Court decisions which read the 14th Amendment as meaning that virtually all the restraints that the first ten amendments imposed on the federal government should be imposed on the states as well, has been turned into a club to beat back the state governments. That the Bill of Rights was written to guarantee dual sovereignty and federalism has been all but forgotten.

Thus the similarity between the Flag Amendment's sponsors and the majority opinion in the *Lopez* decision. The Flag Amendment, insofar as it returns power to the states, is about renewing federalism. But the effort to return to federalism, to return to a regime where the people of the states can exercise their most fundamental right—that of self-government—springs from a realization that a regime that promotes liberty without responsibility is one that will end in anarchy and tyranny.

The Flag Amendment may still fail, of course, because its detractors are legion in the media, the law schools, and the legal profession generally. Their "scare rhetoric" about the First Amendment, as Harvard Law Professor Richard Parker (perhaps the only Harvard faculty member who is a friend of the Flag Amendment) calls it, may yet succeed. Just a few weeks after *Lopez*, by another five-to-four majority, in *U.S. Term Limits, Inc.* v. *Thornton*, the Supreme Court refused to allow states to limit the terms of their federal representatives, even though the Constitution was silent on the question, and even though term limits on federal representatives as a matter of state discretion had apparently been accepted at the time of the passage of the Constitution. The *Term Limits* case was another blow to federalism, but it was the occasion of a brilliant and cogent dissent by Justice Clarence Thomas, who revived the federalist arguments.

Thomas is emerging as the Court's most powerful defender not only of original understanding and judicial restraint, but also of federalism, a color-blind Constitution, and a morality that springs from the natural law that undergirds our system of government. Thomas is the Court's youngest member, he may serve longer than anyone else on the Court, and he is turning into an eloquent foe of liberalism. There is reason to believe, particularly in view of the Court's recent hostility to race-based remedies, that we are witnessing a rethinking of the liberal constitutional dogmas of the 60's, 70's, and 80's and that a return to our original constitutional foundation is underway. Even the *New York Times*' court reporter Linda Greenhouse, the semiofficial voice of the liberal constitutional establishment, has begun to watch with wonder what she calls, borrowing a term from Judge Douglas Ginsburg of the United States Court of Appeals for the District of Columbia, the beginning of the return of the "Constitution in Exile."

If the Constitution actually returns from "exile," it will bring with it the Framers' original understanding that there can be no enduring rule of law without virtue and morality on the part of the people, and that the people's morality cannot long subsist without the public encouragement and protection of religion. Remembering these nearly forgotten truths will not be easy, but *Lopez* and the Flag Protection Amendment, and other developments, are encouraging signs. Perhaps the revolutionary recapture of the Constitution has begun.

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Our Platonic Guardians

by Gregory J. Sullivan

In 1986, Justice William Brennan delivered an address in which he called for "state courts to step into the breach" left by what he discerned as a federal contraction of rights and remedies. In other words, those who wish to remake American society along radically egalitarian lines could no longer count on a sympathetic federal judiciary; the revolution would now have to be continued in state tribunals using state constitutions.

Brennan must have had in mind the court from which he was elevated to the U.S. Supreme Court in 1956—that is, the New Jersey Supreme Court. No state court has been more aggressive at social engineering than the New Jersey Supreme Court under Chief Justice Robert Wilentz. The decision last term in *New Jersey Coalition Against War in the Middle East* v. *J.M.B. Realty Corporation* demonstrates why the doctrine of judicial restraint is as essential in state as in federal courts for the preservation of a republican polity.

In this case, the court held, in a majority opinion written by Wilentz, that large, privately owned shopping malls must permit leafletting by issue-oriented groups. The decision has all the hallmarks of a Wilentz opinion: at 72 pages, it is far too long (a friend of mine has a maxim: the more they write, the more they have to hide), the prose is ponderous, and the reasoning specious. Wilentz based this "right" on the free-speech protections found in the New Jersey Constitution. (This source is all he could use; the federal Constitution contains no right to hand out political propaganda in a shopping mall.)

A central preoccupation of Wilentz's jurisprudence is the tension between affluent (white) suburbs and impoverished (black) cities. This sociological theme is conspicuous in *New Jersey Coalition*, where Wilentz relies on the notion that the suburban shopping mall has replaced the downtown business district. But this analysis is both superficial and flawed, as Justice Marie Garibaldi's dissent trenchantly pointed out:

> The inescapable mission of shopping malls is not to be the successor to downtown business districts; rather, it is to provide a comfortable and conducive atmosphere for shopping, a mission into which mall owners have invested large sums and energy. . . .
>
> Common sense also dictates that privately-owned-and-operated shopping malls are not the functional equivalent of downtown business districts. . . . Shopping malls do not have housing, town halls, libraries, houses of worship, hospitals, or schools. Nor do they contain the small store, such as the corner grocer, that used to serve as the forum for exchange of ideas.

