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# Federalism: An Antidote to Congress's Separation of Powers Anxiety and Executive Order 13,083

BRIAN E. BAILEY\*

“Stroke of a pen . . . . Law of the land. Kind of cool.”<sup>1</sup>

“States’ rights do not get in the way when someone has something he wants  
to do . . . . Liberal Democrats or conservative Republicans—  
they just go whoosh.”<sup>2</sup>

## INTRODUCTION

On May 14, 1998, President Clinton signed Executive Order (“E.O.”) 13,083 entitled “Federalism” while attending an economic summit of industrial nations in Birmingham, England.<sup>3</sup> The order enumerated nine nonexclusive conditions permitting federal agencies to formulate and implement federal policy while limiting, or foreclosing altogether, state policymaking authority.<sup>4</sup> E.O. 13,083 also expressly revoked two previous executive orders which had favored state authority over federal agency policymaking discretion.<sup>5</sup> Strangely, although E.O. 13,083 encouraged federal agencies to consult with state and local governments when federal agency actions had “federalism implications,”<sup>6</sup> President Clinton failed to confer with state and local governments before he issued the order.<sup>7</sup>

The resulting outcry from state and local governmental organizations prompted a swift congressional response. Both Houses of Congress moved to block implementation of the order, that would have given federal agencies almost unlimited power to regulate. Reasons such as a need for uniform national standards; the increased cost of decentralization; or even the reluctance of states to regulate, fearing the flight of businesses to more commercially amenable jurisdictions, would have justified federal agency regulation under E.O. 13,083.<sup>8</sup> Congress, sensing a clear threat both to state autonomy and its own lawmaking power, acted to quell the

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1. James Bennet, *True to Form, Clinton Shifts Energies Back to U.S. Focus*, N.Y. TIMES, July 5, 1998, § 1, at 10 (Paul Begala’s pithy summation of the President’s E.O. strategy).

2. David S. Broder, *White House to Rewrite Federalism Order, Now With State-Local Input*, WASH. POST., July 29, 1998, at A19 (quoting Rep. Bernard Sanders’s diagnosis Congress’s federalism schizophrenia).

3. See David S. Broder, *Executive Order Urged Consulting, but Didn’t; State, Local Officials Want Federalism Say*, WASH. POST, July 16, 1998, at A15.

4. See Exec. Order No. 13,083, 3 C.F.R. 146, 148 (1999) (entitled “Federalism”), reprinted in 5 U.S.C.A. § 601 (West Supp. 1999).

5. *Id.* at 149.

6. *Id.* at 148.

7. See Broder, *supra* note 3, at A15.

8. Exec. Order No. 13,083, 3 C.F.R. 146.

executive intrusion. Under fire from Congress and state and local governmental organizations, the President quickly relented by suspending the executive order.<sup>9</sup> From the ashes of E.O. 13,083's suspension arose a new executive order on federalism to which Congress has not yet responded.<sup>10</sup> This Note, however, focuses on Congress's "anxiety" over E.O. 13,083, its use of federalism as a counterattack, and suggestions on how Congress might eliminate these executive breaches of state sovereignty.

This Note will begin by examining on E.O. 13,083's potential transformation of state and federal cooperation in the policymaking arena. E.O. 13,083 explicitly abandoned safeguards, embodied in two previous executive orders,<sup>11</sup> that protected states from federal agency overreach. Comparing the two orders highlights two distinct visions of the balance of power between state capitals and Washington, D.C. Earlier executive orders reflect sincere regard for state sovereignty and distrust of agency discretion with respect to federalism. E.O. 13,083, in contrast, disfavored state policymaking competence and preferred federal agency intervention.

Part II of this Note will address Congress's uncharacteristic protection of federalism with its challenge to E.O. 13,083. Federalism as well as separation of powers concerns animated the congressional response, although the arguments against E.O. 13,083 were cloaked mainly in the garb of preserving state sovereignty. By passing resolutions<sup>12</sup> condemning the order and sponsoring bills<sup>13</sup> to circumvent its application, Congress acted as a political safeguard for federalism. In this regard, this Note will examine the connection between federalism and underlying substantive policy issues.

The notion that the political branches, rather than the judiciary, should be responsible for upholding federalism has supported a doctrine of noninterference by the courts.<sup>14</sup> Part III of this Note will discuss the re-emergence of federalism as an active governing principle through the political process. When Congress pressured President Clinton into suspending the order, it enforced federalism politically. The Supreme Court has relied on the political branches to enforce federalism even though

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9. See Exec. Order No. 13,095, 3 C.F.R. 202 (1999) (entitled "Suspension of Executive Order 13,083"), reprinted in 5 U.S.C.A. § 601 (West Supp. 1999).

10. Exec. Order No. 13,132 (to be codified at 64 Fed. Reg. 43,255) (1999), available in 1999 WL 594172. This order embodies similar power-shifting principles that are found in E.O. 13,083: (1) federal agencies may construe federal regulations to preempt state authority, "if State authority conflicts with federal authority under the Federal statute"; and (2) the order promotes the same waiver process used in E.O. 13,083. *Id.* Clinton's latest order revokes his own E.O. 13,083 as well as Reagan's E.O. 12,612. See *id.* Thus far neither Congress nor state and local governmental organizations have publicly criticized Clinton's newest order.

11. Exec. Order 13,083, 3 C.F.R. at 149 (revoking President Reagan's E.O. 12,612 limiting federal agency policymaking and President Clinton's own E.O. 12,875 proscribing agency issuance of unfunded mandates).

12. See H.R. Con. Res. 299, 105th Cong. (1998).

13. See H.R. 4196, 105th Cong. (1998) (entitled "State Sovereignty Act of 1998"); S. 2445, 105th Cong. (1998) (entitled "Federalism Enforcement Act of 1998").

14. See, e.g., *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 556 (1985) (holding that Congress has power under the Commerce Clause to apply federal minimum wage and overtime protection to state employees).

the interests of state governments and the federal government at times do not coincide with the constitutional division of power. If, however, the political branches are to assume responsibility for protecting the federal-state balance, then Congress must take this opportunity to establish safeguards from federal agency encroachment on state autonomy. Congress, furthermore, must limit agency discretion with carefully drafted statutes and force its lawmakers to formulate Federalism Assessments when legislative proposals have federalism implications. Taking these simple steps will bridle an aggressive executive branch and restrain lawmakers from proposing laws which unconstitutionally preempt state authority.

