AMERICAN POLITICAL CULTURE AND THE FAILURES OF PROCESS FEDERALISM

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The Supreme Court's recent decision *United States v. Lopez*[1] supposedly signaled a new era of constitutional federalism.[2] The decision itself was significant in that it was the first in over 50 years to hold that the Commerce Clause imposed limitations on federal lawmaking authority. It also soon became clear that *Lopez* was no anomaly. The Court quickly followed the case with important rulings narrowing the scope of federal power under other constitutional provisions. These decisions included

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1. 514 U.S. 549 (1995). In *Lopez*, the Supreme Court invalidated the Gun-Free School Zones Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789, 4844 (codified at 18 U.S.C. § 922 (1994)), as an *ultra vires* exercise of congressional authority under the Commerce Clause. *See id.* at 551. The Act had made it a federal crime to possess a firearm within 1000 feet of a school. *See* 18 U.S.C. § 922(q)(2)(A) (1994 and Supp. II 1996).

2. For a broad collection of views on the possible implications of *Lopez*, see Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533 (1995). Particularly useful articles include Steven G. Calabresi, *"A Government of Limited and Enumerated Powers:" In Defense of* United States v. Lopez, *id.* at 752 (arguing that *Lopez* "marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers" and that "the Court's decision to invalidate an Act of Congress on the ground that it exceeded the commerce power must be recognized as an extraordinary event"); Deborah Jones Merritt, *Commerce!*, *id.* at 674 (claiming that the principles of *Lopez* could significantly rework the Supreme Court's Commerce Clause jurisprudence, but that the Court is unlikely to expand *Lopez* by striking down other congressional statutes); H. Jefferson Powell, *Enumerated Means and Unlimited Ends*, *id.* at 651, 651-52 (predicting that the main effect of *Lopez* is very likely to be nothing more than a renewed congressional interest in loading federal criminal statutes with findings and "jurisdictional element[s] in order to demonstrate the close link between what Congress wishes to regulate and 'Commerce...among the several States'").

Seminole Tribe v. Florida,[3] limiting federal power to abrogate a states Eleventh Amendment immunity, *City of Boerne v. Flores*,[4] circumscribing federal power to enact civil rights legislation under Section 5 of the Fourteenth Amendment, and *Printz v. United States*,[5] limiting federal power to impose affirmative obligations on state officers under the general structure of the Constitution.

The full story as to how these cases might lead to a redrawing of the constitutional parameters governing the judicial enforcement of federalism has yet to be told.[6] Nevertheless, the decisions have been praised by those who favor decentralizing power for at least sending a shot across the bow of the federal government and letting Congress know that federalism concerns need to be taken seriously. After all, the clear lesson of *Lopez* and its progeny is that the sixty-year-long period of judicial *carte blanche* on federalism matters has finally come to an end.[7] Accordingly, given the conservative tenor of

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3. 517 U.S. 44, 47 (1996) (holding that Congress lacks authority under the Indian Commerce Clause to abrogate a state's Eleventh Amendment immunity).

4. 117 S. Ct. 2157 (1997). In *City of Boerne*, the Court invalidated the Religious Freedom Restoration Act of 1993 (RFRA), Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. § 2000bb (1994)), in part as exceeding Congress's remedial power under Section 5 of the Fourteenth Amendment. *See id.* at 2172. RFRA had provided that government may substantially burden a person's exercise of religion only if the burdening is the least restrictive means of advancing a compelling government interest. *See* 42 U.S.C. § 2000bb-1 (1994).

5. 117 S. Ct. 2365 (1997). In *Printz*, the Court invalidated portions of the Brady Handgun Violence Prevention Act of 1993, Pub. L. No. 103-159, 107 Stat. 1536 (codified at 18 U.S.C. § 922(s)(2) (1994)), on the ground that state agents cannot be compelled to execute federal laws. *Id.* at 2384. The Brady Act had required state and local law enforcement officers to conduct background checks of prospective firearm purchasers. *See* 18 U.S.C.§ 922(s)(2) (1994).

6. *See e.g.*, Vicki C. Jackson, *Federalism and the Uses and Limits of Law:* Printz *and Principle?*, 111 HARV. L. REV. 2180, 2205 (1998) (stating that the extent of *Printz*'s effect on other federal statutes is not clear).

7. The watershed date for the Supreme Court ceasing to use principles of federalism to invalidate acts of Congress is customarily set at 1937, with the Court's decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). In *Jones & Laughlin* the Court upheld the National Labor Relations Act of 1935 (NLRA), 29 U.S.C. § 151 (1994), on the basis that the commerce power is plenary and may be exerted to protect interstate commerce no matter what the source of the dangers that threaten it. *See Jones & Laughlin*, 301 U.S. at 37. The NLRA had established the right of employees to bargain collectively. *See* 29 U.S.C. § 157 (1994). Just four years later in *United States v. Darby*, 312 U.S. 100 (1941), the Court emptied the Tenth Amendment of any substantive content by ruling that "[t]he amendment states but a truism that all is retained which has not been surrendered." *Id.* at 124.

