

Michigan Law Review

Volume 94 | Issue 3

1995

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Recommended Citation

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

Available at: <https://repository.law.umich.edu/mlr/vol94/iss3/6>

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“A GOVERNMENT OF LIMITED AND ENUMERATED POWERS”: IN DEFENSE OF *UNITED STATES v. LOPEZ*

Steven G. Calabresi*

“We start with first principles. The Constitution creates a Federal Government of enumerated powers.”¹

— Chief Justice William H. Rehnquist

INTRODUCTION

The Supreme Court’s recent decision in *United States v. Lopez*² marks a revolutionary and long overdue revival of the doctrine that the federal government is one of limited and enumerated powers. After being “asleep at the constitutional switch” for more than fifty years,³ 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. Even if *Lopez* produces no progeny and is soon overruled, the opinion has shattered forever the notion that, after fifty years of Commerce Clause precedent, we can never go back to the days of limited national power. The *Lopez* Court has shown us that we can go back, if we want to, so long as: 1) we can figure out a workable theory of the limits on the federal commerce power; 2) we can agree on the propriety of vigorous judicial review in federalism cases; and 3) we can take proper account of the important reliance interests that have accrued around certain key precedents decided in the past half century.

All three of these concerns animate the important separate concurrence of Justices Anthony M. Kennedy and Sandra Day

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1. *United States v. Lopez*, 115 S. Ct. 1624, 1626 (1995).

2. 115 S. Ct. 1624 (1995).

3. *Expansion Checked*, WALL ST. J., Apr. 27, 1995, at A14.

O'Connor in *Lopez*,⁴ and satisfying all three of these concerns is necessary if *Lopez* is to be not merely a significant case but also the great landmark case of American constitutional history that it deserves to be. Because I believe *Lopez* has the potential to be as important a turning point as *NLRB v. Jones & Laughlin Steel Corp.*⁵ or *United States v. Darby*,⁶ I want to address directly in this article the concerns expressed by Justices Kennedy and O'Connor, focusing especially on their statement that:

The substantial element of political judgment in Commerce Clause matters leaves our institutional capacity to intervene more in doubt than when we decide cases, for instance, under the Bill of Rights even though clear and bright lines are often absent in the latter class of disputes.⁷

This statement, which reflects the weight and thinking of a half century of judicial opinions and law review articles,⁸ is in my judgment mistaken.

Now in fairness to Justices Kennedy and O'Connor, their concurrence does end up rejecting the present-day orthodoxy because they do endorse finally *some* judicial enforcement of the scheme of limited and enumerated powers. But, as the quotation above shows, these two concurring Justices seem to be joining the *Lopez* Revolution only after sounding a note of caution and restraint. Is there any reason why such a show of judicial modesty is called for? Specifically, is it true, as Professor Jesse Choper has claimed, that the Supreme Court's institutional capacity to intervene is more in doubt in Commerce Clause cases than it is in so-called individual rights cases?⁹ This article seeks to rebut that claim with a normative discussion in five parts.

4. See *Lopez*, 115 S. Ct. at 1634 (Kennedy, J., concurring).

5. 301 U.S. 1 (1937).

6. 312 U.S. 100 (1941).

7. *Lopez*, 115 S. Ct. at 1640. (citing *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989) (O'Connor, J., concurring)).

8. For examples of variations on this belief in the legal academic literature, the reader could do no better than to consult: JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980). See also D. Bruce LaPierre, *The Political Safeguards of Federalism Redux: Intergovernmental Immunity and the States as Agents of the Nation*, 60 WASH. U. L.Q. 779 (1982); 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). But see MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 23-62 (1995) (arguing that Choper ignores the normative and textual case for judicial protection of federalism); Lewis B. Kaden, *Politics, Money, and State Sovereignty: The Judicial Role*, 79 COLUM. L. REV. 847 (1979) (arguing that Weschler and Choper's view that the states are protected in the national political process is wrong); William Van Alstyne, *The Second Death of Federalism*, 85 MICH. L. REV. 1709 (1985) (arguing that the Constitution never would have been ratified had the Framers thought it meant what Choper says).

9. See CHOPER, *supra* note 8, at 67-70, 235-40.

In Part I, I consider whether federalism is somehow less important than the separation of powers, the Bill of Rights, or judicial review as a structural feature of American government. If federalism were truly less important, then it would follow that judicial enforcement of constitutional federalism guarantees also might be a lesser priority. While Justices Kennedy and O'Connor consider and reject the proposition that federalism is an unimportant feature of American government,¹⁰ they do not discuss the possibility that federalism actually might be by far the *most* important and beneficial feature of our constitutional scheme. I argue at some length in Part I that federalism is much more important to the liberty and well being of the American people than any other structural feature of our constitutional system. In so arguing, I present what I perceive to be the best empirical and normative arguments for American federalism. This discussion lays the groundwork for my claim that it is vital that some institution enforce our constitutional federalism limitations.

In Part II, I consider and refute the reigning orthodox argument that constitutional federalism guarantees can and should be enforced exclusively, or mainly, through the political process. I show why, under modern public choice theory, we should have no confidence in the political branches as the exclusive or even as the principal enforcers of our constitutional federalism guarantees. Indeed, I argue that reliance on the political branches to enforce federalism limitations almost guarantees that our constitutional federal system will fail to attain the normative benefits — set forth in Part I — that federalism ought to secure. Accordingly, I conclude Part II by arguing that a decision to rely upon the political branches for enforcement of federalism would be a grave mistake — a mistake that would result in less freedom and less prosperity for future generations.