### I. SPARRING OVER FEDERALISM

A brief background sketch of the President's and Congress's authority over executive agencies will provide context to the brawl over E.O. 13,083. Article II, Section 2 of the U.S. Constitution augured the eventual arrival of an administrative bureaucracy by mentioning "Heads of Departments."<sup>15</sup> The Constitution, though, vested the creation of these departments solely within the power of Congress, as directed by the Necessary and Proper Clause.<sup>16</sup> Combining these clauses allows Congress to grant to a "Head of a Department" executive powers that Article II had not directly reserved to the President.<sup>17</sup>

Once Congress has formed a department or agency, the President assumes general administrative control over the ordinary duties of such department's or agency's officers.<sup>18</sup> Yet, the Take Care Clause tempers this general administrative control,<sup>19</sup> the President is constitutionally charged to ensure that executive officials follow Congress's instructions. When Congress imposes a duty on an executive official, the control of the law supersedes a President's direction.<sup>20</sup> Though the Take Care Clause has been a fertile source of broad Presidential claims of authority, the Supreme Court has rejected this line.<sup>21</sup>

Congressional control over administrative agencies is limited, but its breadth "encompass[es] the power to create, abolish, and locate agencies and to define the powers, duties, tenure, compensation, and other incidents of the offices within

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15. See Morton Rosenberg, *Congress's Prerogative Over Agencies and Agency Decisionmakers: The Rise and Demise of the Reagan Administration's Theory of the Unitary Executive*, 57 GEO. WASH. L. REV. 627, 650 (1989) (construing U.S. CONST. art. II, § 2, cl. 2).

16. See *id.* (construing U.S. CONST. art. I, § 8, cl. 18).

17. See *id.*

18. See *Myers v. United States*, 272 U.S. 52, 135 (1926); see also Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 587 (1984) (observing that agencies operate under highly centralized presidential control).

19. See Rosenberg, *supra* note 15, at 650-51 (commenting on U.S. CONST. art. II, § 3).

20. See *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838).

21. See, e.g., *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (holding that President Truman did not have authority to seize private property to insure steel production).

them.”<sup>22</sup> When the President and Congress clash over executive agency control, the Supreme Court adopts a balancing test which has favored Congress in important separation of powers cases.<sup>23</sup> The Court weighs the justifications for congressional maneuvering, coupled with the necessity to maintain Congress’s Article I powers, against the degree of intrusion on the President’s ability to act according to his assigned duties.

The President often flexes his Article II muscle by issuing executive orders. Though not labeled as an executive order at the time, George Washington issued a neutrality proclamation enjoining all U.S. citizens from conduct which might provoke a belligerent power.<sup>24</sup> Lincoln was the first President to issue an executive order as it is known today, though executive orders were not numbered until 1907 when the State Department organized numerically all of the orders it had filed.<sup>25</sup> Franklin D. Roosevelt greatly expanded the authority of the executive order while creating New Deal executive agencies. By April 1942, thirty-five federal agencies operated purely by presidential generation.<sup>26</sup> Presidents Nixon, Ford, and Carter added to the executive’s burgeoning authority by increasing oversight programs during the 1970s economic crisis.<sup>27</sup> Later, President Reagan, frustrated by an opposition-controlled Congress, deployed executive orders to deregulate administrative agencies.<sup>28</sup>

#### A. Executive Order 13,083’s Predecessors

Part of Reagan’s plan in deregulating federal agencies included mandating agencies to treat federalism issues carefully. To understand clearly the implications of E.O. 13,083, one must examine Reagan predecessors, E.O. 12,372<sup>29</sup> and E.O. 12,612.<sup>30</sup> E.O. 12,372 reformed an Office of Management and Budget bureaucratic form used to resolve federal-state disputes over federal grants and expenditures. This executive order directed federal officials to “accommodate to” a designated state

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22. Rosenberg, *supra* note 15, at 695.

23. *See, e.g.,* *Mistretta v. United States*, 488 U.S. 361, 412 (1989) (upholding placement of commission to promulgate sentencing guidelines in the judicial branch); *Morrison v. Olson*, 487 U.S. 654, 696-97 (1988) (holding that Congress acted within its authority in creating an Independent Counsel to investigate the executive branch).

24. *See* Frank B. Cross, *Executive Orders 12,291 and 12,498: A Test Case in Presidential Control of Executive Agencies*, 4 J.L. & POL. 483, 485 (1988).

25. *See id.* at 486 n.5.

26. *See id.* at 491 n.40.

27. *See id.* at 493-94.

28. *See* Rosenberg, *supra* note 15, at 628.

29. Exec. Order No. 12,372, 3 C.F.R. 197 (1983) (entitled “Intergovernmental Review of Federal Programs”), *reprinted in* 31 U.S.C. § 6506 (1994).

30. Exec. Order No. 12,612, 3 C.F.R. 252 (1988) (entitled “Federalism”), *reprinted in* 5 U.S.C. § 601 (1994).

contact or explain why the federal official could not make such an accommodation.<sup>31</sup> As a result, state officials had the ability to contribute meaningfully and determinatively regarding federal aid disbursement and grant development.<sup>32</sup>

Borne of an intense collaborative effort among federal, state, and local governmental representatives, E.O. 12,612 continued the shift from federal agency discretion to state power and responsibility.<sup>33</sup> E.O. 12,612 established nine fundamental federalism principles that laid a foundation for the order's subsequent policymaking guidelines and expressed normative values of federalism. The first of these values is the belief that limiting the scope and power of the national government preserves the political liberty of the people.<sup>34</sup> A second and commonly cited value of federalism is the competency of the states to solve localized problems more effectively than the national government.<sup>35</sup> The order also cites the benefits of allowing states to experiment with diverse public policies.<sup>36</sup>

The most important principle E.O. 12,612 enunciated is the presumption of state sovereignty. Before an agency could issue a regulation, it must have had clear constitutional and statutory authority. When any uncertainty arose as to an agency's authority, a presumption resolved against national regulation.<sup>37</sup> This provision protected against poorly drafted legislation and curtailed agency discretion.

In addition to outlining basic federalism principles, E.O. 12,612 established important policymaking criteria. First, the order re-emphasized the consultation process established by E.O. 12,372. When federal agencies limited the "policymaking discretion" of states, they were required to consult with a designated state official and work with states in developing policies.<sup>38</sup> An additional criterion similar to the presumption principle was that the authority for agency regulation had to be certain and clear.<sup>39</sup>

E.O. 12,612 also instituted important preemption rules. Before an agency could construe a federal statute to preempt state law, the statute had to authorize preemption expressly, or there had to be firm evidence that Congress intended to preempt state law.<sup>40</sup> Where the statute did not preempt state law but allowed for agency rulemaking, the statute had to give an agency express authorization to issue

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31. Executive Order 12,372, 3 C.F.R. 197.