For the conventionally accepted view that the Court's 1937 decisions were a radical departure from its earlier jurisprudence that was brought on by President Roosevelt's

the present Congress, one might expect to see some manner of change in congressional behavior in light of the Supreme Court decisions. The purpose of this article is to provide a quick report on how the Justices' resuscitated concern for federalism is being received in the corridors of the building directly across the street from the Supreme Court–the United States Capitol.

Not surprisingly, the initial reports are not positive. Congress, at the behest of, rather than in resistance to, its conservative leadership has mounted a full scale federalization campaign on all types of subjects. For example, it has continued to seek federalization of issues traditionally reserved to the states. This includes the federalization of tort law as a means of tort reform[8] and the imposition of federal "takings" legislation that would intrude upon state and local government zoning prerogatives.[9] At the same time, Congress, despite the oft-noted value inherent in federalism of allowing states to experiment with differing approaches to complex social and economic problems, is enthusiastically pressing for federal legislation on matters that, because of revolutionary changes in technology,

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Court-packing proposal and stunning electoral victory in 1936, see JOSEPH ALSOP & TURNER CATLEDGE, 168 DAYS 141 (1938). *But see* Barry Cushman, *A Stream of Legal Consciousness: The Current of Commerce Doctrine from* Swift *to* Jones & Laughlin, 61 FORDHAM L. REV. 105 (1992) (arguing that the Court's decision in *Jones & Laughlin* was doctrinally congruent with its contemporary jurisprudence).

8. *See, e.g.*, Product Liability Reform Act of 1998, S. 2236, 105th Cong. The bill provides that:

> In any product liability action that is subject to this title, the damages for which a defendant is otherwise liable under Federal or State law shall be reduced by the percentage of responsibility for the claimant's harm attributable to misuse or alteration of a product by any person if the defendant establishes that such percentage of the claimant's harm was proximately caused by a use or alteration of a product–
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> (A) in violation of, or contrary to, a defendant's express warnings or instructions if the warnings or instructions are adequate as determined pursuant to applicable Federal or State law; or
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> (B) involving a risk of harm which was known or should have been known by the ordinary person who uses or consumes the product with the knowledge common to the class of persons who used or would be reasonably anticipated to use the product.

Id. § 105(a)(1).

9. *See* Property Rights Implementation Act of 1998, § 2271, 105th Cong. The defeat of the legislation by filibuster was described as a "victory for state and local governments" which had opposed its enactment. Opponents of the bill argued that it would infringe federalism interests by letting "developers bypass local zoning and land management policy and go directly to federal court." Mike Cleary, *Local, State Governments Block Property Rights Bill*, WASH. TIMES, July 14, 1998 at B7.

raise novel and unprecedented regulatory issues.[10] An example of this is the current federal effort to regulate cloning.[11] There are also federalization efforts that simply defy description–as when Senators Hatch and Feinstein combined to propose federal action on the need for national anti-paparazzi legislation–always a pressing matter of federal concern.[12] And there is always the example of abortion regulation, which critics of *Roe v. Wade*[13] used to contend was a matter that should be left to the states, but which is now the subject of a never-ending parade of proposed federal intervention.[14]

The current Congress also shows little inclination to abandon the now-common practice of extending its influence over state policy-making through the use of federal funding mandates. House Republicans, for example, have actively sought passage of the Juvenile Crime Control Act of 1997,[15] a bill that would federalize much of juvenile crime. The bill would require states to prosecute juveniles as adults for various crimes, either as a matter of law or as a matter of prosecutorial discretion,[16] as a

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10. *See* Ferguson v. Skrupa, 372 U.S. 726, 730-31 (1963); Calabresi, *supra*, note 2 at 777; Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233 (1994) (citing FERC v. Mississippi, 456 U.S. 742, 788-91 (1982) (O'Connor, J., concurring in the judgment in part and dissenting in part).

11. *See, e.g.*, Prohibition on Cloning of Human Beings Act of 1998, S. 1611, 105th Cong. § 4 (amending § 498C of the Public Health Service act (codified at 42 U.S.C. 289 et seq.) to provide that it shall be unlawful "to implant or attempt to implant the product of somatic cell nuclear transfer into a woman's uterus").

12. *See* Mark Jurkowitz, *Journalists Take Aim at Anti-Paparazzi Bill*, BOSTON GLOBE, May 21, 1998, at D1. The Personal Privacy Act of 1998, S. 2103, 105th Cong. § 3(a), would amend chapter 89 of title 18, U.S.C. by adding § 1822, which would establish criminal penalties and civil liability for anyone who "follows or chases a person in a manner that causes the person to have a reasonable fear of bodily injury, in order to capture by a visual or auditory recording instrument any type of visual image, sound recording, or other physical impression of the person for commercial purposes."

13. 410 U.S. 113 (1973).

