INTRODUCTION: TWENTIETH ANNIVERSARY VOLUME, *HARVARD JOURNAL OF LAW & PUBLIC POLICY*

E. SPENCER ABRAHAM*

When Steven J. Eberhard and I founded the *Harvard Journal of Law & Public Policy* twenty years ago, we did not seek merely to add another specialized journal to the long list of periodicals coming out of Harvard Law School. Rather, we sought to provide a forum for views that seemed to have a harder time being heard the more law journals proliferated. Observation convinced us that conservative ideas had been all but dismissed from the law journals and that conservative law school students had almost no opportunity to pursue and develop their own thoughts and interests. Why? Because the legal academy was dominated by people whose devotion to big, centralized government caused them to advocate an activist judiciary that would twist the meaning of laws, and even the Constitution, to serve their policy goals.

Having been refused funding by the Law School, we set about founding a journal on our own. It was surprisingly difficult at first to find donors willing to invest in a conservative law journal. But perseverance, the help of a few generous individuals, and the contributions of very talented writers paid off. Indeed, the *Journal* has not only survived but flourished over the last twenty years. It has expanded from one issue per year to four. It has become the second most widely read student-edited law review in the nation. It has attracted top-flight academics, judges and policymakers to its pages. And it has had an undeniable impact on debates over the proper size and scope of government, the nature of our constitutional republic and the role of the judiciary in American public life.

This success was far from inevitable. When it first appeared in

* United States Senator from Michigan. The author received his J.D. from Harvard Law School in 1979.

1976, the *Journal* faced an academic community almost univocally hostile to conservative ideas and policies. The dominant view in the legal academy was that judges were free, if not duty-bound, to twist the clear meaning of statutes and the Constitution in whatever form necessary to achieve liberal policy goals. Lawyers, judges and policymakers all seemed to support massive federal intrusions into state and local issues—and free markets in particular. They also agreed that the Constitution, particularly through its Commerce Clause, gave the federal government a blank check to regulate conduct in and by the States, usurping local and state functions. Congress itself had ceased even the pretense of finding some grant in the Constitution to justify expanding federal power. In this way elites in Washington sought to impose their social views on the entire nation. Opponents within the legal and policy communities were few and scattered.

Throughout its existence, the *Harvard Journal of Law & Public Policy* has sought to improve this situation. By providing conservative law students with an opportunity to work on conservative ideas with like-minded faculty and scholars, it sought to help promising young lawyers develop and air ideas opposed to judicial activism and governmental centralization. By providing a forum for broadly conservative professionals to develop and debate judicial and policy positions, it sought to support a strengthened opposition to this activism.

The *Journal's* efforts have been helped enormously by the formation of the Federalist Society for Law and Public Policy Studies, in which the *Journal* was a central participant. This organization has devoted itself to using means such as symposia and debates to expose law students to conservative ideas of judicial restraint, federalism and limited government. Since 1982 it has had a productive relationship with the *Journal*, in which the proceedings of its annual conferences are published.

The Federalist Society has fostered conservative ideas and positions through speakers' programs and grass roots activity. The *Journal* has done the same thing, I believe, through the articles on its pages. And, clearly, the *Journal* has helped bring liberal truisms into question and furthered innovative positions. Many of the ideas currently finding their way into legislation and judicial opinions were raised earlier in the pages of the *Harvard Journal of Law & Public Policy*.

Opposition to judicial activism,[1] support for originalist interpretation along with respect for text and precedent,[2] support for enterprise zones,[3] analysis of prison reform,[4] and numerous philosophical views all were brought out in the *Journal's* pages. These conservative positions have spurred debate. And they are beginning to reshape American law and public policy in a more conservative mold.

I. OPPOSING JUDICIAL ACTIVISM

Conservative opposition to judicial activism dates back at least as far as the Warren Court. But, apart from a few important articles in law reviews, this opposition has been dealt with as purely political, rather than having a scholarly dimension. The *Journal* has helped ensure that this problem receives detailed attention in articles and symposia featuring a number of prominent scholars and lawyers. In a 1984 symposium on "Judicial Activism: Problems and Responses," Lino Graglia expanded on the traditional argument that the first and primary victim of judicial activism is self government.[5] By usurping the role of the political branches, Graglia argued, the Court has in essence taken from the people their right and power to make the laws according to which they will live.[6]

In that same symposium, Judge Frank Easterbrook argued that, to be sure, one source of judicial activism lies in the ambiguity of statutes and of language itself.[7] But where some would draw from this the conclusion that we must trust judges to interpret our inherently flawed laws for us, Judge Easterbrook went in a quite different direction: "[t]he more we doubt the power of words to convey meaning, the more we must doubt the authority of judges to coerce compliance with their conclusions, and the more modest judges must be about their demands."[8] In

1. *See infra* notes 5-21 and accompanying text.

