DUAL-DEVOLUTIONARY FEDERALISM AND THE JUDICIAL ACTIVISM OF THE US SUPREME COURT UNDER CHIEF JUSTICE WILLIAM REHNQUIST, 1992-2001: BRIEF COMPARISONS WITH THE 'FEDERALISM' OF THE EUROPEAN UNION*

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I. THE RECENT JUDICIAL ACTIVISM OF THE REHNQUIST SUPREME COURT TOWARD STATE-CENTERED FEDERALISM.

In the space of one decade, 1992-2001, the US Supreme Court has imploded the powers of the federal government under the Interstate Commerce Clause, the Equal Protection Clause, and other national powers in favor of ''state sovereignty''. For the first time in sixty years, beginning in 1992, and specially after 1995, the Court struck down in extraordinarily rapid succession federal statutes regulating various intrastate activities under both the Tenth Amendment (residual powers of the states) and the Eleventh Amendment (protecting states from private lawsuits without their consent).

This paper argues the following: 1) That the current Supreme Court has excessively impaired the national governments policy-making powers

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based on its return to the original state-centered concept of the federal-state relations, which some thought died with the outcome of the great Civil War in 1865; *i.e.*, a modern resurrection of ''dual'' or ''compact'' federalism which presumes that the states were the semisovereign signatories to the 1787 Constitution; 2) That this rapidly accelerating trend contrasts sharply with the centralizing trends rapidly strengthened by both national and supranational courts in the European Union (EU); 3) That both developments reflect the rising ascendancy of judicial supremacy in all western democracies; *i.e*., the judicialization of politics, which invokes the ''higher law'' of the constitutional or European Treaty Law as against the ''will of the people'' expressed in the elective branches of government. To this writer, this trend has both positive and negative import for the working principles of democratic politics.

The story of the recent devolutionary federalism of the Rehnquist Court begins with the 1992 decision striking down a federal statute authorizing the Environmental Protection Agency ordering New York ''to take title'' and dispose of low-level radioactive wastes internally generated.[1] Rapidly accelerating such decisions from 1995 forward, the Court held that the Interstate Commerce clause could not justify the following federal enactments: the Gun Free School Zones Act, passed after several shocking school ground shootings;[2] mandating local police to conduct background checks on would be handgun buyers during a 5-day waiting period (Brady Act);[3] the Indian Gaming Regulatory Act, permitting Indian tribes to sue states who failed to negotiate gambling casino compacts ''in good faith'';[4] the Violence against Women Act of 1994, saying that raping, stalking, and other crimes against women did not constitute ''an aggregate effect on interstate commerce'';[5] that the Federal Fair Labor Standards Act could not apply to workers right to sue their state government employers for overtime pay violations unless that states

1 *New York v. United States, 505 US 898 (1002).*

2 *United States v. Lopez, 514 US 549 (1995).*

3 *Printz v. United States, 521 US 898 (1997).*

4 *Seminole Tribe of Florida v. Florida, 517 US 44 (1996).*

5 *United States v. Morrison, 120 S. Ct. 1740 (2000).* In a related ruling, a unanimous Court limited a law making arson a federal crime where the property was ''used in interstate commerce'', saying that, as worded, the statute cannot extend to arson of a residential home. Congress's power can only apply to non-commercial property that ''significantly affects commerce'', *United States v. Lopez* decision, *cit.*, note 2.

consent to be sued under the Eleventh Amendment;[6] that the same amendment prevented employees of a state university from suing to enforce the Age discrimination in Employment Act of 1967.[7] Further restraints on federal regulatory power under the ''state immunity'' doctrine came with rejecting a private lawsuit in federal court against a Vermont agency for submitting false claims to the Environmental Protection Agency as in violation of the US False Claims Act.[8] An extreme application of Eleventh Amendment based state immunity doctrine was *Florida v. College Savings Bank*, 1999 decision which closely followed Seminole Tribe of Florida (1996), cited and discussed above.[9] There the Court, departing from its usual conservative favoritism toward private business, held that Congress exceeded its legislative powers in protecting patents and trademarks by allowing private lawsuits against state colleges and universities even if blatant and frequent violations of patent rights could be proven.[10]