The New Jersey Supreme Court has applied free-speech protections to speech on private property before, so in one sense *New Jersey Coalition* is nothing but a slide farther down the slippery slope. But what this case also represents is a startling contempt for private property, which also happens to enjoy rather

substantial protection under the law, notwithstanding the *New York Times*'s cavalier reference to a shopping mall as "nominally private property." As the dissent observed, "Under the majority's theory, private property becomes municipal land and private-property owners become the government."

Of course, it would be a serious misapprehension to assume that this case reflects a principled devotion to free speech. On the contrary, rarely has a court been more vigilant than the Wilentz court in scrutinizing the political correctness of speech before adjudicating the issue of whether it can be allowed. Recently, for instance, a New Jersey Supreme Court decision was summarily vacated by the U.S. Supreme Court for its unconstitutional overreaching in placing restrictions on law-abiding pro-life picketers. One wonders how the leafletting case would have come out had the leaflets conveyed a pro-life message.

The *New Jersey Coalition* case illustrates how subversive a results-driven jurist is with respect to the real policy preferences of New Jersey residents. Wilentz has shown again and again throughout his tenure that *his* vision of the good society must prevail, with or without constitutional sanction. Whether in circumscribing zoning practices to compel the construction of low-income housing, restructuring school funding to destroy local control and to waste more money on schools that resemble war zones, or effectively nullifying the death penalty by creating labyrinthine standards for its application, Wilentz has shown an utter disregard for the text and history of the state constitution and supplanted that document with his own leftist (and race-obsessed) views.

To be sure, Wilentz inherited a court with well-developed activist inclinations. It was in New Jersey, after all, that a "right to die" for Karen Ann Quinlan was fashioned out of the misbegotten federal privacy cases. Still, Wilentz has pushed well beyond anything that preceded him. Indeed, given his role in promulgating policy from the bench, it is certainly no overstatement to say that for the past 15 years or so, Wilentz has easily been the most powerful *politician* in the state.

Fortunately, all New Jersey judges face mandatory retirement at age 70, and Wilentz must go in 1997. Governor Christine Whitman will appoint his successor, and she should not use the opportunity to show her sensitivity to clamorous minorities or women's groups. Rather, she should select a chief justice who will construe the state constitution reasonably and not treat it as a Rorschach test into which a revolutionary agenda can be read. New Jersey has had enough of what Judge Learned Hand once called Platonic Guardians.

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The Ultimate Tax Protest

by Douglass H. Bartley

In *Suzanne M. Bartley et al* v. *United States*, a class-action suit filed on April 17, 1995, in federal district court in Milwaukee, my wife, on behalf of herself and all others who paid federal taxes for the years 1991-93, has sued for a refund of approximately 70 percent of the revenue collected during those years. For fiscal year 1993 alone, the total amount of the refund approximates $808 billion. If the pattern of overcollection for fiscal year 1993 holds true for fiscal year 1991-1992, the grand total of the refund would be a staggering $2.4 trillion.

Unlike the usual "tax protest" cases, the general basis for this suit is that the government, with its various tax statutes and regulations, has far exceeded its lawful taxing authority under Article One, Section 8 of the Constitution. That provision names almost all of the government's lawful spending powers and strictly limits it to raising taxes to carry out the enumerated functions and those alone. The government has *no general power of taxation*.

The Constitution's strict limitation on federal taxing power is made clear in the *Federalist* papers by both James Madison and Alexander Hamilton. Madison, in *Federalist 41*, said:

> It has been urged and echoed that the [taxing power] amounts to an unlimited commission to exercise every power which may be alleged to be necessary for the common defense and general welfare. No stronger proof could be given of the distress under which these writers labor for objections, than their stooping to such a misconstruction.

Hamilton agreed in *Federalist 83*: "This specification [of enumerated powers] evidently excludes all pretension to a general legislative authority, because an affirmative grant of special powers would be absurd, as well as useless, if a general authority was intended."

As the Constitution makes clear, the federal taxing power is limited to funding national defense; postal operations; federal courts; coining and borrowing operations; the administration of laws on bankruptcy, naturalization, patents, trademarks, counterfeiting, weights and measures; the punishment for crimes on the high seas and violations of international law; the District of Columbia and the management of other federal properties; and the regulation of commerce with foreign nations, with Indian tribes, and among the states. For 1993, about 70 percent of all federal expenditures

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"The whole matter revolves around the self-respect of my people. How much satisfaction can I get from a court order for somebody to associate with me who does not wish me near them?. . . I regard the ruling of the U.S. Supreme Court as insulting rather than honoring my race. . . . I have no sympathy nor respect for the . . . pressure group concerned in this court ruling."

—*from Zora Neale Hurston's* Folklore, Memoirs, and Other Writings, *published by the Library of America*