2. *See infra* notes 22-27 and accompanying text.

3. *See infra* notes 28-37 and accompanying text.

4. *See infra* notes 38-42 and accompanying text.

5. *See* Lino A. Graglia, *The Power of Congress to Limit Supreme Court Jurisdiction*, 7 HARV. J.L. & PUB. POL'Y 23, 23 (1984).

6. *See id.* ("The Court has deprived us of our most basic civil right, the right to self-government.").

7. *See* Frank H. Easterbrook, *Legal Interpretation and the Power of the Judiciary*, 7 HARV. J.L. & PUB. POL'Y 87 (1984).

8. *Id.* at 98.

effect, Judge Easterbrook argued for juridical humility and limited government. The meaning that we draw from his Article is that, to the extent that there are severe limits to any authority's ability to set forth clear rules by which we may dependably run our lives, that fact argues for the judiciary to stay out of more disputes.

In some ways arguing with Easterbrook, Richard Epstein acknowledged the problem of statutory unclarity.[9] But Epstein blamed the judiciary's concentration on abstract notions of fairness for allowing the techniques of statutory and constitutional interpretation to fall into disuse and incoherence. Epstein's analysis tells us that only by concentrating on the proper ways to apply the laws by which the people have chosen to be governed can the courts restore to the law stability, self government and meaning.

Unfortunately, according to Judge Loren Smith,[10] the people have chosen, or at least acquiesced in, a government that does too much.[11] Because it attempts to run our very lives for us, Judge Smith argued, the government had to cede power to bureaucratic agencies to carry on the duties of day-to-day governing. Courts, then, had to take on the role of supervising bureaucratic enforcement of bureaucratic rule.[12] The result is a judiciary that attempts to make sense of senseless regulation, thereby overstepping its bounds without achieving its goals. Judge Smith argued that the real solution to judicial activism is the real solution to many of our other political problems as well: a return to a consensus that the government has only a limited role to play.[13]

Several commentators in that symposium suggested other means by which the courts' activism might be curtailed. Charles Rice[14] and Patrick McGuigan[15] stated differing views on the

9. *See* Richard A. Epstein, *The Pitfalls of Interpretation*, 7 HARV. J.L. & PUB. POL'Y 101 (1984).

10. *See* Loren A. Smith, *Judicial Review of Administrative Decisions*, 7 HARV. J.L. & PUB. POL'Y 61 (1984).

11. *See id.* at 65 ("There are many people in our society who feel that the role of government is to do for the society all the things that need to be done.").

12. *See id.* ("Judicial activism ... is a reflection of a growth in the overactivity of government.").

13. *See id.* (arguing that we must "develop a national consensus on some coherent conception of the proper role of government").

14. *See* Charles E. Rice, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 13 (1984).

possibility of limiting federal court jurisdiction, as allowed for by the Constitution.[16] Agreeing in principle, Graglia also pointed out that Congress's will to pass such a statute is very much in doubt.[17]

Judicial activism was revisited in Volume 8 by Judge Malcolm Wilkey.[18] Wilkey noted that the courts, by easing rules of standing and expanding individual and group rights, usurped the role of law in ordering the relations of individuals and institutions.[19] He also explained the sense in which the problem of judicial activism rests in part on the problem of executive and legislative acquiescence.[20] In Wilkey's view, then, the executive and legislative branches needed to be strengthened to make them equal to the task of bringing the courts' powers back in line with those granted in the Constitution.[21]

II. INTERPRETATION

If we are to confine courts to their proper role, we first must make clear to all concerned just what this role is. But that is not enough. We also must revive the notion that there are intelligible legal principles that courts can follow, distinct from the judge's will. Accordingly, the *Journal* has devoted many pages to discussion of the proper means of constitutional and statutory interpretation and how these might be reaffirmed and strengthened in our legal system.

In 1994, the *Journal* published proceedings from the Federalist Society's 1993 symposium on "Judicial Decison-

15. *See* Patrick McGuigan, *Withdrawing Jurisdiction from Federal Courts*, 7 HARV. J.L. & PUB. POL'Y 17 (1984).