32. See *Clinton-Gore v. State and Local Governments: Hearing Before the Subcomm. on Nat'l Econ. Growth, Natural Resources, and Regulatory Affairs of the House Comm. on Gov't Reform and Oversight*, 105th Cong. 161 (1998) [hereinafter *Hearings*] (testimony of Michael Horowitz, a Senior Fellow of the Hudson Institute and the self-described "point man" for the Reagan Administration's efforts to promote federalism).

33. See *id.* at 157-58.

34. See Executive Order 12,612, 3 C.F.R. at 253.

35. See *id.*

36. See *id.*

37. See *id.* at 254.

38. See *id.*

39. See *id.*

40. See *id.* at 255.

preemptive regulations.<sup>41</sup> E.O. 12,612, moreover, forbade agencies from submitting legislative proposals, inconsistent with E.O. 12,612's principles and policymaking criteria, which would have preempted state law.<sup>42</sup>

Finally, E.O. 12,612 directed each agency to designate an official who would ensure the order's implementation. This official was charged with preparing a "Federalism Assessment" when proposed policies had "sufficient federalism implications."<sup>43</sup> A proper Federalism Assessment identified policies inconsistent with E.O. 12,612 and calculated the financial burden a state had to bear.<sup>44</sup> An accurate assessment also identified to what extent such a policy interfered with the state's discharge of its "traditional . . . governmental functions."<sup>45</sup>

The Reagan Administration holds no monopoly over policies favorable to state and local governmental authority. The Clinton Administration had acted favorably toward federalism in late 1992 through the fall of 1993.<sup>46</sup> For example, President Clinton issued E.O. 12,866<sup>47</sup> improving regulatory cost/benefit analysis for executive agencies. In October 1993, the Clinton Administration ordered federal agencies to desist from issuing unfunded mandates.<sup>48</sup> (Two years later Congress passed a law prohibiting a federal agency from imposing heavy financial burdens on states, unless the federal government provided funds to bear the cost of regulation.<sup>49</sup>) If the federal government cannot or will not finance the cost of the agency regulation, state and local governmental officials have the opportunity to provide timely and meaningful information for the development of regulatory proposals.

In addition to executive orders favoring state authority and responsibility, the Clinton Administration conferred with state and local governmental groups on important reform issues. The Clinton Administration consulted with the states on welfare reform and children's health initiatives.<sup>50</sup> State and local governments also participated in programmatic and administrative reforms of Medicaid.<sup>51</sup> Safe drinking water amendments were an additional source of intergovernmental cooperation.<sup>52</sup>

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41. *See id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 254.

46. *See Hearings, supra* note 32, at 110 (testimony of Dan Blue, North Carolina House of Representatives and President of the National Conference of State Legislatures).

47. Exec. Order No. 12,866, 3 C.F.R. 638 (1994) (entitled "Regulatory Planning and Review"), *reprinted in* 5 U.S.C. § 601 (1994).

48. *See* Exec. Order No. 12,875, 3 C.F.R. 669, 670 (1994) (entitled "Enhancing the Intergovernmental Partnership"), *reprinted in* 5 U.S.C. § 601 (1994).

49. *See generally* Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-71 (Supp. IV 1998). A federal agency, however, is free to regulate unless the cost to the state is \$100,000,000 or more. *See id.* § 1532.

50. *See Hearings, supra* note 32, at 110 (testimony of Dan Blue, North Carolina House of Representatives and President of the National Conference of State Legislatures).

51. *See id.*

52. *See id.*

To allow for more effective communication between federal agencies and state governments, E.O. 12,875, "Enhancing the Intergovernmental Partnership," increased the flexibility of the waiver process.<sup>53</sup> States, wishing to avoid federal agency regulations, could submit alternative policy approaches. In turn, federal agencies had to respond to a state alternative policy in less than 120 days.<sup>54</sup> If a federal agency rejected the proposed policy, it had to explain to the state government why it declined the alternative. Thus, on the whole, these contributions from the Clinton Administration favored state and local governments by easing the costs of regulations and encouraging meaningful communication between federal agencies and state governments.

*B. Executive Order 13,083's Potential Transformation  
of Agency Power and Discretion*

In stark contrast to the shifting of authority to state governments and general intergovernmental cooperation, Clinton's E.O. 13,083, "Federalism," threatened to divest state governments of the sovereignty they had recaptured through prior Reagan and Clinton Administration executive orders. Specifically, President Clinton revoked both Reagan's E.O. 12,612, "Federalism" and his own E.O. 12,875, "Enhancing the Intergovernmental Partnership."<sup>55</sup> E.O. 13,083, "Federalism," retained most of the language found in Reagan's federalism order but excised crucial components.<sup>56</sup> In place of his deletions, one finds nine nonexclusive conditions allowing federal agencies to preempt state authority.

Missing from E.O. 13,083 was the presumption of state sovereignty found in Reagan's E.O. 12,612. Federal regulatory agencies, under Clinton's E.O. 13,083, could have regulated when constitutional or statutory authority to act was unclear or uncertain. The traditional dual sovereignty approach, firmly ensconced in Reagan's order, is negated. Also absent from E.O. 13,083 are the preemption provisions ordering agencies to scrutinize statutory authority carefully before preempting state law.<sup>57</sup> E.O. 13,083, likewise, discarded the Federalism Assessment, formerly required when a federal agency proposed regulation with "sufficient federalism implications."<sup>58</sup>

The nine nonexclusive conditions inspired heated responses from state and local governmental organizations and Congress.<sup>59</sup> E.O. 13,083 attempted to distinguish

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53. Executive Order 12,875, 3 C.F.R. at 670.

54. *See id.*

55. *See* Exec. Order No. 13,083, 3 C.F.R. 146, 149 (1999) (entitled "Federalism"), reprinted in 5 U.S.C.A. § 601 (West Supp. 1999).

56. *Id.* (E.O. 13,083, except for removing an explicit reference to the Tenth Amendment and a presumption favoring State authority, uses almost verbatim the federalism principles found in E.O. 12,612).

57. *See* Exec. Order No. 12,612, 3 C.F.R. 252, 255 (1988) (entitled "Federalism"), reprinted in 5 U.S.C. § 601 (1994).

58. *Id.* at 255-56.

59. *See Hearings, supra* note 32, at 9. Representative David M. McIntosh was astonished by the order considering President Clinton's experience as a governor, stating that President Clinton's order "swept away [important] limitations on the power of the federal government."



matters of national or multistate scope from matters that are merely common to the states. Understandably, federal agencies may regulate when the issue involves national or multistate concerns. The difficulty arises in defining what exactly is a national concern. E.O. 13,083's ambiguous and broad definitions of national concerns dangerously abridged state authority and responsibility.