Continuing the pattern, Courts conservative majority is greatly limited or voided federal laws protecting the disabled or physically impaired in several cases: folding (by another 5:4 vote) that state workers may not sue their state government employers under the Americans with Disabilities Act of 1990 (ADA),[11] and that neither disability or age deserve the highest judicial standard as ''suspect classification'' under the Equal Protection Clause of the Fourteenth Amendment, as an alternative to federal Congresss power under the Interstate Commerce Clause.[12] In the latter case, Chief Justice Rehnquist concluded that the ADAs legislative history did not identify any pattern of state discrimination against the

6 *Alden v. Maine, 527 US 706 (1999).*

7 *Kimel v. Florida Board of Regents, 120 S. Ct. 631 (2000).*

8 *Vermont Agency of Natural Resources v. United States ex ret. Stevens, 529 US 769 (2000).*

9 *Florida Prepaid Postsecondary Education Expense Board v. College Savings Board, 527 US 627 (1988).*

10 In support, the Court cited its analysis in City of *Boerne v. Flores, 521 US 507 (1997)*, discussed below, also a 5:4 decision against Congress using the Enabling Clause of the Fourteenth Amendment to expand ''Free Exercise of Religion'' in its Religious Freedom Restoration Act. Because the First Amendment carries no enabling clause, the Boerne majority noted, such legislative expansion invades the independent powers of the judiciary to define the limits of religious freedom.

11 *Board of Trustees, University of Alabama v. Garrett, 531 US 456 (2001).*

12 *City of Cleburne v. Cleburne Living Center, 473 US 432 (1985).*

handicapped and therefore the Eleventh Amendment protection of state immunity from private suit could not be nullified, echoing the Courts pro-state sovereignty argument in *Kimel v. Florida Board of Regents* cited above.

The conservative coalition on the Court did not stop with constitutional invalidations of the ADA. In three successive decisions since 1998, the Court also handed down very restrictive statutory interpretations of this seminal civil rights law which greatly limited employees remedies for protection and compensation from work-related injuries. Such injuries, the Court held, should be better addressed through state workers compensation laws, rather than the federal ADA passed under the broad reach of the Interstate Commerce and Equal Protection clauses. With the narrowed scope of federal enforcement the Court thus has said that employers must provide equal opportunity to those with permanent disabilities, such being deaf, blind, or bound to wheelchairs, but do not have to accommodate those who suffered treatable injuries such as high blood pressure or carpal tunnel syndrome from repeated motions required by the job.[13]

Even in the area of basic, constitutionally defined rights and liberties, the Rehnquist Court has curbed federal judicial and legislative powers. In 1997, it struck down the Federal Religious Freedom Restoration Act designed to overturn a Supreme Court decision which allowed states to prosecute certain forms of religious expression involving drug use.[14] In the same year the justices reversed a Federal Court of Appeals decision extending the constitutional right to privacy to the right of terminally ill or injured persons to commit suicide with aid of a physician, against state laws to the contrary.[15] And it did uphold the Drivers' Privacy Protection Act of 1994, but not on constitutional privacy grounds. That law closely regulates disclosure of personal information in the records of state motorvehicle departments: names, addresses, phone and I. D. numbers, medical information, and photographs. Against South Carolina's argument that it violated state powers under both the Tenth and Eleventh

13 *Toyota v. Williams, US Law Week, 00-1089 (2002)*, showing a rare and surprising unanimous vote of 9: 0 (See also *La Time*s, January 9, 2002, @Al, 8).

14 *City of Boerne v. Flores, 521 US 507 (1997)*, see also my discussion in note 10, above.

15 *Washington v. Glucksberg, 117 S.Ct. 2258 (1997)*; Vacco v. Quill, 117 S.Ct. 1193 (1997).