In Part III, I take up the important and difficult question of whether the Supreme Court lacks the institutional capacity to enforce our constitutional federalism guarantees. My conclusions here are three-fold. First, judicial enforcement of the Commerce Clause does not raise questions of interpretation or fact that are any more troubling than those that the Court regularly struggles with in the Bill of Rights and Fourteenth Amendment contexts. Second, the implications of public choice theory suggest that there is absolutely no reason to fear that a runaway Court ever will crip-

10. See *Lopez*, 115 S. Ct. at 1638-39.

ple the national government, disabling it from performing vital national functions. Third, the only valid fear that anyone ever should entertain about the Supreme Court's ability to enforce the Constitution in federalism cases is that the Court will do far too little, not that it will do too much.

In Part IV, I consider the claim advanced by Professor Choper, among others, that the Supreme Court is needed more in so-called individual rights cases than it is in federalism cases and that it therefore should save its institutional capital for use in the national human rights area.¹¹ In this Part, I attempt to refute the argument that the Supreme Court always does more good for the country when it enforces its elaborate Fourteenth Amendment case law than it would do if it enforced the federalism provisions of the original Constitution. I disagree with the argument that the Supreme Court always has a comparative normative institutional advantage when it is promulgating national codes on abortion,¹² flag burning,¹³ pornography,¹⁴ holiday displays,¹⁵ prison conditions,¹⁶ or procedural rules on criminal trials and investigations.¹⁷

Finally, in Part V, I consider the problem of precedent. Are the reliance interests that have grown up around the Court's Commerce Clause precedents so powerful that they overwhelm the other normative arguments advanced in Part I of this article? In Part V, I argue that even if the Court cannot and should not undo past precedents that, upon close analysis, turn out to be mistaken, it does not follow that the Court should continue to adhere to a wholly mistaken form of analysis in new cases involving new federal statutes. The Court's critics, in my view, wrongly seek to hobble its power by pointing to its past sins and saying in effect that it is too late now for the Court to save itself. The correct response rather would be to acknowledge that specific past mistakes cannot always be undone, while denying that the Court thus should be held forever in thrall to its past bad methods of decisionmaking in federalism cases. The Court should repent, as perhaps it has done in

11. See CHOPER, *supra* note 8, at 169-70.

12. See, e.g., *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989); *Roe v. Wade*, 410 U.S. 113 (1973).

13. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989).

14. See, e.g., *Osborne v. Ohio*, 495 U.S. 103 (1990).

15. See, e.g., *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

16. See, e.g., *Hutto v. Finley*, 437 U.S. 678 (1978).

17. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

Lopez, and then it should “Go and sin no more.”¹⁸ Whatever reliance interest exists surrounding various past federal programs and statutes, there is no continuing reliance interest in having the Court review newly enacted programs and statutes in a misguided fashion that undermines the central normatively appealing feature of our entire constitutional structure.

I. THE NORMATIVE CASE FOR FEDERALISM

World-wide interest in federalism is greater today than it ever has been before at any other time in human history. In section A, below, I discuss at some length why this is the case and what lessons the global federalism revolution might hold for the United States. I conclude that federalism is the wave of the future, that nationalism and the centralized nation-state have been discredited for good reasons, and that these reasons strongly suggest that the United States should retain and strengthen its federal structure. Having developed what might be called a comparative empirical case for federalism I then turn, in section B, to developing the theoretical normative case for federalism. Both the disciplines of economics and political science suggest that there is a good case to be made for federalism. I develop this case in three subparts by considering, first, the arguments for state power, second, the arguments for national power, and third, the arguments for a federal constitutional blend. Finally, in section C, I step back and look briefly at the empirical and normative arguments for federalism in perspective. My goal here is to show that federalism is likely to be *more* important to the liberty and well being of the American people than any other structural feature of our Constitution, including the separation of powers, the Bill of Rights, and judicial review.

A. *Comparative, Historical, and Empirical Arguments*

We all know that since the dawn of the American Republic, a mere 200 years ago, there has been a truly extraordinary change in the way most people are governed. The world-wide democratic revolution so ardently hoped for by Thomas Jefferson¹⁹ and James

18. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 159 (1990).

19. As Jefferson wrote in a letter to George Mason, I look with great anxiety for the firm establishment of the new government in France, being perfectly convinced that if it takes place there, it will spread sooner or later all over Europe. On the contrary a check there would retard the revival of liberty in other countries. I consider the establishment and success of their government as necessary to

Madison²⁰ has come to pass and has swept across the globe, relegating monarchy, aristocracy, empire, Napoleonic dictatorship, national socialism, fascism, and now, communism, to the ash heap of history. It is easy to forget, however, that at the same time that the democratic revolution occurred, and often for many of the same reasons, a very powerful but much less benign "nationalist revolution" also swept across the world. It is worth reminding ourselves briefly of the history of that nationalist revolution because its harsh legacy is still with us in many ways and because it has given rise to what I will call the "Age of Federalism" in which we now live.

stay up our own, and to prevent it from falling back to that kind of Half-way house, the English constitution.

Letter from Thomas Jefferson to George Mason (Feb. 4, 1791), *reprinted in THE POLITICAL WRITINGS OF THOMAS JEFFERSON* 101 (Merrill D. Peterson ed., 1993).