A federal agency could have regulated when the matter "occur[ed] interstate as opposed to being contained within one State's boundary."<sup>60</sup> This language appeared to grant regulatory authority over matters that were merely common to the states, thus, destroying a need for the distinction between national concerns and concerns merely common to the states. The word "interstate" echoes the Commerce Clause,<sup>61</sup> but E.O. 13,083 omits any other qualifier, such as a matter relating to commerce. In effect, the executive order leaves the protection of state authority to the discretion of a federal agency official.

Similarly, E.O. 13,083's language permitted federal agency regulation under almost any imaginable scenario. Subsection 3(d)(2) justified federal regulation when the source of harm sprung from a state different from the state experiencing a significant amount of harm.<sup>62</sup> This subsection logically followed the interstate language of the first subsection but did not limit federal agency discretion. An agency also could have regulated when it perceived a need for uniform national standards.<sup>63</sup> Furthermore, when decentralization increased the cost of government, federal agencies could have issued regulations.<sup>64</sup> Federal agencies would have had additional rulemaking discretion when states failed to protect "individual rights and liberties" adequately.<sup>65</sup> Finally, if states hesitated to impose regulation, fearing the relocation of business to other states, federal agencies would again have had discretion to regulate.<sup>66</sup>

In addition to subverting state autonomy, E.O. 13,083 challenges the Senate's power to ratify treaties.<sup>67</sup> A matter relating to an international obligation would justify regulation by a federal agency under E.O. 13,083.<sup>68</sup> Depending on how broadly one defined an international obligation, executive agencies could have forced states to obey treaties to which the Senate never consented. This concern, in particular, prompted drafting of a House Concurrent Resolution condemning E.O. 13,083.<sup>69</sup>

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*Id.*

60. Exec. Order No. 13,083, 3 C.F.R. at 148.

61. See U.S. CONST. art I, § 8, cl. 3.

62. See Exec. Order No. 13,083, 3 C.F.R. at 148.

63. See *id.*

64. See *id.*

65. *Id.*

66. See *id.*

67. See U.S. CONST. art II, § 2, cl. 2.

68. See Exec. Order No. 13,083, 3 C.F.R. at 148.

69. See 144 CONG. REC. H6870-01 (daily ed. July 31, 1998) (statement of Representative Collins criticizing the order for threatening "[to] impos[e] on States and the American people provisions of international treaties or agreements that have not been ratified by the Senate."); see also H.R. Con. Res. 299, 105th Cong. (1998). The Clinton Administration, nonetheless, may not need to rely on federal agencies to impose unratified international treaties or

## II. THE POLITICAL PROCESS AT WORK

Before the House introduced the Concurrent Resolution, Representative Barr sponsored a bill mandating that federal agencies comply with President Reagan's E.O. 12,612, "Federalism."<sup>70</sup> The bill also specified that Clinton's E.O. 13,083 would have no force or effect. Representative Barr's bill initiated a series of resolutions and hearings which galvanized state and local governmental organizations into action.

Both the lack of prior consultation and the breadth of E.O. 13,083's sweeping provisions forged a strong alliance. The National Governor's Association was unaware of the order's existence until notified by a member of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs.<sup>71</sup> As the news spread to other state and local governmental organizations, the leaders of the "Big Seven"<sup>72</sup> mobilized to force the order's withdrawal. At first, the Clinton Administration refused to withdraw the order and only offered to delay the effective date of the order from mid-August to mid-November.<sup>73</sup>

Finding the Clinton Administration's response unacceptable, Congress initiated hearings on E.O. 13,083 and invited leaders from the "Big Seven" and Clinton Administration officials to discuss the need for the order. The leaders of the "Big Seven" denounced E.O. 13,083 because it would have fundamentally shifted the federal-state balance of power.<sup>74</sup> Some complained about the deletion of the Federalism Assessment.<sup>75</sup> Others criticized the order on account of the broad subjective criteria which displaced previous preemption limits.<sup>76</sup>

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agreements on the United States. Secretary of State Madeleine Albright sent a letter "to numerous foreign ministers" assuring them that the United States would observe the Comprehensive Test Ban Treaty despite its rejection by the Senate. *See* Bill Gertz, *Albright Says U.S. Bound by Nuke Pact: Sends Letters to Nations Despite Senate Vote*, WASH. TIMES, Nov. 2, 1999, at A1.

70. *See* H.R. 4196, 105th Cong. (1998) (entitled "State Sovereignty Act of 1998").

71. *See Hearings, supra* note 32, at 10 (statement of Representative McIntosh, Chairman of the Subcommittee on National Economic Growth, Natural Resources, and Regulatory Affairs). A member of the Subcommittee first called the National Governor's Association ("NGA") to ascertain the organization's views and was shocked to learn the Executive Director of NGA had never heard of the order. *See id.* William T. Pound, executive director of the National Conference of State Legislatures ("NCSL"), called the lack of consultation a "slap in the face." Broder, *supra* note 3, at A15.

72. *See Hearings, supra* note 32, at 10. The "Big Seven" constitutes the National Governor's Association ("NGA"), National Conference of State Legislatures ("NCSL"), National Association of Counties ("NACO"), United States Conference of Mayors ("USCM"), National League of Cities ("NLC"), International City/County Management Association ("ICMA"), and Council of State Governments ("CSG"). *See id.*

73. *See* Broder, *supra* note 2, at A19.

74. *See id.*

75. *See Hearings, supra* note 32, at 170 (statement of Eugene Hickok, former Justice Department official under Attorney General Edwin Meese III and former member of Reagan's White House Working Group on Federalism).

76. *See id.* at 139 (testimony of Betty Lou Ward, President of NACO).

An official from the Office of Management and Budget defended E.O. 13,083 on the grounds that it constituted an update of E.O. 12,612, "Federalism," and E.O. 12,875, "Enhancing the Intergovernmental Partnership."<sup>77</sup> The official maintained that the Unfunded Mandates Reform Act ("UMRA"),<sup>78</sup> recent Supreme Court decisions, and the structure of the Constitution itself left the previous orders outdated.<sup>79</sup> UMRA, according to the Administration official, supplanted E.O. 12,612's analysis of federalism implications. Under E.O. 12,612 agencies were required to document proposed regulations having federalism implications and prepare a cost/benefit analysis. UMRA requires a statement to be issued only when a regulation would result in an expense of at least \$100,000,000 to a state or local government.<sup>80</sup> In addition to UMRA's preemption of the Reagan order, the Administration asserted that E.O. 13,083 improved the waiver application process through which states could have requested to remove themselves from regulation.<sup>81</sup> Despite this defense, in the face of stiff resistance from both Congress and the "Big Seven," President Clinton quickly suspended the executive order.<sup>82</sup>

E.O. 13,083's suspension did nothing to allay the concerns of the "Big Seven" and members of Congress. The power struggle between the executive department, the 105th Congress, and state governments did not culminate until the introduction of the "Federalism Enforcement Act of 1998" ("FEA") in the U.S. Senate.<sup>83</sup> The bill essentially codified E.O. 12,612, using the Reagan order's language almost verbatim. FEA would restore the Reagan order's presumption against federal agency regulation and its preemption standards. Under E.O. 12,612, agencies were to err on the side of state sovereignty when in doubt about their authority to regulate. Moreover, FEA would require agencies to prepare a Federalism Assessment when federal agency regulations would involve significant federalism implications.<sup>84</sup>

FEA differs from E.O. 12,612 in that it only expresses the "sense of Congress" that agencies not prepare legislative proposals which would interfere with state functions.<sup>85</sup> Senator Thompson, who introduced FEA, recognized that only the President could enforce legislative proposal requirements with his Article II

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77. *See id.* at 198 (testimony of G. Edward Deseve, Acting Deputy Director for Management and Controller, Office of Management and Budget).

78. Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1501-71 (Supp. IV 1998).

79. *See Hearings, supra* note 32, at 198 (testimony of G. Edward Deseve, Acting Deputy Director for Management and Controller, Office of Management and Budget).

80. *See* 2 U.S.C. § 1532 (Supp. IV 1998); *see also supra* text accompanying note 49.

81. *See Hearings, supra* note 32, at 176 (statement of G. Edward Deseve, Acting Deputy Director for Management and Controller, Office of Management and Budget).

82. *See* Exec. Order No. 13,095, 3 C.F.R. 202 (1999) (entitled "Suspension of Executive Order 13,083"), *reprinted in* 5 U.S.C.A. § 601 (West Supp. 1999). Apparently, the President is prepared for another bout with Congress over his latest federalism executive order. *See supra* text accompanying notes 9-10.

83. S. 2445, 105th Cong. (1998). Senator Thompson still viewed E.O. 13,083 as a threat to state sovereignty and requested that President Clinton revoke the order permanently. *See* 144 CONG. REC. S9976 (daily ed. Sept. 8, 1998).

84. *See* S. 2445, 105th Cong. § 5 (1998).

85. *Id.*

powers.<sup>86</sup> The bill, however, ultimately died in the Committee on Governmental Affairs at the end of the legislative year. Though Congress failed to enact legislation protecting federalism, the legislature sent a strong message that state authority (at least as it relates to federal agency regulation) will be protected.

#### A. Federalism: Framing the Debate

Congress, despite its rhetorical flourish about state sovereignty and responsibility, was motivated by other concerns when it challenged Clinton's order. Some in Congress viewed the his executive order as another avenue through which President Clinton planned to bypass the national legislature.<sup>87</sup> Separation of powers issues permeated much of the debate and discussion about state sovereignty. Federalism, therefore, served as a convenient "surrogate"<sup>88</sup> through which Congress could restrain executive encroachment on legislative power.

Federalism often provides a useful tool for proponents on either side of the ideological spectrum to frame a debate. Federalism often masks disagreement over basic social or political issues. Recently, gun owner and manufacturer advocates adopted state sovereignty arguments to challenge a provision of the Brady Handgun Violence Prevention Act, requiring local law enforcement officials to conduct criminal background checks on prospective hand gun buyers.<sup>89</sup> In *Printz v. United States*, the Supreme Court held that criminal background checks conducted by local officials "directly conscript[ed] State officers to execute federal law."<sup>90</sup> Gun owners and gun manufacturers, however, probably would not support state autonomy as aggressively should states begin to devise strict gun control enactments.<sup>91</sup> At that juncture, gun owners and gun manufacturers would jettison state sovereignty

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86. See 144 CONG. REC. S9976-77 (daily ed. Sept. 8, 1998).

87. See *Hearings*, *supra* note 32, at 27 (statement of Rep. Bob Barr).

88. Norman Redlich & David R. Lurie, *Federalism: A Surrogate for What Really Matters*, 23 OHIO N.U. L. REV. 1273, 1273 (1997). The thrust of this article asserts that federalism is a tool for political debates that have little to do with allocating power between state and federal governments. Political leaders use federalism to frame debates around conservative and liberal public policy positions. State autonomy has often been used as an argument to withstand progressive federal enactments. See Erwin Chemerinsky, *The Values of Federalism*, 47 FLA. L. REV. 499, 500 (1995). In the early nineteenth century southern states camouflaged opposition to federal action limiting slavery with arguments about State sovereignty and the concept of interposition. See SAMUEL H. BEER, *TO MAKE A NATION: THE REDISCOVERY OF AMERICAN FEDERALISM* 224, 316 (1993) (describing John Calhoun's vision of state's rights and interposition). After the Civil War, southern states objected to a federal military presence which they viewed as an infringement of state autonomy and federalism. Federalism was also used to counter progressive era federal laws reforming child labor conditions, enacting a minimum wage, and regulating business monopolies. See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating federal regulation of employment); *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (holding that federal government could not regulate child labor); *United States v. E.C. Knight*, 156 U.S. 1 (1895) (holding that businesses engaged in production, not commerce, could not be regulated by the Sherman Antitrust Act).

89. Pub. L. No. 103-159, 107 Stat. 1536 (1993) (codified at 18 U.S.C. § 922(s) (1994)).

90. 521 U.S. 898, 914-15 (1997).

91. See Redlich & Lurie, *supra* note 88, at 1283-84.

principles and would adopt Second Amendment and other constitutional challenges to dispute state sovereignty.<sup>92</sup>

Other highly politically charged policy issues, such as abortion, could force advocates to embrace either state autonomy or federal preemption doctrine depending on the nature of the political threat. For instance, President Clinton and pro-choice advocates oppose “partial birth” abortion bans<sup>93</sup> because they limit treatment options by physicians.<sup>94</sup> However, a “conservative federalist” might also denounce the ban as an affront to reserved traditional state powers over family, marriage, or crime. If Congress enacted a federal ban, pro-choice advocates would soon trumpet the fundamental authority of states to ban “partial birth” abortions.<sup>95</sup>

Furthermore, typically “liberal” criminal defendant attorneys find themselves favoring state sovereignty in opposition to the increasing federalization of crimes.<sup>96</sup> Criminal defendants would rather face state authorities and judicial systems than the federal government’s panoply of resources aimed at reducing crime. Furthermore, a criminal defendant convicted under federal law will more likely suffer longer prison sentences and more severe penalties.<sup>97</sup> Thus, criminal defense attorneys attack Congress’s use of the Commerce Power vis-à-vis state autonomy as the basis for federal criminal statutes.<sup>98</sup>

### B. Federalism as Principle and Rhetoric

Likewise, the dispute over E.O. 13,083 was as much a skirmish over separation of powers as it was a conflict over federalism. E.O. 13,083 constituted one of many 1998 Clinton Administration initiatives circumventing congressional authorization. In July of 1998, with White House advisers pessimistic that the 105th Congress would pass any major legislation, President Clinton “plann[ed] to issue a series of executive orders to demonstrate that he [could] still be effective.”<sup>99</sup> Clinton’s senior

92. *See id.* at 1282-83.