Amendments, Chief Justice Rehnquist wrote for a unanimous Court to approve the law because it deals with such databases on drivers as property which definitely impacts and engages interstate commerce, not because Congress had ''taken over'' or ''mandated'' any particular state function. Noticeably absent in the opinion was any reference to privacy itself.[16]

Most of these decisions came from a badly divided Court, 5:4 or 6:3. justice John Paul Stevens' dissent joined by three others in the Age Discrimination in Employment Act case reflects the increasing friction on the Court and in the country over this pattern of highly constrictive and almost revolutionary exercise of judicial power in favor of state and private corporate interests:

''By its own repeated overruling of earlier precedent, the majority has itself discounted the importance of *stare decisis* in this area of the law. The kind of judicial activism manifested in cases like [those mentioned above] represents such a radical departure from the proper role of this Court that it should be opposed whenever the opportunity arises''.[17]

Perhaps the ultimate example of judicially mandated state-centered federalism, disguised by elements of national statutory and constitutional law, was the Court's decision in the contested presidential election of 2000 (the case of *Bush vs. Gore*).[18] In a complicated and fractured decision, with no fewer than six separate opinions, the Court by 5 votes to 4 reversed the Florida State Supreme Court and upheld the state's chief election official (backed by a strongly republican state legislature) to overturn further recounting by several county election officials in that state. The Court majority relied on both federal and state legislative statutes that electors for president be certified chosen by certain deadlines, the latest being December 12, under the Federal Electoral Count Act of 1887, the earliest being November 14 under Florida law.

In the end, the ruling of the Florida Secretary of State prevailed, with the chief *nexus* being article II, section I of the United States Constitution providing that ''each state shall appoint, in such manner as the legislature

16 *Reno v. Con don, 528 US 141 (2000).*

17 *Kimel v. Florida Board of Regents, 528 US 62 (2000),* per Justice Stevens, dissenting (joined in part by justices Souter, Ginsburg, and Breyer).

18 *Bush v. Gore, 531 US 98 (2000).*

thereof may direct'' the electors for president and vicepresident of the United States. Seven of the nine justices did find probable Equal Protection violations by the lack of uniform state-wide standards for manually recounting disputed votes. But only five joined the majority in holding that no remedy was available because time had run out with the ultimate December 12 deadline. Thus by one swing vote, most likely that of justice Sandra Day O'Connor or justice Anthony Kennedy, a bare majority of the non-elected, life-tenured Supreme Court determined that the next president of the United States would be George W. Bush —basically in the name of state laws governing how and when presidential votes would be counted.

II. The Peculiar ''Judicial Activism'' of the Rehnquist Court in Historical Perspective

As the latter presidential election case dramatically illustrates, perhaps the greatest change in judges' perception of their role in the United States and all other democracies is that courts no longer exist solely to ''settle disputes or apply statutes to individual cases'', but to ''solve problems'' in the broadest sense, *i.e.*, to act as independent policy-makers in the political system. More will be said about this power role in cross-national comparative context. In the US, a more accurate picture of the Rehnquist Court's activist decisions is gained by comparison to the frequency and political direction of past activist courts in similar time spans. ''Judicial Activism,'' used here, means that the Supreme Court or any state or federal court in the US, can void or greatly limit the application any law or official action under the ''higher law'' of the Constitution (this can also mean state policies voided in the name of state constitutional law because of the division powers in the federal system). The comparative data on the conservative (state-centered) judicial activism of the Rehnquist Court follows, 1986-2001.[19]

In the somewhat notorious Hughes Court (Chief Justice Charles Evans Hughes), between 1930-1940, the anti-New Deal ''Nine Old Men'' overruled 21 of its own precedents and struck down a total of 14 pieces of

19 M. O'Brien, David, *The Storm Center: The Supreme Court in American Politics*, 5a. ed., W.W. Norton, 2000, Table @ 30.

Roosevelt legislation, 11 of which occurred in a short 2-year period, 1935-1937. At the end of that short period of intense activism and dual federalism, the Court, with new appointments and intimidation to ''pack the Court'' by president Roosevelt, dramatically began to uphold federal regulatory powers, especially under the Interstate Commerce Clause, which continued until the 1990's. Another famous ''activist'' Supreme Court, under Chief Justice Earl Warren, this time under a liberal, civil rights and liberties-oriented constitutional philosophy, struck down no fewer than 25 acts of Congress and overruled 45 of previous decisions between 1954-1969.