16. Rice argued that Congress should act to take away from the Supreme Court both jurisdiction over abortion and jurisdiction to act under the incorporation doctrine. *See* Rice, *supra* note 14, at 13, 14. McGuigan argued that Congress should act to remove jurisdiction over these issues from the federal courts and return that jurisdiction to the state courts. *See* McGuigan, *supra* note 15, at 18.

17. *See* Graglia, *supra* note 5, at 25 (pointing out that "we do not have and are unlikely to have a Congress strong and determined enough to pass legislation limiting the Supreme Court's jurisdiction").

18. *See* Hon. Malcolm Richard Wilkey, *Judicial Activism, Congressional Abdication, and the Need for Constitutional Reform*, 8 HARV. J.L. & PUB. POL'Y 503 (1985).

19. *See id.* at 506-07 (standing), 508-09 (substantive rights).

20. *See id.* at 516-22 (discussing the abdication of responsibility by Congress), 523-24 (discussing the paralysis in the Executive branch).

21. *See id.* at 524-30 (suggesting reforms affecting Congress); 531-34 (suggesting reforms of the Executive branch).

making: The Role of Text, Precedent, and the Rule of the Law."[22] This symposium brought together lawyers and scholars from all parts of the political spectrum to discuss the current viability of traditional restrictions on the power of judicial decision making. This included a Panel on whether the conventional view that stare decisis has a significant and legitimate role in constitutional adjudication is legitimate[23] (Professor Gary Lawson of Northwestern argued no,[24] and Professor Charles Fried argued yes[25]). It also included Professor Thomas Merrill of Northwestern's "modest proposal" that when courts take the view that the traditional tools of interpretation are inadequate to resolve a case, they openly acknowledge that and state expressly what tools they actually are using.[26]

A more narrowly focused symposium was held in 1995 by the Federalist Society. This was published in the *Journal* under the title "Originalism, Democracy, and the Constitution."[27] Again, a variety of philosophical and professional viewpoints were presented dealing with the relationship of an interpretive technique (originalism) to self-rule by the people (democracy) and constitutional government.

The 1995 symposium served to remind readers that democracy, or rule by the people, would be impossible in a system that gave unelected judges the power to change the meaning of laws at their own will. Changes made to the Constitution by judges bypass and undermine the democratic process. Only by following the amending process included in our founding document (which explicitly requires approval of the people through their representatives) can we change it in accordance with the people's will. As important, examination of originalist analysis shows that it is not, as some would allege, impossible to discern and abide by the original understandings of the Founders and other, later lawmakers.

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22. Symposium, *Judicial Decisionmaking: The Role of Text, Precedent, and the Rule of Law*, 17 HARV. J.L. & PUB. POL'Y 1 (1994).

23. *See Panel II:* Stare Decisis *and Constitutional Meaning*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

24. *See* Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y 23 (1994).

25. *See* Charles Fried, *Reply to Lawson*, 17 HARV. J.L. & PUB. POL'Y 35 (1994).

26. *See* Thomas W. Merrill, *A Modest Proposal for a Political Court*, 17 HARV. J.L. & PUB. POL'Y 137 (1994).

27. Symposium, *Originalism, Democracy, and the Constitution*, 19 HARV. J.L. & PUB. POL'Y 235 (1996).

III. REVITALIZING IMPOVERISHED AREAS

Consistent with its title, the *Journal* has attempted to influence debate, not just concerning judicial interpretation, but also concerning public policy. For example, in 1981, at the beginning of the Reagan Administration, Scott Golden contributed to the *Journal* an Article defining, analyzing and explicating what was then a relatively new idea for helping areas seemingly impervious to economic growth.[28] The government would designate certain impoverished portions of our inner cities and rural areas as "enterprise zones."[29] These areas would benefit from combinations of tax reductions, regulatory relief for small business, and agreements between federal, state and local governments to keep total taxes low on job-creators.[30]

First conceived and tried in Great Britain,[31] enterprise zones had by this time made their way to America, and into the United States Congress, through the efforts of then-Congressman Jack Kemp (R.-N.Y.).[32] By lowering the burden placed on job creation by taxes and regulations, the argument went, the government could encourage the growth of useful businesses that would employ local workers and contribute to a rebirth of commerce.[33] As a result, residents would be able to break the cycle of welfare dependency, learn important work skills and build for themselves a better neighborhood and a better life.[34]

Enterprise zone proposals rest on the recognition that federal programs aimed at fighting poverty have backfired. Instead of producing vibrant, prosperous neighborhoods, the mammoth

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28. *See* E. Scott Golden, *Enterprise Zones: New Life for the Inner City*, 4 HARV. J.L. & PUB. POL'Y 243 (1981).