Years later, in 1821, Jefferson elaborated,

As yet we are but in the first chapter of its history. The appeal to the rights of man, which had been made in the U.S. was taken up by France, first of the European nations. From her the spirit has spread over those of the South. The tyrants of the North have allied indeed against it, but it is irresistible. Their opposition will only multiply its millions of human victims; their own satellites will catch it, and the condition of man thro' the civilized world will be finally and greatly ameliorated. This is a wonderful instance of great events from small causes. So inscrutable is the arrangement of causes & consequences in this world that a two-penny duty on tea, unjustly imposed in a sequestered part of it, changes the condition of all its inhabitants . . .

AUTOBIOGRAPHY, 1821, *reprinted in id.* at 100-01.

Finally, in his last letter written 11 days before he died on July 4, 1826, Jefferson wrote:

May [the Fourth of July] be to the world, what I believe it will be, (to some parts sooner, to others later, but finally to all,) the signal of arousing men to burst the chains under which monkish ignorance and superstition had persuaded them to bind themselves, and to assume the blessings and security of self-government. That form which we have substituted, restores the free right to the unbounded exercise of reason and freedom of opinion. All eyes are opened, or opening, to the rights of man. The general spread of the light of science has already laid open to every view the palpable truth, that the mass of mankind has not been born with saddles on their backs, nor a favored few bootied and spurred, ready to ride them legitimately, by the grace of God. These are grounds of hope for others. For ourselves, let the annual return of this day forever refresh our recollections of these rights, and an undiminished devotion to them . . .

Letter from Thomas Jefferson to Roger C. Weightman (June 24, 1826), *reprinted in id.* at 213.

20. James Madison shared Jefferson's sentiments as is revealed in the following passage from a letter to George Nicholas written in March 1793:

The war in which [France] is engaged seems likely to be pushed by her enemies during the ensuing campaign. As yet her conduct has been great both as a free and [as a] martial nation. We hope it will continue so, and finally baffle all her enemies, who are in fact the enemies of human nature. We have every motive in America to pray for her success, not only from a general attachment to the liberties of mankind, but from a peculiar regard for our own. The symptoms of disaffection to Republican government have risen, and subsided among us in such visible correspondence with the prosperous and adverse accounts from the French Revolution, that a miscarriage of it would threaten us with the most serious dangers to the present forms and principles of our governments.

RALPH KETCHAM, *JAMES MADISON: A BIOGRAPHY* 339-40 (1990).

1. *The Rise and Fall of Nationalism*

The nationalist revolution that began about 200 years ago was linked closely with the democratic revolution that Thomas Jefferson and James Madison helped launch. It had similar underpinnings in the rationalist thought of the Enlightenment and a similar anti-feudal, anti-aristocratic orientation. It was inspired to some degree by the American Revolution, gathered force with the French Revolution, and dominated the globe from 1789 until 1945.²¹ It destroyed countless aristocratic *transnational* entities like the Holy Roman Empire, the Spanish and Portuguese Empires in Latin America, the Austro-Hungarian Empire, the British and French Empires in Asia and Africa, and, most recently, the Soviet Communist Empire. It also destroyed countless *regional and local feudal entities*. In Europe, for example, both the German principalities and the Italian city states lost power when Germany and Italy were forged out of the remains of the Holy Roman and Austro-Hungarian Empires.

Democrats and nationalists were political allies in Europe, Latin America, Asia, and Africa in the fight against feudalism, monarchy, and colonial empire.²² Thus, from 1789 to 1914, most democrats were nationalists, and most nationalists were democrats. This interlinking of democracy and nationalism was the peculiar and bitter-sweet legacy of the French Revolution. The American Revolution obviously also had interlinked democracy and nationalism, but its final Federalist outcome muted the connection. Not so with the French Revolution, the Napoleonic nationalist conclusion of which was crushed temporarily by the forces of the old transnational aristocratic, feudal order.²³ For the better part of the nineteenth century, European democrats had every reason to revel in the nationalism of the French Revolution and to use it as a political tool for whipping the people into a populist frenzy against their aristocratic oppressors.

21. See JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 14-18 (2d ed. 1985). See generally 1 R.R. PALMER, *THE AGE OF THE DEMOCRATIC REVOLUTION: THE CHALLENGE* (1959) (discussing democratic revolutions in America and Europe from 1760-1800); 2 R.R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION: THE STRUGGLE* (1964) (same).

22. The advocates of democracy and nationalism were inspired by Enlightenment ideas about natural law, natural rights, and rationalism. Evidence of the interlinking of all of these ideas can be seen, for example, in our own Declaration of Independence.

23. Those forces gathered at the Congress of Vienna after Napoleon's armies had been defeated by the Duke of Wellington, and they sought there to recreate the pre-1789 European social and political order. Their success in this regard proved to be only temporary.

The bitter harvest of the nationalist revolution was gathered in this century with the slaughter of the First and Second World Wars and with the fifty-year Cold War that then followed. These events finally made clear to the great-great-grandchildren of the Enlightenment that celebration of the nation state could lead to Nazism and Stalinism, to war and genocide, and to totalitarianism and the most complete loss of freedom humankind ever experienced. By 1945, the democratic revolution was still in full flow, but the nationalist revolution was *not*. World leaders scrambled to replace the still collapsing colonial, imperial transnational structures with new federal and confederal transnational structures.