14. *See* Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. § 1531(a) (providing that "[a]ny physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years, or both"). *See also* Child Custody Protection Act, H.R. 3682, 105th Cong. (1998) (making it a federal crime to transport a minor out of state to have an abortion if her home state requires parental involvement).

15. H.R. 3, 105th Cong. (1997).

16. *See id.* § 302(a) (amending the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 1802(a)(1) (codified at 42 U.S.C. § 3796 et seq. (1994)). The bill provides that, in order for a state to be eligible to receive a grant, it must

> ensure that juveniles who commit an act after attaining 15 years of age that would be a serious violent crime if committed by an adult are treated as

precondition for the receipt of juvenile accountability block grants.[17] Standing in direct contradiction to the decision in *Printz*,[18] this bill would further require state officers to maintain records–including fingerprints and photographs[19]–of every juvenile adjudication in a manner equivalent to adult records,[20] and it would make those records available to law enforcement officials, schools, and courts.[21] If a juvenile is adjudicated delinquent for an act that would be a felony if committed by an adult, the court is required to send a copy of the record to the FBI.[22] Meanwhile, the Senate, with bipartisan support, recently passed the Transportation Equity Act for the 21st Century,[23] one portion of which rewards states with federal highway funds if they establish a 0.08 blood alcohol level as the threshold of legal intoxication.[24]

There has been no limit. Congress has even aimed its

> adults for purposes of prosecution as a matter of law, or that the prosecutor has the authority to determine whether or not to prosecute such juveniles as adults.

Id.

17. These grants are to be used by the states for the purpose of "promoting greater accountability in the juvenile justice system." Such measures can include building detention facilities, administering accountability-based sanctions, hiring juvenile prosecutors, and establishing juvenile "gun courts." *Id.*

18. The law invalidated in *Printz* required state officers to conduct background checks of prospective purchasers of firearms. *See Printz*, 117 S. Ct. at 2368.

19. *See* H.R. 3, 105th Cong. § 107 (1997) (amending 18 U.S.C. § 5038(b) (1994)) ("The Attorney General shall establish guidelines for fingerprinting and photographing a juvenile who is the subject of any proceeding authorized under this chapter.").

20. *See id.* (amending 18 U.S.C. § 5038(a)(1) (1994)) (providing that the court shall keep a record of the arrest and adjudication that is–(A) equivalent to the record that would be kept of an adult arrest and conviction for such an offense; and (B) retained for a period of time that is equal to the period of time records are kept for adult convictions).

21. *See id.* (amending 18 U.S.C. § 5038(a)(2) (1994)) ("Such records shall be made available for official purposes, including communications with any victim or, in the case of a deceased victim, such victim's representative, or school officials, and to the public to the same extent as court records regarding the criminal prosecutions of adults are available.").

22. *See id.* (amending 18 U.S.C. § 5038(c) (1994)).

23. Pub. L. No. 105-178, 112 Stat. 107 (1998) (to be codified in scattered sections of 23 U.S.C.).

24. *See id.* § 1404(a), 112 Stat. at 240 (to be codified at 23 U.S.C. § 163(a)). The Act provides that:

> The Secretary [of Transportation] shall make a grant . . . to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense).

Id.

legislative guns at reversing the specific results achieved by the Supreme Court in the federalism decisions themselves. The Gun-Free School Zones Act at issue in *Lopez* has already been resurrected by Congress with the mere addition of a Commerce Clause hook[25] to circumvent the specific objections to the original legislation raised by the Supreme Court,[26] and there are serious bipartisan movements afoot to override *City of Boerne* and restore the Religious Freedom Restoration Act.[27]

These examples compel a simple conclusion–the protection of the states through the political processes in Washington is dead, or if not dead, is seriously ill.

This is not to deny that there may be some political benefit in raising federalism concerns. Several Democrats raised federalism issues in opposition to the Juvenile Crime Control Act of 1997,[28] and some Republicans opposed the Transportation Equity Act on federalism grounds.[29] The governing rule, however, is clear–whether a matter will be federalized depends entirely upon its attractiveness, as a substantive political issue, to federal officeholders. At best, the federalism argument will enter the debate only as a secondary rhetorical point.[30]

There are a number of possible explanations why the

25. *See* The Violent Crime and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320904, 108 Stat. 1796, 2125 (amending 18 U.S.C. § 922(q) (1994 & Supp. II 1996)) attempts to justify Congress's regulatory power under the Commerce Clause. Congress has now found that "firearms and ammunition move easily in interstate commerce," and that violent crime in school zones precipitates a decline in the quality of education, which in turn "has an adverse impact on interstate commerce and the foreign commerce of the United States." *Id.* Perhaps thumbing its nose at the Court, Congress concluded by declaring that it "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 . . . ." *Id.*

26. *See Lopez*, 514 U.S. at 563 (1995) ("But to the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

27. *See* Religious Liberty Protection Act of 1998, S. 2148, 105th Cong.