29. *See id.* at 277-79 (discussing reasons for strict or nonrestrictive limits on which areas were to be eligible for "enterprise zone" designation).

30. *See id.* at 279-91 (describing tax benefits granted under various enterprise zone proposals), 276 (explaining how proposals differed in their approach to lifting regulations).

31. *See id.* at 268 (noting that the term "enterprise zone" was introduced in a 1978 proposal made by British Conservative Sir Geoffrey Howe, and that the idea was first described by Professor Peter Hall of Reading University, England).

32. *See id.* at 270-72 (describing the Kemp bills proposing enterprise zones).

33. *See id.* at 279-95 (discussing the effect that lower taxes, as proposed by then-Congressman Kemp, and fewer regulations, as proposed by then-Congressman Ron Paul (R.-Tex.), would have on areas designated as enterprise zones).

34. *See id.* at 281 (pointing out that a reduction in the minimum wage requirements would enable more people to obtain jobs, learn how to handle the jobs, and thereby be removed from welfare), 295-301 (listing the many benefits that residents would enjoy due to the presence of increased numbers of businesses and the resulting opportunities for employment and neighborhood improvement).

federal "war on poverty" produced inner cities beset by crime, broken families and welfare dependency.[35] The federal government made the situation worse by raising taxes and increasing the regulatory burden on small businesses.[36] Thus, rather than continue failed liberal policies, those proposing enterprise zones urge us to revitalize our neighborhoods by limiting government—by lowering taxes and regulations and in general getting the government off the backs of local entrepreneurs.[37]

IV. AUTHORITY IN THE PRISONS

In recent years we have witnessed an explosion of lawsuits by prisoners seeking to undermine the authorities in charge where they are incarcerated.[38] In part the result of genuine abuses, this explosion was also caused by the view that judges were government actors able to cure all the world's ills. Judicial expansion of the right against cruel and unusual punishment has reached the point where judges are overseeing the temperature of the food and water in Michigan prisons[39]—and

35. *See, e.g., id.* at 255 (quoting a proposed bill listing, among other suggested findings for Congress, the fact that "there exists today a nation within a nation composed of millions of Americans who live in urban slums . . . in poverty, misery, and despair").

36. *See id.* at 264-67 (explaining that small businesses hire the most new people and therefore that government programs that provide incentives or disincentives to small businesses have the most effect on job creation).

37. *See id.* at 269-76 (describing 1980 proposals for enterprise zones). *See also* TERRY ALLEN, THE IMPACT OF ENTERPRISE ZONES (1996) (analyzing the success of current enterprise zones and advocating more enterprise zones based on a model showing that newly created enterprise zones should reach employment-rate parity with surrounding communities within twelve years).

38. *See* Gail L. Bakaitis DeWolf, *Protecting the Courts from the Barrage of Frivolous Prisoner Litigation*, 57 OHIO ST. L.J. 257, 257 (1996) (noting that approximately 15% of all civil suits filed in the federal courts are prisoner lawsuits, and that "most filings by prisoners are frivolous").

39. *See* United States v. State of Michigan, 680 F. Supp. 928, 1058 (W.D. Mich. 1987).

> This opinion does not cover all of the problem areas . . . . I have selected for discussion those areas that I believe require the most attention.
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> The fifth area of concern is with the temperature of the food served to the inmates . . . . [T]he poor condition of the insulated trays may be a problem, and I request the independent expert to continue to monitor the situation.
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> The seventh area of concern is defendants' continued failure to comply with the hot water requirements of the State Plan. The Court . . . notes the situation as one to be remedied under the Consent Decree and the State Plan.

Id.

have been repeatedly asked to ensure that prisoners' hair is cut only by licensed barbers.[40] Judicial micro-management of this sort costs money, leads administrators to disengage from their duty to supervise prisoners, and ultimately casts doubt on society's moral authority to punish lawbreakers.

Kathleen Engel and Stanley Rothman's Article in Volume 7 of the *Journal* shows in graphic fashion how judicial micro-management has hurt prison administrators' ability to maintain secure prisons.[41] The result is not merely an increase in risks for guards and those living in the vicinity of prisons, but a staggering increase in prisoner-on-prisoner crime that has made our jails significantly more dangerous than they were in the 1930s. Guards and other prison authorities have in effect retreated from the prison yard, leaving the strongest, most dangerous prisoners and gangs to run the inside.[42]

V. PHILOSOPHICAL QUESTIONS

For a number of years the *Journal* had a productive relationship with the Institute for Humane Studies. IHS is devoted to defending the principles and practices of a free society. It produced a number of symposia for the *Journal* reviewing the juridical status of traditional liberties and the Ninth and Tenth Amendments in particular. These symposia examined procedural and constitutional rules as well as the philosophical underpinnings of rights we hold sacred.