The fifty years since then have seen the birth of the United Nations, the North Atlantic Treaty Organization (NATO), the European Union, the European Convention on Human Rights, the British Commonwealth, the Confederation of Independent States (CIS), the GATT, the NAFTA, and countless other transnational "federal" entities of varying degrees of importance.²⁴ Many of these were openly inspired by the success story of American federalism, which, for example, led many Europeans to want to build a Common Market that could become a "United States of Europe." While many of these new democratic transnational entities are very weak, they nonetheless have developed important powers: they have helped to keep the peace, and in some instances, as with the European Union, they show real potential for some day attaining essentially all the attributes of sovereignty commonly associated with a federal nation-state, like the United States. The growth and success of transnational confederal forms since 1945 is truly astonishing and rightly is viewed by many — either with alarm or with hope — as holding out the eventual prospect of a future global federal government or at least the prospect of several continental-sized federal governments.

At the same time, U.S.-style constitutional federalism has become the order of the day in an extraordinarily large number of

24. For a thoughtful treatment of federalism problems within the GATT and a fascinating consideration of similarities between the dormant Commerce Clause doctrine and various legal rules in the GATT, see Daniel A. Farber & Robert E. Hudec, *Free Trade and the Regulatory State: A GATT's-Eye View of the Dormant Commerce Clause*, 47 *VAND. L. REV.* 1401 (1994).

Many of these transnational entities still seem very weak to contemporary Americans who may be tempted to dismiss their importance and deny their "federal" qualities. These entities, however, compare favorably in many cases with our own early attempts at federal government under the Articles of Confederation and then the Constitution. We should not be blinded to these facts by overly formal definitions of what constitutes a federation or a confederation.

very important countries, some of which once might have been thought of as pure nation-states. Thus, the Federal Republic of Germany, the Republic of Austria, the Russian Federation, Spain, India, and Nigeria all have decentralized power by adopting constitutions that are significantly more federalist than the ones they replaced.²⁵ Many other nations that had been influenced long ago by American federalism have chosen to retain and formalize their federal structures. Thus, the federalist constitutions of Australia, Canada, Brazil, Argentina, and Mexico, for example, all are basically alive and well today.

As one surveys the world in 1995, American-style federalism of some kind or another is everywhere triumphant, while the forces of nationalism, although still dangerous, seem to be contained or in retreat. The few remaining highly centralized democratic nation-states like Great Britain,²⁶ France, and Italy *all* face serious secessionist or devolutionary crises.²⁷ Other highly centralized nation-states, like China, also seem ripe for a federalist, as well as a democratic, change. Even many existing federal and confederal entities seem to face serious pressure to devolve power further than they have done so far: thus, Russia, Spain, Canada, and Belgium all have very serious devolutionary or secessionist movements of some kind. Indeed, secessionist pressure has been so great that some federal structures recently have collapsed under its weight, as has happened in Czechoslovakia, Yugoslavia, and the former Soviet Union.

All of this still could be threatened, of course, by a resurgence of nationalism in Russia or elsewhere, but the long-term antinationalist trend seems fairly secure. There is no serious intellectual support for nationalism anywhere in the world today, whereas everywhere people seem interested in exploring new transnational

25. For a general discussion of the trend toward federalism in civil law countries, see MERRYMAN, *supra* note 21, at 151-58.

26. See WILL HUTTON, *THE STATE WE'RE IN* (1995); ANDREW MARR, *RULING BRITAIN: THE FAILURE AND FUTURE OF BRITISH DEMOCRACY* (1995); Fred Barbash, *The Movement to Rule Britannia Differently: Popularity Grows for Written Constitution, Bill of Rights, Senate-Like Chamber*, WASH. POST, Sept. 23, 1995, at A27.

27. Separatist demands have been raised, for example, by Scotland and Northern Ireland against the government of the United Kingdom, by Britany and Corsica against the national government of France, and by the Lombard League against the national government of Italy. One commentator has written recently that "[s]eparatism is a fact, the single greatest political fact of the post-cold war world. With external enemies removed, with hybrid states no longer held together by hegemonic super powers, the petty annoyances and existential difficulties of living in mixed-ethnic marriages within nation-states has become increasingly intolerable." Charles Krauthammer, *Quebec and the Death of Diversity*, TIME, Nov. 13, 1995, at 124.

and devolutionary federal forms.²⁸ The democratic revolution that was launched in Philadelphia in 1776 has won, and now it seems that democrats everywhere join Madison in “cherishing the spirit and supporting the character of federalists.”²⁹

2. *Why Has Federalism Become So Globally Popular?*

Why, then, we should ask ourselves, is federalism so incredibly popular all over the world today? Why is it that the centralized nation-state is under simultaneous assault at the end of the twentieth century from *both* an internationalist and a secessionist-devolutionist direction? The answers to these questions are highly complex, but two major factors are evident.

a. Federalism as a Response to the Problem of Majority Tyranny. First, federalism is popular today because in a surprisingly large number of circumstances it has the potential to offer a direct cure to a central and age-old failing of democracy: the tendency of certain kinds of political majorities to tyrannize and abuse certain kinds of political minorities.³⁰ This problem — majority tyranny — is a problem in all democracies, but it is most acute in democracies that are very heterogeneous as a matter of their racial, ethnic, religious, linguistic, or social class background. It is the problem that concerned James Madison in the *Federalist Ten*,³¹ and it is the problem that has generated support in this country and around the world for judicial review.