28. *See e.g.*, 143 CONG. REC. H5385 (daily ed. July 16, 1997) (statement of Rep. Stupak) ("Let the local communities decide, give them the flexibility to do their job, and we should seek to encourage the development of these prevention programs in every community across America.").

29. *See e.g.*, 144 CONG. REC. S5361 (daily ed. May 22, 1998) (statement of Senator McCain) ("Local- and state-elected officials should make the final decisions on local and state roads.").

30. *See* Marshall, *supra* note * at 724-25.

federalism arguments are routinely discounted. First, and most plainly, it is politically damaging to oppose substantively popular legislation on federalism grounds. Any congressman will tell you that she cannot get away with arguing that a given piece of legislation should be defeated simply because Congress does not have the authority to enact it. A lawmaker who voted against the national Megan's Law[31] or the national car-jacking law,[32] for example, would almost certainly be characterized as being soft on crime in her opponent's next thirty-second sound bite.

Similarly, politicians who get on the bandwagon of popular legislation can expect to be rewarded. Consider the following example. On April 27, 1997, former Joint Chiefs of Staff Chairman General Colin Powell led a volunteer summit in Philadelphia.[33] Not coincidentally, legislation entitled the Volunteer Protection Act of 1997,[34] which limits legal liability for people who volunteer for charitable organizations,[35] passed

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31. *See* Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act of 1994, 42 U.S.C. § 14071 (1994 & Supp. II 1996). The Act stipulates that the Attorney General will

> establish guidelines for State programs that require–
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> (A) a person who is convicted of a criminal offense against a victim who is a minor or who is convicted of a sexually violent offense to register a current address with a designated State law enforcement agency . . . ; and
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> (B) a person who is a sexually violent predator to register a current address with a designated State law enforcement agency . . . .

Id. § 14071(a)(1). *See also* Megan's Law, 42 U.S.C. § 14071(d) (1994 & Supp. II 1996) (requiring states to "release relevant information that is necessary to protect the public concerning a specific person required to register under this section").

32. *See* Anti-Car Theft Act of 1992, 18 U.S.C. § 2119 (1994 & Supp. II 1996). The Act establishes criminal penalties for anyone who, "with the intent to cause death or serious bodily harm takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so." *Id.*

33. *See* John F. Harris & Blaine Harden, *A Presidential Push for Helping Hands; Past, Present Leaders Open Volunteer Summit*, WASH. POST, Apr. 28, 1997, at A1.

34. Pub. L. No. 105-19, 111 Stat. 218 (codified at 42 U.S.C. § 14501 et seq. (1997)). Congress locates its authority to encourage volunteerism in the Commerce Clause because "services and goods provided by volunteers and nonprofit organizations would often otherwise be provided by private entities that operate in interstate commerce." *Id.* § 2(a)(5).

35. The Act provides that, with certain exceptions,

> [N]o volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if–
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> (1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission;

ninety-nine to one in the Senate.[36] Protection of volunteers had never before been a priority of the federal government, but support for the bill was politically timely and suddenly it was in a lawmaker's interest to present herself as a supporter of affirmative efforts on behalf of volunteers.

Second, lobbying groups have decided that it is better to live and work in Washington, D.C., than in the many state capitals. Transaction costs are significantly lower if one lobbies a single legislature rather than fifty.[37] Indeed, even when lobbyists act at the state level, they must still go to Washington, D.C., to ensure that their state gains are not preempted by federal lawmaking.[38] In short, from the standpoint of a lobbyist, there is little question that federal lobbying efforts are more efficient.

Third, lobbyists may also seek action at the federal level because federal law is considered by some to be of higher quality[39] and, owing to its broad scope, more difficult for regulated parties to avoid.[40] The quality and breadth of federal law result in an impression that, if regulatory reform is desired, one should go to the federal government because it will do a better job.

Fourth, it has become commonplace to believe that issues of national consequence should be addressed by federal laws.

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(2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;
(3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
(4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to–
(A) possess an operator's license; or
(B) maintain insurance.

Id. § 4(a).

36. *See* 143 CONG. REC. S3880 (daily ed. May 1, 1997) (Rollcall vote No. 55 Leg.).

37. *See* Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation: Toward a Public-Choice Explanation of Federalism*, 76 VA. L. REV. 265, 271 (1990) (observing that "[i]t is simply less expensive to obtain passage of one federal statute than to obtain passage of fifty state statutes").

38. *See id.* at 271 (noting that "political support must still be provided to federal regulators to induce them to forbear from later preempting the field").

39. *See id.* at 272.

40. *See id.* at 272-73.