IHS articles sparked discussion concerning the nature of constitutional rights and the proper character of procedural safeguards. In this way they have helped conservatives of all stripes hone their arguments and strengthen their reasoning.

VI. THE CURRENT VOLUME

The *Journal* continues its tradition of publishing hard-hitting articles relating to conservative legal positions. In the current

40. *See* Bettis v. Delo, 14 F.3d 22, 23 (8th Cir. 1994) (affirming grant of summary judgment on prisoner's suit seeking to prohibit non-licensed barbers from cutting prisoner's hair, and citing five previous cases in which other prisoners had made similar claims).

41. *See* Kathleen Engel & Stanley Rothman, *The Paradox of Prison Reform: Rehabilitation, Prisoners' Rights, and Violence*, 7 HARV. J.L. & PUB. POL'Y 413 (1984).

42. *See id.* at 413-16 (describing how, in the absence of authoritarian administrative regimes, inmate hierarchies control prison life through the use of violence).

Issue, authors have taken controversial positions on both economic and social issues. Professor Calvin Massey argues that the graduated income tax is in fact a taking of property without just compensation.[43] In addition, Professor Scott FitzGibbon critiques the Model Physician-Assisted Suicide Act[44] and Professors Dwight Duncan and Peter Lubin critique the Ninth Circuit's opinion in *Compassion in Dying*,[45] while Colorado's Deputy Attorneys General, John Daniel Dailey and Paul Farley, examine the Supreme Court's ruling striking down Amendment 2, the initiative barring localities from adopting gay rights ordinances.[46]

Issue 2 of this Volume will feature the Federalist Society Symposium. This Symposium will focus on the impact of the Warren Court's additions to criminal procedure, and on reforms suggested by conservative commentators, some of which have been implemented by innovators such as Charleston Police Chief Reuben Greenberg. The *Journal* is also continuing its tradition of philosophical examination in the current Volume, as a forthcoming Issue will feature an examination of the difference between natural law and natural rights.[47]

VII. LEGAL AND POLICY OUTCOMES

Thus, almost alone among major law reviews, the *Journal* continues to provide an effective forum for articles defending the sanctity of life and private property as well as self-rule and the rule of law against those who would empower the courts to decide every issue in our lives. That the *Journal* has done so for twenty years gives us reason to hope that the tradition will continue. And some recent events even give us reason to hope that the movement of which the *Journal* has been an active part is beginning to influence decisions in law and public policy.

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43. *See* Calvin R. Massey, *Takings and Progressive Rate Taxation*, 20 HARV. J.L. & PUB. POL'Y 85 (1996).

44. *See* Scott FitzGibbon & Kwan Kew Lai, *The Model Physician-Assisted Suicide Act and the Jurisprudence of Death*, 20 HARV. J.L. & PUB. POL'Y 127 (1996).

45. *See* Dwight G. Duncan & Peter Lubin, *The Use and Abuse of History in* Compassion in Dying, 20 HARV. J.L. & PUB. POL'Y 215 (1996).

46. *See* John Daniel Dailey & Paul Farley, *Colorado's Amendment 2: A Result in Search of a Reason*, 20 HARV. J.L. & PUB. POL'Y 215 (1996).

47. *See Symposium: Natural Law and Natural Rights: What Are They? How do They Differ?*, 20 HARV. J.L. & PUB. POL'Y__ (forthcoming 1997).

In a number of areas, Congress and the Supreme Court have begun moving in directions promoted by the *Journal*. From the enumeration of powers and interpretation of the Commerce Clause to federalism and private property rights, Congress and the Court have moved further toward protecting traditional understandings of limited government and private rights.[48] Even in the more fundamental area of judicial interpretation, we recently have seen some progress toward a new respect for our Constitution and the Framers' intent, although we have also seen some very discouraging decisions.

One means by which Congress has justified its intrusion into areas properly left to the States has been the Commerce Clause. After initially resisting the New Deal, the Supreme Court has aided this usurpation by acquiescing in interpretations of the Commerce Clause broad enough to justify almost any congressional action. In 1995, however, the Supreme Court issued its first decision in almost sixty years striking down a federal law because it reached beyond the scope of the Commerce power.[49] Whether this marks the beginning of an era of decreased federal interference in issues properly belonging to States, localities, families, and individuals, or whether it is a mere aberration, remains to be seen.