The Burger Court (under Chief Justice Warren Burger) followed with even more overrulings of precedent (52) —an all-time record, and 34 decisions invalidating federal statutes, in roughly the same time period (1969-1986) as both the previous Warren Court and the following Rehnquist Court of 1986-present. It must be remembered, however, that the Burger Court, with often narrow majorities, reflected wide swings between both liberal and conservative views of the federal-state relationship. For example, on the one hand, it held that the overtime and maximum hours provision of the National Fair Labor Standards Act, passed under the authority of the Interstate Commerce Clause, does not apply to state or local government workers; yet less than a decade later it reversed itself 5:4 and held that the same provisions apply to state workers, after all.[20] This is also the same court that brought us a woman's right to abortion[21] while upholding 13 years later a state anti-sodomy law enforced exclusively against homosexual activity conducted in a private bedroom.[22]

What makes the Rehnquist Court even more activist and conservative than its counterpart in the 1930's is the increasing frequency and public policy importance of its devolutionary decisions against national regulatory powers over the state governments and private business since 1995. Beginning with its voiding of the Federal Gun-Free School Zones Act (cited and discussed above), the Court has struck down some 20 federal laws on constitutional grounds, ranging from women's rights against rape

20 *National League of Cities v. Usery, 426 US 833 (1976), overruled by Garcia v. San Antonio Mass Transit Authority, 469 US 528 (1985).*

21 *Roe v. Wade, 410 US 113 (1973).*

22 *Bowers v. Hard wick, 478 US 186 (1986).*

in state institutions, to age and disability protections and federally-mandated overtime pay for state workers. In just over five years, that ls more than the total number of federal statutes overturned in the previous 20 years combined.[23] The Court has also overruled or greatly limited at least 35 precedents, especially in the aforementioned Interstate Commerce Clause cases dealing with violence, guns, and federal protections for state employees, as well as such federal legislative expansion of affirmative action programs and religious freedom.[24]

What does this mean for the evolving democracy of the United States and the historical pattern of expanding federal power, with some exceptions, since the administration of Theodore Roosevelt in at the turn of the 20'th century? Moreover, is democracy threatened by the ''judicialization of politics'' through activist policymaking by the federal judiciary? Before answering these fundamental questions, it might be useful to juxtapose the increasingly devolutionary jurisprudence of the Rehnquist Court in the United States to the sharply contrasting trend toward federalization of the EU, in great part due to the activism of both national constitutional courts and the European Court of Justice and human rights conventions.

III. FEDERALIZING THE EUROPEAN UNION VIA JUDICIAL POLICY-MAKING: A BRIEF COMPARATIVE PERSPECTIVE

Rulings by national constitutional tribunals and supranational courts of the European Union show two major trends in comparison to the discussion above. One sharply contrasts with the Rehnquist Court in upholding Union powers over the member states under the various treaties since the European Common Market Treaty (Rome Treaty) of 1958, as well as the authority of the Commission and Court of Human Rights over the larger number of nations signatory to the Convention of Human Rights of the Council of Europe. The other trend is strongly parallel to the judicial activism of the Rehnquist Court in overturning or greatly limiting the statutory products of legislative democracy —labeled here

23 Pomper, Stephen, ''The Gipper's Constitution'', in Bruce Stinebrickner, 31a. ed., Annual editions: American government, McGraw-Hill, 2002.

24 Extrapolated from both O'Brien, cited above, note 19, and Pomper, above, note 23.

as— ''the judicialization of politics'', or more traditionally, judicial supremacy.[25]

The original core of the European Union was in the founding of the common market under the 1958 Rome Treaty, steadily moving into the concept of European Community under the Single European Act (1986), the Treaty of European Union (Maastricht, 1993), and the Treaty of Amsterdam (1997). As integration proceeded, the goals of supranational governance have expanded accordingly... Priorities expanded to an EC-wide regulatory system which incorporated new issues of fiscal and monetary policy, including the final achievement of a common currency, the ''Euro'' (Britain, Sweden, and Denmark opted out). It also meant petitions for gender equality, health care, consumer, and environmental protection, and human rights more broadly defined to include ethnic equality and coping with the atrocities in the Balkans.[26]

The four governing institutions include the Commission, ''the supranational nerve center of the Community system,'' combining rule-making and enforcement powers.[27] Another is the Council of Ministers, composed of specialized, as-needed cabinet ministers named by the member nation governments —the *de facto* European Union legislature. The European Parliament, the only body directly elected by voters in the member states, and which has some 626 delegates, the weakest of the three, with only reactive powers and whose amendments to Council legislation are subject to override The European Court of Justice has become the real source of ''constitutionalizing'' the rules of the EU, and thus transforming it ''into a multi-tiered, quasi-federal polity'' much like any federal system with the most generalized and dominant powers residing in the central government —in this case— the three aforementioned bodies and the supreme authority of the European Court of Justice itself. The Court comprises 15 justices appointed by each of the member states and serving 6-year renewable terms.