93. *See* Redlich & Lurie, *supra* note 88, at 1284-85; *see, e.g.*, Partial-Birth Abortion Ban Act of 1997, H.R. 1122, 105th Cong. (1997).

94. President Clinton stated he would support a ban only if an exception were allowed for the life and health of the mother. *See* Katherine Q. Seelye, *States Outlaw Late Abortions as a Federal Ban Faces a Veto*, N.Y. TIMES, May 5, 1997, at A1.

95. *See* Redlich & Lurie, *supra* note 88, at 1284.

96. *See* Andrew Weis, Note, *Commerce Clause in the Cross Hairs: The Use of Lopez-Based Motions to Challenge the Constitutionality of Federal Criminal Statutes*, 48 STAN. L. REV. 1431 (1996).

97. *See generally* Greg Hollon, Note, *After the Federalization Binge: A Civil Liberties Hangover*, 31 HARV. C.R.-C.L. L. REV. 499 (1996) (comparing harsh federal sentences with generally more lenient state sentences for the same conduct).

98. *See, e.g.*, *United States v. Oliver*, 60 F.3d 547 (9th Cir. 1995) (failed challenge to federal carjacking statute); *United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995) (failed challenge to statute proscribing possession of a firearm by a felon)

99. Bennet, *supra* note 1, at 10.

policy adviser, Rahm Emanuel, announced, “[The President] [i]s ready to work with Congress if they will work with him. But if they choose partisanship, he will choose progress.”<sup>100</sup>

The President launched a mid-summer domestic policy bonanza, first focusing on the safety of fruit and vegetable juice. Finding Congress unwilling to legislate on this issue, President Clinton later signed E.O. 13,100 to establish the President’s Council on Food Safety.<sup>101</sup> The President also planned to issue an executive order to make health care more accessible to federal employees.<sup>102</sup> Clinton had previously expanded coverage under Medicare health insurance for the elderly and ordered federal agencies to enlist millions more poor children for Medicaid.<sup>103</sup>

Even critics outside the Republican-controlled Congress agreed that President Clinton was stretching the legal limits of his authority. Professor David Schoenbrod, a New York Law School professor, faulted Clinton for “consistently trying to take more power than Congress gives him.”<sup>104</sup> Jeremy Taylor, Director of Natural Resource Studies at the Cato Institute, claims that President Clinton distinguishes himself from other Presidents by his aggressive expansion of authority.<sup>105</sup> However, Taylor correctly blames Congress for allowing the President to usurp Congress’s own powers. Congress often fuels presidential encroachment by delegating broad discretionary authority.<sup>106</sup>

In addition to protecting against presidential usurpation and asserting Congress’s power to make law,<sup>107</sup> many of the Republican Congress’s own policy proposals contradict a professed reverence for state authority and responsibility. Neither the 104th nor the 105th Congress was a shining example of a principled protector of state sovereignty. A number of “conservative” policy objectives have undermined or threatened to undermine state authority and responsibility, beginning with the “Contract with America.” Among other affronts to state autonomy, the “Contract with America” contained a plan to “reform” the common law of torts of each state

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100. Elizabeth Shogren, *Clinton to Bypass Congress in Blitz of Executive Orders*, L.A. TIMES, July 4, 1998, at A1.

101. See Exec. Order 13,100, 3 C.F.R. 209 (1999), reprinted in 21 U.S.C.A. § 341 (West Supp. 1999).

102. See Bennett, *supra* note 1, at 10.

103. See Shogren, *supra* note 100, at A1.

104. Editorial, *King Clinton*, WALL ST. J., July 8, 1998, at A14.

105. See Robert Pear, *The Presidential Pen Is Still Mighty*, N.Y. TIMES, June 28, 1998, § 4, at 3.

106. See *id.* § 4, at 3. The article cites a classic illustration of lethargic congressional delegation when it mandated that the poor have access to the Internet and other communication outlets. Congress characteristically allowed the Federal Communications Commission (“FCC”) to iron out the details. Congress was “shocked” when the FCC proposed a new tax to pay for Congress’s “universal access.” *Id.*

107. See U.S. CONST. art. I, § 1.

by establishing federal limits on punitive damage recovery.<sup>108</sup> Moreover, Republican proposals would have increased federal interference in state law enforcement by forcing states to alter their sentencing practices.<sup>109</sup>

Congress has also strictly limited the length of time during which welfare recipients can collect payments and precluded legal aliens from collecting welfare altogether.<sup>110</sup> A witness present at the E.O. 13,083 congressional hearings criticized the current Congress for efforts to preempt state authority to tax goods and services through the Internet.<sup>111</sup> The witness also worried about telecommunication proposals, federal tax reform, and electric utility deregulation that may substantially diminish state autonomy.<sup>112</sup>

"Conservative" Republicans as well as "liberal" Democrats, thus, have shown an ability to discard federalism principles for political gain. Though many Republican leaders sincerely viewed E.O. 13,083 as a threat to state autonomy, Clinton's executive order stimulated a separation of powers conflict framed by federalism rhetoric. With mixed motives, Congress challenged the President on the executive order and achieved a temporary victory. This highly political process and legislative maneuvering secured, for the advocates of state autonomy, an important check on executive agency policymaking discretion.

### III. CONGRESS AS A POLITICAL SAFEGUARD FOR FEDERALISM

Some scholars and Justices of the Supreme Court have envisioned the political branches as the proper repositories of federalism safeguards, rather than federal courts as neutral arbiters over state and federal conflicts. The 105th Congress's barrage of resolutions, bills, and hearings, in some respects, empirically supports a political process vision of federalism. The Court, however, should not depend on Congress and the President exclusively to referee federal-state power-sharing.

#### *A. Tracing the Judicial Approach to Federalism*

The Court, in 1937, began to uphold federal statutes and abandon federalism-based restraints on federal legislation.<sup>113</sup> In time, federalism was rarely mentioned as an

108. NEWT GINGRICH ET AL., *CONTRACT WITH AMERICA: THE BOLD PLAN BY REP. NEWT GINGRICH, REP. DICK ARMEY AND THE HOUSE REPUBLICANS TO CHANGE THE NATION* 146 (Ed Gillespie & Bob Schellas eds., 1994); see also Redlich & Lurie, *supra* note 88, at 1280-81.