The relevant case is *United States v. Lopez*.[50] *Lopez* dealt with a student who attempted to bring a gun into his high school.[51] Immediately arrested and charged under state law, he soon found himself charged with violating the federal Gun-Free School Zones Act of 1990.[52] Congress had passed this law, prescribing punishments for those found knowingly in possession of a firearm in a school zone, claiming authority

48. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (holding a portion of the Gun-Free School Zones Act of 1990 unconstitutional as not within the federal government's power under the Commerce Clause); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a regulation depriving land of all economically beneficial use is a taking that must be compensated, unless the regulation merely prohibits a use that is common law nuisance); New York v. United States, 505 U.S. 144 (1992) (holding that federalism principles preclude Congress from ordering a State to implement a federal program).

49. *See Lopez*, 115 S. Ct. 1624 (holding 18 U.S.C. § 922(q) unconstitutional as not within the scope of the Commerce Clause).

50. 115 S. Ct. 1624.

51. *See id.* at 1626.

52. *See id.* The state charges were dismissed after the filing of the federal charges. *See id.*

under its power to regulate interstate commerce.[53]

The Act's defenders relied on an extremely convoluted and dubious chain of reasoning to find the Act within Congress's commerce power. According to this reasoning (spelled out in Justice Breyer's dissent),[54] guns make schools violent, bad places to learn.[55] Further, bad learning environments produce less educated graduates and even drop-outs, who will, of course, be less productive, thereby causing the local economy to decline—with a resultant negative impact on commerce, bringing gun possession within Congress's commerce power.[56]

Implausible as this reasoning is, it is not self-evidently less plausible than that used by the Court earlier in *Wickard v. Filburn*.[57] In *Wickard*, the Court held that grain a farmer grew for his own use affected interstate commerce by reducing the amount of grain sold on the interstate market.[58] Nevertheless, the cases are distinguishable. It is one thing to say that one farmer's tiny impact on the local economy, when repeated over and over again, adds up to a substantial effect on interstate commerce. It is quite another thing to say that a regulation ostensibly concerned with non-economic conditions can be justified on the grounds that the impact of this behavior at the federal level, when added up over the entire economy, affects interstate commerce. In *Lopez* the Supreme Court adopted that distinction.

For the *Lopez* majority, Chief Justice William Rehnquist wrote that the Gun-Free School Zones Act "is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[59] Accordingly, he refused to sustain it as a proper exercise of the commerce power.[60]

Despite considerable complaining about it, the Court's

53. *See* Gun-Free School Zones Act of 1990, 18 U.S.C. §§ 921-24 (1994). Specifically, the Act stated: "Congress has power, under the interstate commerce clause and other provisions of the Constitution, to enact measures to ensure the integrity and safety of the Nation's schools by enactment of this subsection." *Id.* at 922(q)(1)(I).

54. *See Lopez*, 115 S. Ct. at 1657 (Breyer, J., dissenting).

55. *See id.* at 1659.

56. *See id.* at 1659-61.

57. 317 U.S. 111 (1942).

58. *See id.* at 127-29.

59. *Lopez*, 115 S. Ct. at 1630-31.

60. *See id.* at 1634.

decision seems irrefutable as far as it goes. Because the act in question had no plausible connection with the Commerce Clause, as the majority noted, the reasoning necessary to sustain it would justify congressional regulation of anything.[61] Indeed, though challenged by the majority on the point, the dissent refused to cite a single example of a regulation outside of Congress's authority under its approach.[62] Determining whether Congress is acting within its constitutional authority may be a difficult question in many cases. But a theory that *always* justifies congressional action cannot fit the Founders' care in enumerating the powers Congress was to have, and hence cannot be squared with according any meaning at all to the enumeration.

Unfortunately, the *Lopez* opinion has the weaknesses of its strengths. Chief Justice Rehnquist, although pointing to the problems with the Government's view,[63] tells us little about what kinds of federal laws are and are not within Congress's commerce power. Beyond the observation that education and crime are traditionally local concerns, he gives little information about the principles on which future decisions will be based.[64] Thus we do not know whether a law premised on a slightly shorter causal chain, or even one that is simply different, would be upheld.