This assertion, ironically, was offered in an attempt to limit federal jurisdiction, as when Chief Justice Rehnquist implied that federal legislation should be reserved only for truly important matters.[41] Nevertheless, the sense that federal law is somehow more prestigious is not exactly an incentive for federal representatives to avoid an issue. Consider, for example, the increasing push for the federalization of family law that has occurred in recent years. Prior to this trend, some commentators had argued that the fact that states have always regulated family law was an indication that its importance had never been taken seriously. The obvious remedy for those concerned with family law issues, then, was to urge Congress to federalize family law in order to stress how important family law matters actually were.[42] A vote against such legislation would, in the mind of its advocates, be a political statement that issues of family were not important. The result of this dynamic is not difficult to predict. There was immense pressure to enact legislation such as the Violence Against Women Act of 1994,[43] which, among other things, creates a federal offense for crossing interstate lines and engaging in domestic violence.[44] This is not to dispute that the curtailing of domestic violence should be an important priority–it clearly should. The question is whether it should be federalized. The fact is that regulations of the most important types of human contact have traditionally existed at the state level–murder laws, property laws, contract laws, and the like.[45] The issue is whether these types of laws will also succumb to the federalization steamroller.

In theory, none of this should be a concern, or at least a large enough concern to require judicial intervention. According to

41. *See* William H. Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary*, 24 THE THIRD BRANCH, 1, 2 (1992) (arguing that federal courts should be "reserved for issues where important national issues predominate").

42. *See* Judith Resnik, *"Naturally" Without Gender: Women, Jurisdiction, and the Federal Courts*, 66 N.Y.U. L. REV. 1682, 1749 (1991) (arguing that the federal law's silence on matters that are of particular concern to women indicate that women "are assumed not to be related to the 'national issues' to which the federal judiciary is to devote its interest").

43. Pub. L. No. 103-322, 108 Stat. 1796, 1902 (codified in scattered sections of U.S.C., Titles 16, 18, and 42).

44. *See* 18 U.S.C. § 2261 (1994 & Supp. II 1996).

45. *See* Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994).

the theory of process federalism outlined by Professor Herbert Wechsler[46] and Dean Jesse Choper,[47] and endorsed by the Supreme Court in *Garcia v. San Antonio Metro. Transit Auth.*,[48] judicial enforcement of federalism is unnecessary because members of Congress represent the states as states and will, therefore, guard against federal expansion at state expense.[49]

Professor Larry Kramer has effectively refuted many of the specifics of the Wechsler-Choper theory, and his arguments need not be repeated here.[50] Professor Kramer, however, also argues that there are other political restraints on federal lawmakers that serve to protect the states from federal encroachment. He maintains that the restraints on federalization occur through what he calls the culture of political parties.[51] Within this culture, according to Professor Kramer, there is an interdependence between state and federal officeholders of political parties that inhibits federalization. Federal lawmakers will not commandeer the issues state officeholders wish to address because they have alliances with

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46. *See* Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 546-58 (1954).

47. *See* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS: A FUNCTIONAL RECONSIDERATION OF THE ROLE OF THE SUPREME COURT 175-80 (1980).

48. 469 U.S. 528 (1985).

49. *See e.g., id.* at 551 n.11 (overruling National League of Cities v. Usery, 426 U.S. 833 (1976)) (citing Wechsler, *supra* note 46, at 546-58, and CHOPER, *supra* note 47, at 175-84). *See also id.* at 550-51 ("It is no novelty to observe that the composition of the Federal Government was designed in large part to protect the States from overreaching by Congress. The Framers thus gave the States a role in the selection both of the Executive and the Legislative Branches of the Federal Government.").

50. *See* Kramer, *supra* note 45, at 1503-14. The protections cited by Wechsler and Choper include the following:

> representation in Congress is allotted by states; qualifications to vote in federal elections are determined by state law; Representatives are elected in districts drawn by the states; each state has equal representation in the Senate through Senators chosen by the state's legislature; and presidential candidates must obtain a majority in the Electoral College.

Id. at 1506 (citing Wechsler, *supra* note 46, at 54, and CHOPER, *supra* note 47, at 176-81). In his article, Professor Kramer demonstrates that the states' power to decide who votes for members of Congress can only be exercised indirectly, by limiting the electorate in state elections, that the power to redraw congressional districts can be exercised but once a decade, that the political significance of the Electoral College has been undermined by modern elections' popular canvass, and that state representation in the Senate, "the chief protection afforded to state institutions in the original plan of the Constitution . . . evaporated with the adoption of the Seventeenth Amendment." *Id.* at 1506-08.

51. *See id.* at 1522-23.

and are dependent upon their state counterparts.[52] For this reason, Professor Kramer agrees with the essential point of the Wechsler-Choper thesis–that judicial intervention is not necessary to preserve federalism–even as he disagrees with their conclusions as to why that is true.

It is true that political culture *can* serve as a restraint on federalization. Indeed, that restraint exemplified much of our nation's history. The political culture, however, is rapidly changing, and there are numerous factors at work that suggest that the political culture can no longer be relied upon to serve as an effective check on an ever-expanding federal government. One of these changes we have already discussed–the growing sentiment that a matter is appropriate for federalization if it is important. But there are other factors at work as well.