109. See Gene Nichol, *The New and Unfortunate Face of Judicial Federalism*, 23 OHIO N.U. L. REV. 1197, 1203 (1997).

110. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

111. See *Hearings*, *supra* note 32, at 131 (statement of Brian O'Neill, President of the National League of Cities and Councilman of the City of Philadelphia, Pennsylvania).

112. See *id.*

113. Compare *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding that production of materials was no longer determinative of Commerce Clause power; rather, any production affecting interstate commerce could trigger Commerce Clause power) with *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding that commerce was a thing apart from production and mining; therefore, Congress could not regulate

issue in Supreme Court cases while battles raged over the New Deal and the expansion of civil rights. Instead, the Court and constitutional scholars concentrated on the extent of Congress's power under the Commerce Clause, separation of powers, and individual rights protected under the Constitution.<sup>114</sup> Federalism did not resurface in constitutional jurisprudence until *National League of Cities v. Usery*, when the Supreme Court attempted to develop the traditional governmental functions doctrine.<sup>115</sup> A traditional governmental function, such as the authority to regulate marriage, would constitute an area "carved out" for state governments in which Congress could not use the Commerce power to pass legislation.<sup>116</sup>

The Court quickly abandoned the traditional governmental functions standard in *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>117</sup> The "confusion, wasteful litigation, and contradictory decisions"<sup>118</sup> generated by *National League's* conception of federalism forced the Court to abandon judicial protection of federalism. *Garcia* relied on political safeguards to insure the balance of state-federal power. Building on the political safeguard concept, the Court instituted a clear statement rule requiring Congress to expressly refer to states before enacting regulation that would apply to states.<sup>119</sup> The Court believed that such a requirement might actually prod Congress into considering state interests before passing laws inimical to state authority.<sup>120</sup>

Recent opinions, however, indicate that the Court will not rely solely on Congress and the President to protect federalism. The Court, reminiscent of the *National League* traditional functions test, has carved out certain state governmental areas with which Congress may not constitutionally interfere. In *New York v. United States*,<sup>121</sup> the Court held that Congress cannot regulate states by ordering them to act in a particular way.<sup>122</sup> Justice O'Connor reasoned that federal officials directing state action would blur the lines of political accountability.<sup>123</sup> Federal intervention in this manner would confuse the electorate about which state or federal official is ultimately responsible for unwise or unwanted legislation. The Court has also, for the first time since 1937, broadly circumscribed Congress's Commerce Clause power. In *Lopez v. United States*,<sup>124</sup> the Court held that the Gun Free School Zones Act, banning firearms within 1000 feet of school grounds, exceeded the scope of the Commerce Clause.<sup>125</sup> Lastly, the Court has withheld another state governmental

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production or mining).

114. See Redlich & Lurie, *supra* note 88, at 1274.

115. 426 U.S. 833, 852 (1976).

116. *Id.*

117. 469 U.S. 528 (1985).

118. *Id.* at 554.

119. See Gregory v. Ashcroft, 501 U.S. 452, 470 (1991).

120. See Ann Althouse, *Enforcing Federalism After United States v. Lopez*, 38 ARIZ. L. REV. 793, 809 (1996).

121. 505 U.S. 144 (1992) (holding that a federal statute ordering states either to regulate radioactive waste or take title to it violates the Tenth Amendment).

122. See *id.* at 161-63.

123. See *id.* at 168-69.

124. 514 U.S. 549 (1995).

125. See *id.* at 567-68.



function from Congressional arrogation. In *Printz v. United States*,<sup>126</sup> the Supreme Court declared that Congress could not constitutionally command states or state officers to implement federal regulatory programs.<sup>127</sup>

The rulings issued since *New York v. United States* demonstrate a new tack by the Supreme Court, but it has not yet expressly abandoned the political safeguard argument first articulated by Professor Herbert Wechsler in his seminal 1954 law review article.<sup>128</sup> Wechsler contended that the political process adequately protects states and state interests. Wechsler maintained that U.S. Senate procedures, such as the two-thirds vote requirement needed to stymie states' rights filibusters, the rigid seniority system, and committee control shield state interests from federal governmental meddling. In addition, before *Baker v. Carr*,<sup>129</sup> rural interests were over-represented in state legislatures and guided decennial redistricting.<sup>130</sup> Wechsler also argued that the Electoral College compels Presidential campaigns to travel to every state. Wechsler concluded that the national political process was "well adapted to retarding or restraining new intrusions by the cent[ral power] on the domain of the states."<sup>131</sup>

### B. The Flawed Political Process Argument

Professor Jesse H. Choper resumed the political process argument,<sup>132</sup> a rationale supporting *Garcia v. San Antonio Metropolitan Transit Authority*.<sup>133</sup> Choper claimed that the federal courts should refrain from wasting their adjudicative resources on federalism cases and confine their energies to individual rights cases. He noted that all three branches enforce the Constitution, with the political branches as the most appropriate enforcers of federalism.<sup>134</sup> Choper updated some of Wechsler's arguments and added his own political process grounds for political branch protection of state autonomy.

Building on Wechsler's argument about the Senate and House of Representatives as protectors of state interests, Choper posits that the basic political orientation of the national legislature's members inherently guards states from federal intrusion. Because as many as three-fourths of senators and representatives graduate from state and municipal offices, they will be inclined to consider the effects national legislation will have on states.<sup>135</sup> The emergence of the intergovernmental lobby also has provided states and localities with a strong voice in Washington, D.C. Organizations such as the National Governor's Association, the Council of State

126. 521 U.S. 898 (1997).

127. *Id.* at 935.

128. 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 (1954).

129. 369 U.S. 186 (1962) (holding that each citizen's vote should weigh equally).

130. *See* Wechsler, *supra* note 128, at 548-52.

131. *Id.* at 558.

132. *See* JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980).

133. 469 U.S. 528, 551 n.11 (1985).

134. *See* CHOPER, *supra* note 132, at 236-37.

135. *See id.* at 178-79.

Governments, and the National League of Cities have the requisite knowledge of state and local concerns and the power to influence both national legislation and federal agency regulation.<sup>136</sup>

The skirmish over E.O. 13,083 exemplifies the power the “intergovernmental lobby” can wield over the national political process. The “Big Seven” in tandem with “conservative” Republican congressional leaders forced the President to suspend E.O. 13,083 at least temporarily. National newspaper coverage—spurred by the “Big Seven’s” anxiety over regulatory agency preemption, congressional hearings, and a plethora of bills and resolutions—swelled against Clinton’s new initiative. Rather than risk further alienation of these state and local governmental organizations, the President acquiesced.