Even more fundamentally, federalism was not lost through a series of court decisions, although they played their part. Far more important was the gradual loss of federalism's hold on the people's imagination. This loss caused, or permitted, the national government's expansion. Federalism will not be restored until it recovers its hold on all of our imaginations. *Lopez* may be an important step toward this end. But, at best, it is only a step.

The Supreme Court has also begun to take seriously

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61. *See id.* ("To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States.").

62. *See Lopez*, 115 S. Ct. at 1632 (noting that Justice Breyer "is unable to identify any activity that the States may regulate but Congress may not").

63. *See id.* at 1632 ("Under the theories the Government presents in support of 922(q), it is difficult to perceive any limitation on federal power .... Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.").

64. *See id.*

protections for property rights expressly afforded by the Constitution. In *Nollan v. California Coastal Commission,*[65] a divided Court held that California could not demand an easement in exchange for a building permit.[66] The Court found that the stated purpose of the permit requirement, to prevent houses from blocking public views of the beach, was in no way advanced by the easement.[67] *Nollan* was reinforced by *Lucas v. South Carolina Coastal Council.*[68] Here the Court held that any "regulation that deprives land of all economically beneficial use" effects a taking (requiring compensation) unless the use prohibited is a common law nuisance.[69] In *Dolan v. City of Tigard,*[70] a narrow majority interpreted *Nollan* to require that burdens imposed by permit conditions bear "rough proportionality" to the impact of the property's proposed use.[71] All of these cases point toward a reinvigorated Takings Clause that will prevent government appropriation of private property in the name of regulation.

Finally, the Supreme Court in recent decisions has shown itself more willing to consider the original understanding of the Framers in interpreting the Constitution and other, lesser statutes.[72] Unfortunately, in many cases federal judges at all levels continue to substitute their will for the will of the drafters. But increasingly, and particularly in rhetoric coming from the Supreme Court, decisions have been providing, at a minimum, lip service to originalism—and in some cases more than lip service.

One important case in this regard was *New York v. United*

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65. 483 U.S. 825 (1987).

66. *See id.* at 842 (holding that if California "wants an easement across the Nollans' property, it must pay for it").

67. *See id.* at 838-39 ("It is quite impossible to understand how a requirement that people already on the public beach be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house.").

68. 505 U.S. 1003 (1992).

69. *Id.* at 1027 (noting that uses proscribed under the common law as nuisances were never part of a landowner's title, and therefore that formally proscribing such uses by statute cannot be said to constitute a taking).

70. 512 U.S. 374 (1994).

71. *See id.* at 391 (holding that "[t]he city must make some sort of individualized determination that the [permit's] required dedication is related both in nature and extent to the impact of the proposed development").

72. *See, e.g.,* New York v. United States, 505 U.S. 144, 163-66 (1992) (using the Framers' intent to resolve the question whether Congress should be able to use state governments as regulatory agencies).

States.[73] In this case, the Supreme Court struck down a portion of the federal law requiring that States provide for the disposal of radioactive waste generated within their borders or take title to that waste and the tort liability the waste may generate.[74] While refraining from cutting back on many generous interpretations of federal power, Justice O'Connor recognized an important limitation on this power: Congress cannot commandeer state authorities in order to implement federal programs.[75]

Justice O'Connor put to one side arguments over whether the federal structure provided sufficient benefits to justify its protection. "Our task . . . . consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution."[76] Justice O'Connor went on to cite a number of constitutional ratification debates to the effect that the Constitution does not allow the federal government to coerce the States into acting according to its dictates.[77] Not even with the consent of the States, Justice O'Connor held, could the federal government so directly determine state action as it was attempting to do here.[78] The original understanding of our structure of government would not allow this usurpation of state power.[79]

Decisions such as *New York v. United States* have not re-established true federalism or smaller government in our politics, or originalism and judicial restraint in our law. But they do provide reason to hope for and work toward a more responsible judiciary. They raise the possibility of a greater recognition on the part of our courts concerning the importance of the Founders' design in determining the structure of our government and the meaning of our laws.

Congress, too, has moved toward a renewed understanding of

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73. 505 U.S. 144, 155-57 (1992) (relying on the Tenth Amendment as an expression of the principle that courts should aim to protect state sovereignty through interpreting other constitutional provisions).

74. *See id.* at 149.

75. *See id.* at 166 ("The Federal Government may not compel the States to enact or administer a federal regulatory program.").

76. *Id.* at 157.

77. *See id.* at 164-65.

78. *See id.* at 181-83 ("Where Congress exceeds its authority relative to the States, the departure from the constitutional plan cannot be "ratified" by the consent of state officials.").