First, contrary to Professor Kramer's suggestion, the political interdependence between state and federal officeholders created through political party affiliation does not serve as an effective restraint on federalization. To begin with, as a descriptive matter, it is notable that many federal officeholders do not rise through party ranks and, thereby, are not as indebted to the state political party as Professor Kramer presupposes. More importantly, however, even when there is interdependence, there is no guarantee that such interdependence will serve to prevent federal commandeering of important issues. Indeed, the contrary result is equally, if not more, plausible. State officeholders may likely conclude that the more their party succeeds in Congress, the more likely they are to succeed at the state level because they will reap the political benefits of their party's national success. Accordingly, state lawmakers will hesitate to raise federalism objections against their party allies in Congress. For this reason, although state politicians may criticize political opponents in Congress for purportedly improperly invading the domain of the states, one seldom hears of state legislators urging their own party members in Congress not to pass popular legislation. Just like the federal officeholder, the state legislator is likely to raise the federalism issues only as secondary rhetorical points to reinforce her substantive support of, or opposition to,

52. *See id.* at 1523.

particular legislation.[53]

Second, the nature of modern campaigning has dramatically changed the scope of the federal-state dynamic. Federal officeholders are no longer as beholden to state party organizations as they may once have been. Federal campaigns require money and a large amount of it.[54] Candidates sometimes supply much of the money themselves. During the 1996 Senate races, for example, the national Democratic party recruited millionaires to run for office because of the importance of money to getting elected.[55] The majority of funds may also come from PACs and individuals ideologically or pragmatically tied to the candidate without regard to state party affiliation or even state boundaries. Candidates for federal office, for example, increasingly raise more money from out-of-state sources than from within their own states.[56] Furthermore, substantial funds are sometimes raised through the assistance of the parties' national organizations, such as the Democratic or Republican Senatorial Campaign Committees. At virtually no time, however, are the state parties the key

53. The federalism concern itself is not likely to frame even the state legislator's position. After all, a state legislator who publicly opposes a federal Megan's law or federal car-jacking law on federalism grounds will be as vulnerable to his opponent's attack that he is soft on crime as is his federal counterpart.

54. *See* Jill Abramson, *'96 Campaign Cost Set Record at $2.2 Billion*, N.Y. TIMES, Nov. 25, 1997, at A18 (The 1996 election campaigns resulted in $2.2 billion in expenditures. The median expenditure on a House race rose to $559,807 in 1996 from $348,287 in 1994. The median expenditure in a Senate race rose to $3.5 million from $2.7 during the same period.).

55. *See Kerrey's Millionaires*, TIME, Feb. 19, 1996, at 13, available in 1996 WL 8824753 ("Senator Bob Kerrey of Nebraska, the head of the Democratic Senatorial Campaign Committee, is recruiting millionaires who can self-finance their runs for the Senate."). Millionaire candidates that Senator Kerry encouraged to run include the following: Tom Bruggere of Oregon, the founder of Mentor Graphics; James Sears Bryant of Oklahoma, legal counsel for the NFL and NBA players associations; Elliott Springs Close of South Carolina, CEO of Island Harbor Development; Walter Minnick of Idaho, former CEO of TJ International; and Charlie Sanders of North Carolina, a former Glaxo chief executive. *See id.*

56. *See e.g., Incumbents Receiving Most of Campaign Money from Out of State*, ASSOCIATED PRESS, July 6, 1998, available in WL 7428099 ("Some of Connecticut's members of Congress have collected most of their reelection campaign money from out-of-state sources, federal campaign finance reports show."). Democratic Senator Christopher Dodd has raised $1.8 million (about eighty percent of his funds) from out-of-state campaign donors. Representatives Rosa DeLauro and Sam Gejdenson, both Democrats, and Republican Representative Nancy Johnson, have also raised about eighty percent of their campaign funds from outside the state. Democratic Representative James Maloney raised fifty-eight percent of his donations out of state. *See id.*

players in the fundraising enterprise.[57] The realities of modern fundraising, in short, ensure a community of interests not between federal officeholders and state party members, but between federal officeholders and national constituencies.[58]

Third, the changing nature of media coverage has a profound, although subtle, impact on political culture. Media theorists suggest that the press is unable to influence the public's opinions on a particular issue.[59] Nevertheless, what the media is able to do is to direct the focus of the public's attention through its selective coverage of events. Again, consider the example of crime.[60] The contemporary media's emphasis on

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57. State parties may be helpful to a candidate's fundraising, but their efforts are always likely to be overshadowed. To begin with, state parties are limited by federal law as to how much they may contribute to federal campaigns and, as a factual matter, state party fundraising lists are generally not as comprehensive or as valuable as the lists of the national parties or the national interest groups.