25 For the first phrase, see N. Tate C. and Vallinder T. (eds.), *The Global Expansion of Judicial Power*, New York, University Press, 1995, and especially Stone Sweet, Alec, *Governing with judges: Constitutional Politics in Europe*, Oxford University Press, 2000; for the second, especially Justice Jackson's Robert, *The Struggle for Judicial Supremacy*, 1941.

26 *Ibidem*, pp. 153-154.

27 *Ibidem*, pp. 155-158

Under article 177 of the Rome Treaty, any national court, including the separate constitutional tribunals, can refer any question on the applicability of European Union law in the case before them to the European Court of Justice for ''a preliminary ruling'', *i.e.*, final disposition by the European Court of Justice disguised as a national judicial action. Even a trial judge can make this type of referral directly to the European Court of Justice, bypassing completely his/her own internal judicial hierarchy. As profesor Stone Sweet has stated, ''the doctrine of supremacy lays down the rule that in any conflict between an European Comunity legal norm and the national rule or practice, the European Comunity norm must always be given primacy'', subject, of course, to final implementation by the national court against official behavior or any rule of the member state government.[28] In this way, national policy-making authority in the European Union has been effectively ''judicialized'' as well as ''federalized'' by the European Court of Justice as the supreme ''Constitutional Tribunal'' invoking Treaty law, backed by their ''interlocutories'' in the form of the national courts acting as surrogates[29] —J.H.H. Weiler, Volcansek, 1992b). As Stone Sweet reports, since 1961 when the first article 177 reference was sent to the ECJ, such referrals grew to 100 per year in the 1970's, and more than 175 in the 1980's, to over 200 annually by 1998; in the earlier periods more than half concerned just two issue areas, free movement of goods, and national agricultural policies. By 1995, these domains accounted for only 27 per cent of total references, while policy issues such as environmental protection, commercial regulation, equal rights for transnational workers, and competition are becoming increasingly important[30] (Stone, @,160-64).

Another powerful but less frequently exercised source of judicial authority is the European Convention for the Protection of Human Rights and the much broader International Covenant on Civil and Political Rights. Wholly apart from the European Court of Human Rights and its administrative screening agency, the Commission, both conventions have

28 *Ibidem*, pp. 162-163; also Sheltema, M., ''Constitutional Developments in the Netherlands: Towards a Weaker Parliament and Stronger Courts?'', in Hesse and Johnson (eds.), *Governing the New Europe*, Oxford Press, 1995, p. 207.

29 Weiler, J. H. H., ''The Transformation of Europe'', 100 *Yale law journal*, pp. 2403-2483, 1991; Volcansek, Mary, Special Issue on Judicial Politics in Western Europe, *15 West European Politics*, 1992.

30 Stone Sweet, *op. cit.*, note 25, pp. 160-164.

been invoked by national constitutional tribunals in Europe to override governmental reluctance to act on human rights abuses. Perhaps the most well known example of this connection is when the Law Lords, England's highest tribunal, overruled its own Court of Appeals and sustained a petition by a spanish trial court to extradite the former chilean dictator, Augusto Pinochet, in the name of almost 700 spaniards who died or disappeared in Chile during the 1970's. In doing so, it invoked article 3 of the European Human Rights Convention and the aforementioned International Covenant, both protecting individuals from ''torture, or inhuman, or degrading punishment''. The democratically elected Chilean government in 1998 vigorously opposed the proceedings against Pinochet who claimed immunity as an official Senator for Life. Although the British Home Secretary retained final authority, Pinochet was held in England out of respect for the spanish petition and the treaty law justifying it. He was eventually returned to Chile for health reasons.[31]