One can reasonably conclude that the political process succeeded in protecting state interests with respect to E.O. 13,083. However, the states’ victory, in this instance, is not compelling evidence that the federal judiciary should leave federalism issues to the political branches. Professor Calabresi counters the Wechsler-Choper political process analysis with observations about the recent transformation of national politics. Calabresi contends that, while the political process provides a meaningful outlet for state concerns and interests, relying solely on Congress and the President to enforce federalism would vitiate the Tenth Amendment.<sup>137</sup>

First, the role of the national courts in reapportioning congressional districts, coupled with political action committee (“PAC”) financing of national political campaigns, has diminished the power of state political entities.<sup>138</sup> Successfully waging an election campaign requires expensive financing supplied by PACs that usually represent national special interests. Thus, a candidate for national office must spend a substantial amount of time courting and developing these national special interest PACs. As a result, modern senators and representatives have expanded their constituencies to include national special interests as well as citizens in their home states and districts.<sup>139</sup> This modern arrangement creates, in some cases, an unresolvable conflict between national PAC interests and state and local interests. PACs, like other special interests, will favor or disfavor state interests according to the dictates of their substantive policy.

Moreover, the Wechsler-Choper analysis inadequately assesses the degree to which federalism concerns of state and local officials influence members of Congress and the President. With one eye closely scrutinizing each upcoming election and the other eye focused on the annual budget, members of Congress and the President ritually expand resources and dole them out to their constituents. In turn, voters applaud the additional federal resources and reciprocate by feeding the re-electoral appetite of their senators and representatives.<sup>140</sup> Furthermore, espousing or defending

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136. *See id.* at 180-81.

137. *See* Steven G. Calabresi, “A Government of Limited and Enumerated Powers”: In *Defense of United States v. Lopez*, 94 MICH. L. REV. 752 (1995).

138. *See id.* at 794.

139. *See id.*

140. *See id.* at 795-96 (“Pass a national speed limit, collect a donation from the insurance companies. Pass a national drinking age, collect a donation from Mothers Against Drunk Driving. Every breach of the constitutional fabric becomes a new fundraising opportunity and

federalism principles at the behest of state and local officials cannot be clearly articulated by news sound bites.<sup>141</sup>

A final reason the federal judiciary should not entrust the political process to enforce federalism is that state and local officials may not pursue objectives consistent with federalism principles.<sup>142</sup> State and local officials are, at times, more interested in shifting responsibility and accountability to federal officials.<sup>143</sup> Moreover, state and local officials often seek portions of the federal largesse for state and local constituencies. Inevitably, increased federal expenditures are attended by correspondingly increased power and regulation at the federal level.<sup>144</sup>

*C. Increasing the Role of Political Process in Effective  
Federalism Enforcement*

Because neither state nor federal officials have great incentive to protect federalism on a regular basis, the federal judiciary should not leave federalism enforcement to the political process. Yet, the recent battle over E.O. 13,083 presented a rare opportunity for Congress and state and local officials to discuss intergovernmental cooperation based on federalism principles. Though the political process is an inherently limited method to protect state autonomy, Congress can still improve the enforcement of federalism.

Congress should first reintroduce and then pass the Federalism Enforcement Act ("FEA"). FEA would require federal regulatory agencies to regulate only under clear statutory and constitutional authority. Furthermore, FEA would direct federal agencies to prepare Federalism Assessments whenever a proposed regulation would have sufficient federalism implications. Lastly, FEA would require regulatory agencies to consult with designated state officials when a proposed regulation has sufficient federalism implications. The consultation requirement promotes intergovernmental cooperation, allowing both states and the federal government to find effective constitutional solutions to pressing problems. Though Reagan's E.O. 12,612 requires federal agencies to follow these guidelines, FEA would enshrine these directives to prevent future executive branch usurpation.

In addition to promulgating FEA, Congress should enact legislation restraining itself from passing legislation which infringes on state autonomy. This legislation should take the form of a self-imposed Federalism Assessment which E.O. 12,612 currently orders federal agencies to formulate. Before leaving a committee, any bill that has sufficient federalism implications, should include an assessment of possible preemption conflicts with state law. A proper Federalism Assessment would weigh the costs and benefits of federal legislation in the light of preexisting state measures.

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a new television spot in one's campaign for reelection.").

141. *See id.*

142. *See id.* at 797.

143. *See, e.g., Hearings, supra* note 32, at 163 (Michael Horowitz stated that when the Reagan Administration began to shift more authority and responsibility to state and local officials through block grants, these same state and local officials protested because of increased accountability).

144. *See Calabresi, supra* note 137, at 797.

The Federalism Assessment would act as a self-disciplined check on unconstitutional legislation.

Congress could also protect federalism by restricting the discretion federal regulatory agencies currently exercise. Curtailing agency discretion would necessitate carefully drafted and detailed federal statutes. Prudently written laws would spare Congress the shock of regulatory agencies requesting tax increases to pay for Congress's own vague mandates such as "universal Internet access." Therefore, enacting FEA, limiting legislative preemption, and drafting more detailed legislation would allow the political branches to enforce federalism more effectively by themselves.

#### CONCLUSION

Congress and state and local officials effectively utilized the political process to enforce federalism. E.O. 13,083 would have substantially altered federal-state relations. Abolishing Reagan's E.O. 12,612 consultation requirement, preemption safeguards, and the Federalism Assessment would leave states without important protection from unnecessary and unconstitutional federal agency regulation. Clinton's E.O. 13,083's nine non-exclusive conditions for federal agency intervention would have given agencies far too much discretion in regulatory action.

The stealth promulgation of E.O. 13,083's mandates is largely responsible for the states' angry reaction and Congress's efforts to neutralize the effect of the order. In addition to the order's sweeping provisions, Congress sensed a threat to its power to make law. E.O. 13,083 opened the door for additional executive orders ultimately amounting to executive legislation. Facing a Congress controlled by the opposition party, Clinton was forced to pass his initiatives as executive orders rather than formally proposing legislation. Congress, for the most part, however, framed the debate in terms of federalism. Arguing about state autonomy gave Congress another means to protect its legislative power and ensure the separation of powers.

One can view Congress's efforts as a victory for the political process in enforcing federalism. Congress and the "Big Seven" used hearings, bills, and resolutions to pressure the President politically into suspending E.O. 13,083. However, the emergence of PACs, pork-barrel spending, and state officials wishing to shift accountability to the federal government overrides the political process protections envisioned by Wechsler and Choper. Although the political process cannot consistently enforce federalism, Congress has a rare opportunity to address and correct the current federal-state imbalance of power as well as protect against future encroachments.<sup>145</sup> Legislative deliberation and judicial scrutiny, as well as the stroke of the President's pen (in the case of E.O. 12,612), should act as the protectors of federalism.

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145. The head of a new executive order hydra has sprung in the form of E.O. 13,132. See *supra* text accompanying notes 9-10.