58. The increased activism of national special interest organizations in federal elections may also be adding to the federalization pressures. By contributing funds, engaging in grass roots activities, and more recently, mounting their own advertising campaigns, activist special interest organizations have been successful in bringing their own issues, whether traditionally left to the states or not, to the federal agenda. In this regard the special election for the seat formerly held by Walter Capps may be a harbinger of things to come. The candidates in that race tried to control the issues of the debate, but a number of national interest groups entered the fray, spent their own funds as independent expenditures, and focused the debate on their own issues. This effectively undermined the candidates' control over their own races. *See* Lou Cannon, *Single-Issue Ads Driving California Race; House Hopefuls Vie to be Heard Above Big-Money Media Onslaughts*, WASH. POST, Feb. 21, 1998, at A4, available in WL 2468945. (The candidates were unable to control the terms of the debate because their "home-town messages have been overshadowed by campaigns waged by national single-issue groups.").

If this trend continues, even candidates who may wish to avoid federalization issues may be unable to do so, and the trend is likely to continue. As on commentator has noted:

> Issue advertising is attractive to outside groups because it is not subject to the usual restrictions on raising and spending money. Corporations, unions and other organizations can pay for the advertising out of their general treasury funds, rather than having to raise it for their political action committees in maximum increments of $5,000. The sources and amount of spending also don't have to be publicly disclosed.

Ruth Marcus, *When the Opposition Isn't on the Ballot; Candidates Expect Another Fall of "Issue Advocacy" Spots; Outside Groups Anxious Too*, WASH. POST, June 30, 1998, at A4, available in 1998 WL 11589273.

59. *See, e.g.*, C. WRIGHT MILLS, POWER, POLITICS, AND PEOPLE 590 (Irving L. Horowitz ed., 1963) (arguing that "it is people talking with people more than people listening to, or reading, or looking at the mass media that really causes opinions to change"). *But see* BENJAMIN I. PAGE & ROBERT Y. SHAPIRO, THE RATIONAL PUBLIC: FIFTY YEARS OF TRENDS IN AMERICANS' POLICY PREFERENCES 339-54 (1992) (arguing that media communication of evidence from credible experts and other respected sources seems to exert an influence on public opinion).

60. *See e.g.*, SHANTO IYENGAR & DONALD R. KINDER, NEWS THAT MATTERS:

crime exposes people to stories of distant crimes unrelated to their own localities and thereby creates the impression that crime is a problem that demands a national, as opposed to a state or local, solution. The result is that Congress has authored and passed a constant stream of legislation federalizing criminal law. In these circumstances, the federal officeholder who wishes to oppose the legislation on federalism grounds may well be inhibited from doing so. The nuanced claim that she did not support the legislation attacking the problem because of federalism concerns will have no resonance with the electorate. The sounder choice from a political standpoint is to support the legislation. If the public perceives the issue to be a national problem, federal lawmakers will be disposed to take federal action because they want to be responsive, and to be seen to be responsive, to their constituents' concerns.

Fourth, modern political advertising, or the threat it poses, is also a factor. Even if the federal officeholder might otherwise choose to swim against the federalization tide, prudence and the fear of the thirty-second attack ad, may lead him to an alternative course. As I have noted, a federal officeholder who votes against a federal car-jacking law will likely be characterized by the officeholder's opponent as soft on crime. Although the officeholder might respond to the attack ad with a discussion of how the vote was motivated by federalism concerns, the officeholder may rightly be concerned that the defense may be too nuanced to be effective in a thirty-second sound bite. The officeholder may legitimately want to avoid the risk of having to expend scarce campaign funds in responding to such an ad altogether.

The political culture, in short, is becoming increasingly nationalized. For this reason, the claim that the political culture is able to restrain the expansion of federal law is not realistic. Indeed, as we have seen, the political culture serves only to increase the pressure for federalization. Federalization and the

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TELEVISION AND AMERICAN OPINION 33 (1987) ("By attending to some problems and ignoring others, television news shapes the American public's political priorities."). *See also* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23, 47 (1997) (stating that research has found two ways in which crime and violence in the media influences public opinion: directly by making crime seem more prevalent and indirectly by setting forth crime as a salient political topic).

nationalization of the political culture are, after all, complementary, rather than antagonistic, trends.

The question is what, if anything, to do about it? If the Court in *Lopez, Seminole Tribe, City of Boerne,* and *Printz* was sending a shot across the bow to remind the Congress to do its job, the result has been, as we have seen, that the warning has gone unheeded. The political pressures in favor of federalization are too strong and the restraints too weak. This leaves judicial intervention as the only other alternative, an alternative which presents its own constitutional debate.

The battle lines in this debate are well drawn. Opponents of judicial intervention to enforce federalism would argue that there is still no call for the judiciary to intervene because the structural protections of states remain in place, even if those protections are not serving to protect states as a practical matter.[61] They also contend that federalism is not an appropriate subject for judicial intervention because the modern economy requires national regulatory schemes, [62] or because heightened judicial scrutiny is not needed in matters other than those involving individual rights.[63] In essence, the opponents are concerned that a revitalization of judicial enforcement of federalism could return the Court to its pre-1930s regime in which critical national legislation was invalidated on federalism grounds.[64]

Ironically, conservatives often make the same arguments with respect to judicial scrutiny of individual rights. To them, it is the invalidation of legislation on individual rights grounds that creates the danger of unchecked judicial power frustrating

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61. *See e.g.,* Wechsler, *supra* note 46, at 546-58; CHOPER, *supra* note 47, at 175-80.