Arend Lijphart, a distinguished and leading political scientist, puts the matter as follows:

That it is difficult to achieve and maintain stable democratic government in a plural society is a well-established proposition in political science — with a history reaching back to Aristotle’s adage that “a state aims at being, as far as it can be, a society composed of equals and peers.” Social homogeneity and political consensus are regarded as prerequisites for, or factors strongly conducive to, stable democracy. Conversely, the deep social divisions and political differences within plural societies are held responsible for instability and breakdown in democracies.³²

28. See Giandomenico Majone, *Preservation of Cultural Diversity in a Federal System: The Role of the Regions*, in *COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA* 67-75 (Mark Tushnet ed., 1990).

29. THE FEDERALIST NO. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961).

30. See generally Steven G. Calabresi, Note, *A Madisonian Interpretation of the Equal Protection Doctrine*, 91 YALE L.J. 1403 (1982) (discussing ways of protecting minority rights without at the same time undermining majority rule).

31. THE FEDERALIST NO. 10 (James Madison); see also Calabresi, *supra* note 30.

32. AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* 1 (1977) (citation omitted). Lijphart also develops his ideas on democracy in plural

As Lijphart emphasizes, social heterogeneity can pose a big threat to stable democratic government. Federalism sometimes can reduce this threat by giving minorities a level of government within which they are the geographical majority. If minorities are concentrated geographically to some degree and if the nation is willing to cede control over key issues to constitutionally established subunits of the nation, then federalism can help maintain social peace.

Obviously there are some very big "ifs" here that cannot always be satisfied. But, in a very important and growing category of cases, voters are discovering that they can solve the problem of majority tyranny simply by redrawing the jurisdictional lines of government. This redrawing can take two forms. Sometimes *expanding* the size of the polity is enough to make a formerly tyrannical majority only one of many minorities in the new, more "international" federal jurisdiction. This solution is the familiar "pluralist" solution of *Federalist Ten*.³³ Other times, the redrawing involves a devolution of national power over a certain set of emotionally charged and sensitive issues *down* to a regional or local federalist entity. This solution is the one employed by Spain with Catalonia and the Basque Country and by Canada with Quebec.³⁴

Both kinds of jurisdictional line redrawing are related closely because they are both attempts to deal with the threat of majority tyranny in a socially heterogeneous democracy. Both address the problem that raw democracy is nothing more than rule by a majority of the *demos*,³⁵ and the definition of what constitutes the *demos* may be inherently arbitrary. Thus, it turns out that for people in many federations all over the world, the relevant *demos* may differ depending on what issue is being addressed. For residents of Quebec, for example, the relevant *demos* for language issues may be their provincial government, the relevant *demos* for trade issues may include all of Canada or all of NAFTA, and the relevant *demos* for deciding how to respond to an intercontinental nuclear attack may include all of NATO.

This type of jurisdictional line drawing is often more than just a matter of providing for a common-sensical allocation of govern-

societies in AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968), and *CONFLICT AND COEXISTENCE IN BELGIUM: DYNAMICS OF A CULTURALLY DIVIDED SOCIETY* (Arend Lijphart ed., 1981).

33. *THE FEDERALIST* No. 10 (James Madison).

34. For a thoughtful discussion of the role of the use of federalism to protect geographically based minorities, see James F. Blumstein, *Federalism and Civil Rights: Complimentary and Competing Paradigms*, 47 *VAND. L. REV.* 1251 (1994).

35. *Demos*, of course, means "the people" in Greek.

mental decisionmaking power.³⁶ Rather, it is frequently a direct response to *the central problem* that political philosophers always have perceived with democracy, the problem of majority tyranny. It is thus unsurprising that Jefferson and Madison's democratic revolution has brought in its wake a federalism revolution. Federalism tempers the excesses of democracy whereas nationalism aggravates them. Federalism forces us always to ask why is a majority of *this demos* relevant for deciding *this* issue. Federalism thus allows democratic social cooperation in many circumstances in which nationalism does not.

Federalism clearly is not the only constitutional mechanism for dealing with majority tyranny in a socially heterogeneous polity. Other mechanisms for dealing with this problem include: judicial review, separation of powers with checks and balances, proportional representation, the creation of collegial cabinet-style executives, and the complex interlocking web of practices that Arend Lijphart calls "consociational democracy."³⁷ But federalism *is a uniquely successful* constitutional device for dealing with many of the most heartfelt and divisive problems of social heterogeneity.

No one thinks the Bosnian Serbs, the Basques, or the Quebecois ever could be appeased and satisfied by firmer guarantees of judicial review, separation of powers, proportional representation, or cabinet power sharing. Those solutions — while they might help somewhat at the margins — really do not get at the heart of their distinctive grievances. The problem that agitates the Bosnian Serbs, the Basques, or the Quebecois is that, in important ways and as to questions that are fundamental to their identity, they do not believe that they should be part of the same *demos* as their fellow countrymen. At the same time, as to other economic and foreign policy issues, they may be perfectly happy to remain within a larger entity so long as their social autonomy is guaranteed in iron-clad ways. Federalism addresses these needs in a way that no other constitutional power-sharing mechanism can hope to do.