An interesting extension of judicial empowerment is the ECJ's own use of the human rights treaties as ''supplying guidelines'' for its decisions: ''the Court has referred to the Convention as if it were a basic source of community rights and invoked it in review of member state acts''.[32]

IV. Comparative Perspectives on the Judicialization of Politics

In 1996, *La Suprema Corte de Justicia de la Nación, en pleno*, for the first time held that the constitutional guarantee of free information under six applies to government attempts at secrecy. On the same issue, in 1999 the Court held in a second *amparo de revisión* that international treaty law also binds Mexico to protect citizen, group, and media rights to information. The Court's activist policy-making was based in large part on resurrecting its independent investigative powers established by article 97 of the Federal Constitution.[33]

31 ''Anti-Pinochet Ruling Reopens Chile's Fault Lines'', *La Times*, November 26, 1998, p. A30.

32 Stone Sweet, *op. cit.*, note 25, p. 172, citing the *Rutili* (ECR 1975), and *Commission v. Germany* (ECR 1989) decisions.

33 *Garantías individuales (derecho de la información). Violación grave prevista en el segundo párrafo del artículo 97 constitucional. La configura el intento de lograr la*

These cases demonstrate the best side of activist judicial policy-making and respect for limits on the national government in a federal system. What more democratic principle of governance is there than the open disclosure and free access to government information? In the same sense, how could one object on grounds of democratic theory when the Warren Court affirmed that the Equal Protection Clause did apply to equalize the mathematical value of voters in urban areas compared to their disproportionate weight in rural areas; *i.e.*, "one person, one vote";[34] or that race should be irrelevant to admission to public schools;[35] or that personal privacy in the marital bedroom is an unspecified but definitely implied and fundamental constitutional right against government intrusion?[36] Or when the spanish Constitutional Court rules in favor (for the second time) of a journalist fined by a civil trial court for satirizing a local mayor; in that case, the *Tribunal Constitucional* invoked the free press/expression rights of the 1979 Constitution based on the direct *amparo* petition brought by the journalist?[37] Or when the European Court of Justice invokes article 10 of the European Convention on Human Rights to declare "'pluralism as connected to freedom of expression'... indeed constitute[s] one of the fundamental rights guaranteed by the Community legal order?".[38]

impunidad de las autoridades que actúan dentro de una cultura del engaño de la maquinación y del ocultamiento por infringir el artículo 6 también constitucional, p. 513. Tesis P. LXXXIX/96, registro núm. 200, l11, aislada, *Seminario Judicial de la Federación*, novena época, t. III, junio de 1996; also amparo en revisión 1475/98 por el Sindicato Nacional de Controladores de Tránsito Aéreo, con la tesis: *Tratados internacionales se ubican jerárquicamente por encima de las leyes federales en el Segundo plano respecto de la Constitución Federal* S.J.F., 2 de mayo de 1999, and el amparo en revisión núm. 2099/99, por Evangelina Vázquez Curiel, 7 de marzo de 2000, upholding the same thesis on freedom of information international treaty law.

All these decisions are cited and discussed in Jorge Carpizo, "Veintidos años de presidencialismo mexicano, 1978-2000: una recapitulación", *Boletín Mexicano de Derecho Comparado*, nueva serie, núm. 100, enero-abril de 2001.

34 *Baker v. Carr, 369 US 186 (1962).*

35 *Brown v. Board of Education of Topeka, 347 US (1954).*

36 *Griswold v. Conn., 381 US 379 (1965).*

37 Spanish Constitutional Court (SCT): Case 104/1986, J.C. vol. XV, @559, SCT: Case 159/1987, J.C. vol. XIX, @134, both cited and discussed in Stone Sweet, *op. cit.*, note 25, pp. 119-120.

38 *Commission v. The Netherlands, case 353/89, ECR 1989, @1263*, quoted from Stone Sweet, *op. cit.*, note 25, p. 182.