62. *See e.g.,* Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions,* 96 COLUM. L. REV. 2213, 2220 (1996). Professor Hovenkamp argues that the justification for judicial restraint is

> particularly strong in the areas of federal economic regulation and federalism, in which (1) individual rights are less obviously at stake; (2) the soundness of the regulatory regime in question depends on judgments about regulatory or economic theory, not about Constitutional law; (3) the Constitution does not speak clearly; and (4) changes in everything from technology and the economy to the scope of markets and their spillovers counsel strongly for permitting flexibility.

Id.

63. *See* United States v. Carolene Products, Co., 304 U.S. 144, 152 n.4 (1938) (calling for heightened judicial scrutiny in individual liberties cases).

64. *See, e.g.,* Hammer v. Dagenhart, 247 U.S. 251 (1918).

the political will.[65]

Both sides are correct. Judicial intervention virtually guarantees that, whether in the name of individual rights or in the name of constitutional structure, arguably "incorrect" decisions may be issued invalidating popular, and at times important, legislation. The appropriate question, however, is not whether an active judicial role could possibly result in erroneous decisions. This is the price of judicial review. Rather, the appropriate question is whether there are sound reasons that justify judicial intervention.[66]

The current political culture, as it affects federalism, provides such a reason. In this climate, judicial intervention is necessary if the values of federalism are to be meaningfully protected. In such circumstances, as Professor Steven Calabresi has argued, there is no reason why the proper relationship between federal and state governments should not be scrutinized with the same rigor as civil liberties issues,[67] at least if one shares the view that federalism plays a critical role in the constitutional

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65. *See, e.g.*, United States v. Virginia, 518 U.S. 515, 566-603 (1996) (Scalia, J., dissenting). Justice Scalia argued that the judiciary should refrain from declaring the state of Virginia's all-male military academy unconstitutional, because such matters are properly addressed through political channels:

> The virtue of a democratic system with a First Amendment is that is readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution.

Id. at 567. These very same arguments in favor of judicial restraint are often ignored, however, when these very same conservatives address federalism issues. *See* Printz v. United States, 117 S. Ct. 2365 (1997) (Scalia, J.) (striking down provisions of the Brady Handgun legislation on non-textual federalism grounds).

66. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 76 (1980) (arguing that "it is an appropriate function of the Court to keep the machinery of democratic government running as it should, to make sure the channels of political participation and communication are kept open") (interpreting *Carolene Products*, 304 U.S. at 152-53 n.4).

67. *See* Calabresi, *supra* note 2, at 811-26. Professor Calabresi argues against the prevailing conventional wisdom that holds that the judiciary should "conserve its political capital by deciding 'individual rights cases' while leaving enumerated powers limitations to be enforced by the political branches." *Id.* at 811 (quoting CHOPER, *supra* note 47, at 169-70). Professor Calabresi asserts that such a claim is one of "comparative institutional competence," and is based on the belief that the judiciary is institutionally better at enforcing the Constitution's guarantees of individual rights than it is at defining the boundaries of constitutional federalism. *Id.* at 811-12. In fact, the Judiciary is as well suited to enforce federalism principles as it is to protect political rights and enforce anti-discrimination laws. *See id.* at 823-26.

system.[68] Indeed, one of the values of federalism is that it protects individual liberties by serving as a structural check on the expansion of federal power.[69]

Because this is a Federalist Society symposium, however, it is essential to stress the "flip side" of this argument. If it is permissible to engage in judicial intervention on behalf of federalism interests, because of the reality that the political process left to itself may not adequately protect those interests, then it clearly must be permissible to engage in judicial intervention to protect individual rights on grounds that the political process left to itself may not adequately protect the rights of minorities and dissenters.[70] Many of the very same arguments that support *Lopez* and *Printz*, after all, also support *Romer v. Evans*.[71] At the end of the last panel, Professor Douglas Laycock stated the point most succinctly–you cannot have both limited government and a weak judiciary.[72]

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68. A notable dissent in this area is set forth in Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 907 (1994).

69. *See, e.g.*, United States v. Lopez, 514 U.S. 549, 576-77 (1995) (Kennedy, J., concurring). *See also* Gregory v. Ashcroft, 501 U.S. 452 (1991):

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front....
>
> In the tension between federal and state power lies the promise of liberty.

Id. at 458-59.

70. *See Carolene Products*, 304 U.S. at 152 n.4 (1938).

71. 116 S. Ct. 1620 (1996).

72. *See* Douglas Laycock, *Federalism as a Structural Threat to Liberty*, 22 HARV. J.L. & PUB. POL'Y 67, 82 (1998).