Moreover, and very importantly, federalism *sometimes* can make minority groups feel secure while *deemphasizing* the lines of

36. Professor Lino Graglia sometimes has criticized his conservative friends on the Supreme Court and in the academy for their undemocratic willingness to strike down acts of Congress on federalism grounds. See Lino Graglia, "Interpreting" the Constitution: Posner on Bork, 44 STAN. L. REV. 1019, 1027-28 (1992). Such invalidations are *not*, however, undemocratic. They are jurisdictional resolutions of the question whether federal or state democracy should prevail. I owe this point to a conversation with Professor Gregory Maggs in July, 1995.

37. See LIJPHART, DEMOCRACY IN PLURAL SOCIETIES, *supra* note 32.

political and social cleavage.³⁸ Thus, it is not always necessary or indeed desirable that federal units and subunits correspond with great exactness to the precise geographical lines that most completely and thoroughly would separate out distinctive minority groups and subgroups. Federalism works better, in my view, when it allows those groups a say in governmental decisionmaking while *blurring* and masking over the fault lines of social division. A few examples may help to make this point a little clearer.

Let us start with an example of how *not* to set up a minority-protecting federal regime. Consider here the cases of Canada and the former Czechoslovak federation, which recently fell apart. In both instances, it seems striking that the principal minority group almost entirely was contained within the boundaries of *one and only one* province or subfederal entity. In Canada, the overwhelming majority of French-speaking Canadians live in Quebec, and, in Czechoslovakia, the overwhelming majority of Slovaks lived in Slovakia with relatively few living in Bohemia or Moravia. Geographical federalism in these two federations *accentuated and emphasized* the linguistic and ethnic social division instead of blurring it over. The division was sharpened further by the absence of what Arend Lijphart has called "crosscutting social cleavages."³⁹ Thus, in Canada, for example, the Quebecois tend to be Catholic and relatively poorer than their Protestant English-speaking countrymen.⁴⁰ In Slovakia, the Slovaks tended to be poorer and more Catholic than their Czech-speaking, more Protestant countrymen.⁴¹ Thus, in both countries, the social fault lines of language, ethnicity, religion, and class all reinforced each other *and coincided precisely with the geographical boundaries of the relevant federal subunits*. This situation is a recipe ultimately for secession or at least for a very major devolution in powers over cultural and social issues.⁴² Similar though not identical situations have led to trouble in other very heterogeneous countries like Belgium, Cyprus, and Lebanon.

38. Federations are *not* always set up in a way that makes this happen, as the discussion that follows makes clear. *But*, when they are properly designed, I think they are *less* likely than proportional representation schemes to lead to trouble.

39. See LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*, *supra* note 32, at 71-81.

40. See *id.* at 119-29.

41. See Frances D'Emilio, *Protestant Martyrs Honored by Pope*, *Pitt. Post-Gazette*, July 3, 1995, at A3 (discussing the ancient rift between Catholic Slovaks and Eastern European protestants); Viera Langerova, *Czechs, Slovaks Agree to Split*, *Chi. Sun-Times*, June 20, 1992, at 3 (noting that Slovaks constituted the poorer section of former Czechoslovakia).

42. See LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*, *supra* note 32, at 44 n.31 (citing ERIC A. NORDLINGER, *CONFLICT REGULATION IN DIVIDED SOCIETIES* (Occasional Paper in Intl. Affairs No. 29, 1972)).

On the other side of the equation, consider two of the world's truly great federalism success stories: Switzerland and the United States. Both have an extraordinarily large number of federal subunits, no single one of which coincides totally with any single social minority group. As a result, Switzerland's twenty-five cantons and the fifty American states provide plenty of opportunities for social minority groups to dominate particular federal subentities *without* encouraging secession by, in effect, creating a country within a country.

The fortuitous existence of large numbers of federal subunits in countries like Switzerland and the United States blurs over the fault lines of social division while greatly raising the costs of secessionist and devolutionary political movements. To organize secession — or a civil war — in such a federation requires first that you put together a *group* of cantons or states that want to secede. There may be serious collective action problems in doing this, particularly if the national entity is adept at buying off some of the cantons or states that might be needed most for the secession to succeed. Secessionists in Quebec or Slovakia face no such obstacle, however, because in those instances the geography of federalism reinforces social fault lines instead of covering them over.⁴³

Federalism in countries like Switzerland and the United States also works because of two other fortuitous accidents of history. First, no one state or canton is a great deal larger than all of the rest in a way that might create tension or fear of domination in the smaller states. This problem was the undoing of the former Soviet Union; after Gorbachev's *glasnost*, because Russia was so much larger and more populous than all of the other fourteen Republics combined, the others could not imagine a Soviet Federation in which they would be anything other than very junior partners. Germany's size could have posed a similar problem for the European Union countries had they not averted this trouble by greatly ex-

43. The collective action problem created for secessionists by the existence of a large number of federal subunits was helpful to the North in winning the American Civil War. Problems of coordination delayed secession until the 1860s, left several border states in the Northern camp, and hindered the South's ability to fight the Civil War successfully. Our large number of federal subunits helped the Union to survive the struggle over slavery. The geography of federalism also may matter if not all the states that wish to secede are contiguous to each other. Conversely, a federation may be very interested in preventing secession or in encouraging union in order to obtain contiguity. Such issues were important in the desire of the Framers to secure ratification of the Constitution by New York. They also were relevant in the struggle over Vicksburg during the Civil War, the purpose of which was to split the Confederacy. A lack of contiguity helped lead to the separation of Bangladesh from Pakistan in 1971. Finally, worry over these issues has made English Canada more eager to prevent the secession of Quebec, which would isolate geographically the maritime provinces.

panding the size of the Union of which Germany was a part. Similarly, the Framers of the American federation could have faced a similar problem had the State of Virginia, Mother of presidents,⁴⁴ held onto all or most of the Northwest Territories⁴⁵ instead of ceding them to the national government. Imagine the tumultuous early history the United States could have had if the present states of Virginia, West Virginia, Ohio, Indiana, and Illinois all had been one state in a federation that did not extend yet beyond the Mississippi River!