79. *See id.* at 180 ("The Framers did not intend that Congress should exercise power through the mechanism of mandating state regulation.").

our federal structure of government. It is working in a number of ways to lessen the federal government's intrusion in areas where state and local governments, or individuals, traditionally have played primary roles. In particular, recent welfare legislation has sought to "devolve" power back to the States. Arguing that governors and state legislators have more knowledge concerning the particular needs of their constituents than do Washington bureaucrats, the new Republican Congress in 1996 passed legislation giving States greater control over the requirements their residents must meet in order to continue receiving welfare payments.[80] In this way Congress has encouraged experimentation—for example, work requirements, family caps, and other mechanisms—by which the States can encourage recipients to use hard work and personal responsibility to escape the trap of welfare dependence. As important, these new powers will reinvigorate state and local governments by allowing them to exercise powers and judgments too long monopolized by the distant government in Washington.

Congress even seems interested in limiting itself to the exercise of its constitutional powers. My proposed legislation, requiring that Congress explicitly state the constitutional power it is exercising in each piece of legislation it passes,[81] has met with considerable interest. I believe that members of Congress, faced with the requirement that they state and defend the constitutional basis of their proposals, may be less likely to push for legislation expanding federal powers. In any event. I am convinced that such a requirement will facilitate discussion of proper congressional powers, rather than, as today, debates strictly concerning whether the proposed law's goal is a good one. The possibility of a serious debate on which level of government should properly address a problem is one road for returning to a more limited national government.

We are also seeing spreading interest in and advocacy of some of the specific proposals championed in the *Journal*, such as enterprise zones. Michigan in particular has embraced them. That State has passed legislation according to which certain

80. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 104 Pub. L. 193, 110 Stat. 2105 (codified in scattered sections and titles of U.S.C.).

81. *See* Enumerated Powers Act (no bill number as of date of publication).

impoverished areas may seek designation as state "enterprise zones."[82] Zones so designated will enjoy a far lighter tax burden, and qualifying new businesses will be freed from some taxes entirely.[83]

Congress, too, has begun to take notice of the fact that enterprise increases, and benefits communities, when tax and regulatory burdens are lessened. A law signed by President Clinton now permits federal agencies to designate certain federal "empowerment zones."[84] This program provides limited, circumscribed relief to certain businesses in designated areas when the businesses agree to reinvest in that area and sign onto a government blueprint for development.[85] Though highly diluted, the President's version of enterprise zones shows the extent to which the logic behind them has become accepted in American public life. During the last Congress more ambitious zones were contemplated, and the political momentum appears to be going their way.

In addition to limiting judicial interference with local economies, Congress has given increased attention to limiting judges' interference in prison administration. Recognizing the increasing dangers of prison life, along with the increased costs to taxpayers from aggressive judicial oversight, Congress, at my instigation, has limited judicial decrees micro-managing prisons. The Prison Litigation Reform Act[86] provides that only violations of federal rights can serve as the basis of judicial decrees entered under federal law. Barring such violations, or given their correction, such decrees must be refused or ended.

VIII. UNFINISHED BUSINESS

The *Journal* has much work left to do. However small, there now is at least some presence of conservative faculty at our law schools.[87] We must encourage this trend and provide a forum in

82. *See* Enterprise Zone Act, MICH. COMP. LAWS § 125.2101-23 (1996).

83. *See id.*

84. *See* Designation and Treatment of Empowerment Zones, Enterprise Communities, and Rural Development Investment Areas, 26 U.S.C. §§ 1391-97f (setting out requirements for businesses wishing to participate in the benefits given to employers in empowerment zones).

85. *See id.*

86. This Act was passed as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996).

87. *See* Jacob Appel, *Kennedy and Lindgren Measure Diversity*, HARV. L. RECORD, Oct. 25,

which conservatives may converse and debate with one another, honing their arguments while reminding themselves that they are not alone in their belief in judicial restraint and limited government. In addition, we must work to convince Congress, the courts and the American people that only respect for our Constitution as originally written can protect the ordered liberty we all cherish. The beginnings we have made in devolving powers, requiring enumeration of power before passing legislation, and limiting the scope of the Commerce Clause, all are helpful. But we must continue working to make clear the proper limits of judicial action and federal power in order to regain and retain the republic bequeathed to us by our Founders.

1996, at 1 (reporting on a study conducted by Professor James Lindgren, which found that 12.9% of law school faculty members were Republican, as opposed to 41% of the population).