But in ''constitutionalizing'' political debate and legislative outcomes, do constitutional courts endanger democratic values of give-and-take, bargaining and compromise, and appeals to public opinion and interest groups via the legislative process? In the specific cases of the Rehnquist Court's rapid-fire assault on decreasing federal legislative powers, do these decisions serve a balanced and open democracy? To take one example in the negative, under the *Alden v. Maine-Kimel v. Board of Regents* line of cases discussed in part I of this paper,[39] the Cou t has assigned states a right that is not expressed anywhere in the Constitution: the principle that persons unquestionably injured by state government cannot sue the state directly to gain compensation or deter through injunction the state from repeating its harmful acts. This is because it has taken the ''state immunity'' concept of the Eleventh Amendment to a new and, to this writer, alarming level of judicially created blanket immunity from legitimate claims by ordinary people against state governments without even the opportunity to examine the merits of those claims.

In similar fashion the Court ruled against well-substantiated congressional acts to control violence in the US. The 1990 Gun-Free School Zones Act struck down in *United States v. Lopez*[40] was a federal response to a rash of killings on school grounds, most involving young children or teenagers. In *Printz v. United States*,[41] the Court held that The Brady Handgun Violence Prevention Act of 1993, a direct result of the attempted assasination of president Reagan, and an effort to impose nationally uniform controls on the proliferation of firearms, violated the Tenth Amendment by requiring local police and sheriffs to check the backgrounds of all buyers of handguns. The Violence Against Women Act of 1994 was based on impressive statistical findings that serious crimes against women such as rape and assault had an important and adverse ''aggregate effect'' on interstate commerce, *e.g.*, it deterred potential victims from traveling, from engaging in employment, and transacting various kinds of business. It also diminished worker productivity and increased costs of emergency medical and other treatments. Congress had further found that such crimes were not being effectively prosecuted at the local level: *e.g.*, rape survivors had only a 5% chance of seeing their

39 See cases cited and discussed above, notes 1-13.

40 Cited and discussed, note 2, p. 2.

41 Cited and discussed, note 3, p. 2.

attackers convicted and a 1% chance of collecting damages from them in civil courts.[42] (No fewer than 41 state attorneys general gave written support for the passage of the Act, and 17 of 18 federal trial courts reviewing the statute found it to be a constitutional.) Nonetheless, *in United States v. Morrison*,[43] the Court found that such ''aggregate effects'' were not sufficient as ''a substantial burden on commerce''.

Tell that to Christy Brozonkala, the original plaintiff in that case, a young woman who alleged she had been gang-raped by two football players in her dormitory room at a state university during her first week in college, only to see the university fail to discipline or even press charges against her attackers. Failing any effective remedy in state courts, this victim thus was denied any opportunity to take her assailants to federal court for civil damages. She had nowhere else to go for legal redress.

What is the corrective remedy when a constitutional court engages in a pattern of countermanding the prerogative of the national elective branches to address manifest national problems and extend the rights of individuals? General consensus among lawyers and social scientists is that in established democratic republics, abuse of judicial power can be checked by other elements of the political system and by Court's own self restraint. As Alexander Hamilton saw it in *The Federalist num. 78*, ''the federal judiciary will always be the least dangerous of the different departments of power.... [It] has no *influence* over either the sword or the purse, no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It [has] neither force nor will, but merely judgment''. In any democracy, such judicial power can never be sustained without political support from outside the courts, to withstand attacks upon it. Martin Shapiro[44] goes a step further: that courts, not even constitutional courts, can match the prototype of impartial and independent adjudicator of disputes, at the high level of policy-making as well as in ordinary civil and criminal litigation. Courts historically uphold and enforce the norms of the dominant regime be-

42 See Pomper, cited above note 23, @ pages 111-12, see also Barbara Bardes, *et al., American and Politics Today*: 2002-2003 (Wadsworth, 2002), pp. 101-102.

43 Cited and discussed, note 5, p. 3.

44 Shapiro, Martin, *Courts: A Comparative and Political Analysis*, University Chicago Press, 1980.

cause they are inescapably part of the regime. So much for the pure form of judicial independence.

In the present situation, however, effective checks on the Supreme Court have been vitiated because of the divided government we have experienced since 1992; *i.e*., the Executive under one party, the Congress as a whole (1994-2000) and in part (1992-1994, 2000, 2002) under the opposition party. The conservative majority of the Rehnquist Court has been able to drive its devolutionary agenda though the fragmented checking powers of elective branches. More of the same could fundamentally alter the nature of federalism in the United States for years to come. Those taking their rights seriously, as citizens of our *national* community, should find this trend alarming. Just ask Christy Brozonkala.