A second fortuitous accident of history that has made Swiss and American federalism work is that in both federations, unlike in Canada or Czechoslovakia, there are many crosscutting social cleavages. Thus, in Switzerland, the majority of German speakers and the minority of French speakers both are divided fairly equally into Protestant and Catholic subgroups and into urban and rural subgroups. The religious and urban-rural cleavages crosscut both each other *and* the language cleavage. Thus, this small four-language federal polity is remarkably stable because it naturally possesses the plurality of small interest groups envisioned by Madison's *Federalist Ten*. On any given issue, rural French-speaking Catholics may have more in common with rural German-speaking Catholics than they do with their urban French-speaking Protestant brethren.

The United States similarly is blessed, so much so that most Americans are not even aware either of how divided or how lucky they truly are. The U.S. has four major geographic regions — the Northeast, the Midwest, the South, and the West — each of which easily could be a separate country. Although language does not divide these regions, all students of American politics know that they vote very differently in presidential and other elections and that they particularly disagree on matters of religion, culture, and, to

44. Virginia received this nickname early in our history because four of the first five Presidents, Washington, Jefferson, Madison, and Monroe, all were from Virginia. In addition, three of the next seven Presidents, Harrison, Tyler, and Taylor, all were born there.

Obviously, Virginia so dominated the presidency early in our history for the same reason that California dominates it today. Virginia, was then, as California is now, the richest prize in the Electoral College.

45. Many states claimed part of the Northwest Territories as their own. Virginia, however, had the best claims to by far the largest portion. Cession of the Territories to the Articles of Confederation Congress eliminated the need to adjudicate these claims and prevented Virginia from emerging as a federation threatening megastate. See EDMUND S. MORGAN, *THE BIRTH OF THE REPUBLIC, 1763-1789*, at 108-12 (Daniel J. Boorstin ed., 1956).

some extent, on race and ethnicity.⁴⁶ The South, broadly defined to include the border states, is especially unique.

The South is more religious, more culturally conservative, less Catholic, and more racially polarized in its voting behavior than the rest of the country. Southern block voting for decades kept the Congress and even the White House in Democratic hands, and it now may be just as likely to keep those institutions in Republican hands. Whereas the other three regions of the country are evenly divided between the parties, the South has gone from being solidly Democratic to being solidly Republican in national elections.⁴⁷ Frankly, if the U.S. federation consisted of only four states, I think the things that make the South different from the rest of the country would generate serious devolutionary and even secessionist pressure.

The West, however, also differs sharply from the rest of the country. It is comparatively thin in population, libertarian in its politics, and resentful of the enormous federal land holdings from which it alone suffers. Rumbblings of rebellion are heard from time to time in Alaska and in some of the Rocky Mountain states. At the same time, California and the Pacific Rim states are well aware of their nation-sized economies and, at times, resent domination by east coast politicians. Western disaffection might be more serious if the West were not able already to dominate federal politics when it votes as a block with the South as it essentially did in 1968, 1972, 1980, 1984, and 1988 — five of the last seven presidential elections.⁴⁸ If the whole of the West constituted only one state, it would never agree to current federal policies on the environment and land use, and it would never stay in any American federation that the South chose to leave.

The Northeast is simultaneously more secular, more Catholic, and more ethnic than the rest of the country. It has a high population density, is environmentally sensitive and culturally liberal, and

46. See DANIEL J. ELAZAR, *AMERICAN FEDERALISM: A VIEW FROM THE STATES* 117-40 (1st ed. 1966); DAVID L. SHAPIRO, *FEDERALISM: A DIALOGUE* 86-87 (1995).

47. Recent voting patterns suggest that within a decade, the Southern state legislatures all will be Republican-controlled as well, assuming the trends of the past 30 years continue. See John McQuaid, *Tauzin's GOP Jump Predictable*, *NEW ORLEANS TIMES-PICAYUNE*, Aug. 8, 1995, at A1 (describing the growing dominance of the Republican party in the traditionally Democratic South).

48. President Clinton's campaign manager in 1992, James Carville, has recognized the importance of capturing these regions in order to win the presidency. See Wesley Pruden, *The Grand Coalition of 45 Percent*, *WASH. TIMES*, Nov. 6, 1992, at A5 (describing Carville's admission that he had not found the key to open the GOP's sunbelt lock on the Electoral College but merely had "picked the lock" this one time).

favors relatively higher levels of government redistribution of resources. Although traditionally it was the wealthiest region of the country, it is rapidly converging toward the national norm as the Southern, Plains, and Rocky Mountain states all have been catching up.⁴⁹ It has been highly disaffected with recent Sunbelt dominance of national politics, and this disaffection surely would be more pronounced if the whole Northeast constituted a single megastate in a four-state federation.

