 590.
\textsuperscript{106} Id. at 600.
\textsuperscript{107} Id. at 602.
government. That chance, in terms of federalism in America, requires an activist court that will, on occasion, sustain attacks on statutes by citizens invoking various devices like the Tenth Amendment, the dormant commerce clause, and the others we have previously discussed.

Indeed, Pettit argues that a way in which antipower can be realized in a society is if it is promoted by measures that have been devised for the very purpose of limiting the resources of those in power to wield arbitrary authority and, conversely, to give to the otherwise powerless the opportunity to invoke effective challenge against their rulers. These devices are the "rule of law constraints that guard against legislative oppression, for example, and by requirements of regular election, democratic discussion, limitation of tenure, rotation of office, separation of powers, availability of appeal and review, provision of information, and the like." He could have added federalism and all of the mechanisms the Supreme Court has fashioned to enforce it. He could have quoted Justice Kennedy in *Lopez* and pointed out that in these ways the people would be able to keep open and clear the lines of political accountability necessary to their freedom.

If this is the kind of freedom the Framers wanted to achieve by federalism, then the simplest way to evaluate whether federalism is working is not to look for indications of how free we are individually, but how far our government is from the paradigm of an arbitrary and tyrannical force. Federalism frees us by destabilizing government in the sense that it does not permit a ready gathering of political power into one neat, but fearful, place.

### C. Evaluating Federalism: Expecting More Than a Promise of Liberty

But is this destabilization enough of a result to warrant the reverential intonations we whisper when we speak of federalism? Should we be expecting more for our investment than just a dose of antipower? Much mischief can be visited upon an innocent person in a system in which antipower is the order of the day. If we want more than just this kind of freedom, if we want ours to be a just society, we may need to evaluate federalism in far different terms than our Framers perhaps intended for it.

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108. *Id.* at 591.
I have no intention to ask the question of what justice is. I will, for a brief moment, adopt the John Rawls conception of justice as fairness, and consider its two fundamental principles in terms of whether federalism is, by itself, enough of a device to achieve it.

For Rawls, a society that has achieved justice as fairness operates under two principles. First, each person has an equal right to the most extensive liberty compatible with a like liberty for all, meaning that there exists a system of fundamental freedoms that is capable of being shared and enjoyed by all in the society. The second principle is that where social or economic inequalities exist, they must exist so as to inure to the greatest benefit of the least advantaged, with all persons in society having a fair and equal opportunity to obtain the offices and positions which are weighted to that end.

Federalism itself does not enforce an overall series of individual liberties to be shared equally by all and certainly does require the distribution of the limited resources of society in a way that inures to the benefit of the least advantaged. Perhaps asking for federalism to produce a just society in Rawl's terms is asking too much of it.

But its utility in achieving those terms can be gleaned. Even if it serves only to negate the creation of a state of subjugation, that is, even if it creates no more (but no less) than Pettit's state of Antipower, it will form the necessary underpinnings of a condition making the realization of Rawl's first principle possible.

As to Rawl's second principle, the feature of federalism that could best advance the channeling of social/economic inequalities to the aid of those most in need is its promotion of the idea of government as laboratory. Federalism allows diverse government bodies to experiment in the distribution of scarce resources with a hoped for result that the best balances of such distribution will be seen and copied throughout government in a way fostering our overall advancement towards a just state.

Federalism, then, can facilitate justice as it does its bit to preserve the concept of freedom it is so centrally structured to insure.

VII. CONCLUSION

In any event, the effort to ponder these questions is important. We must give federalism its due since, after all, it is what the Constitution prescribes. To know why we chose it, and what we expect from it, must help guide how we enforce it and whether we should one day consider scrapping it.

This may all seem like a far departure from Brazilian Federalism, but it is not. It is just what we should see when we look into the mirror Professor Rosenn has held up for us. We should thank him most sincerely.