Lastly, there is the Midwest, heartland of the country and, of all the four regions, the one that is the closest to the national norms on all major indicators. While it has things in common with each of the other regions, it is too small relative to them to play peacemaker when they are really at odds. The Midwest tends to follow the national trends as much as it leads them. It does not and cannot dominate federal politics the way Germany dominates European politics or the way Russia dominated Soviet politics.

All of these brief sketches should suggest the powerful centrifugal and devolutionary pressures that lurk just beneath the surface of American public life. Why is it, then, that the American federation has held together so peacefully in the 130 years since 1865? First, the fortuitous division of the Union into fifty states helps enormously by accentuating many minor and some not so minor cleavages that crosscut the regional cleavage. For the disbelieving skeptic, let me just catalogue very briefly a few of these. Believe it or not: northern New England distrusts southern New England; southern New England distrusts New York; New Yorkers think they are different from Pennsylvanians; Maryland is really a border state; Virginia is deep South; Carolinians and Georgians think northern Virginia has a lot of Yankees; Florida is full of northern retirees and Cuban immigrants; Louisiana is *sui generis* because of the Cajun-French influence; Tennessee, Kentucky, and Arkansas are all border states; Indiana is a lot more rural and conservative than Ohio or Illinois; Michigan is conservative ethnic, while Wisconsin and Minnesota are dominated by Scandinavian and German progressives; the northern plains states differ from the

49. See Bernard Wysocki Jr., *Income Gap Between Regions Narrows: Theory of Convergence Calls for Longer View*, WALL ST. J., Oct. 4, 1995, at A2. Mr. Wysocki reports that in 1929, looking at per capita income as a percentage of the U.S. average showed that the richest regions were at about 140% of the U.S. average while the poorest regions were at 50% of the U.S. average. Today, the richest regions are at about 120% while the poorest are around 85%. The big losers since 1929 have been New England, the Mid-Atlantic states, the Far West, and the Great Lakes states; the big winners have been the Plains states, the Rocky Mountain states, and the states of both the Southeast and the Southwest.

central plains states; and Texas, California, Utah, Alaska, and Hawaii are all practically separate countries, while the desert southwest differs from the Rocky Mountain west, which in turn differs from the Pacific Northwest.

All these state and local cleavages crosscut the big regional cleavages, making them less visible and less dangerous. In addition, other important crosscutting cleavages exist as well: the Catholicism of the northeast dampens its secularism; the rising wealth of the South, Plains states, and Rocky Mountain West diminishes the old William Jennings Bryan era rural-urban split, as does the nationwide rise of the suburbs; and most importantly, and most sadly, severe racial tensions growing out of the legacy of slavery are a problem for all four major regions, even if those problems produce the most polarized voting only in the South.

These nationwide crosscutting cleavages make American federalism stable because they give it a Madisonian plurality of interest groups, no one of which is likely to terrorize the others on a permanent basis. American federal politics involves the assembling and maintaining of shifting and unstable coalitions of numerous groups with wildly different goals. The very instability of these continental, federal coalitions is what makes the whole thing work. No one feels permanently threatened because the combination of federalism, a separately elected Congress and President, and a very high degree of instability in political coalitions guarantees almost every faction a piece of the pie. All of this is facilitated greatly by our highly fortuitous division into fifty states, which masks over the underlying regional fault lines.

The United States, then, like Switzerland, provides a textbook example of how federalism *under some circumstances* can help alleviate the problem of majority tyranny — the key problem that is raised by the democratic revolution of the past 200 years. What then of separation of powers or cabinet power sharing or proportional representation? Are not these constitutional mechanisms for dealing with social and political heterogeneity just as good at alleviating the problem of majority tyranny? The answer to this question, I think, is no. All three mechanisms work by exposing and making visible the most dangerous social fault lines and then giving each social group something close to a veto over governmental decisionmaking. This tends to produce weak, if not paralyzed, coalition governments and societies that are acutely, if not bitterly, aware of their social divisions.

Frankly, people are happier, in my view, when their governmental structure provides some outlets for their minority viewpoints but does so in a way that blurs over and deemphasizes the fault lines as much as possible. Sometimes that blurring over is best accomplished by governmental structures and policies that accentuate crosscutting fault lines over the ones that are more socially dangerous. American federalism blurs over regional fault lines, racial fault lines, and religious and cultural fault lines, just as Swiss federalism blurs over linguistic fault lines, ethnic fault lines, and religious fault lines.⁵⁰

Small state federalism is a big part of what keeps the peace in countries like the United States and Switzerland. It is a big part of the reason why we do not have a Bosnia or a Northern Ireland or a Basque country or a Chechnya or a Corsica or a Quebec problem.⁵¹ American federalism in the end is not a trivial matter or a quaint historical anachronism. American-style federalism is a thriving and vital institutional arrangement — partly planned by the Framers, partly the accident of history — *and it prevents violence and war*. It prevents religious warfare, it prevents secessionist warfare, and it prevents racial warfare. It is part of the reason why democratic majoritarianism in the United States has not produced violence or secession for 130 years, unlike the situation for example, in England, France, Germany, Russia, Czechoslovakia, Yugoslavia, Cyprus, or Spain. There is *nothing* in the U.S. Constitution that is more important or that has done more to promote peace, prosperity, and freedom than the federal structure of that great document. There is *nothing* in the U.S. Constitution that should absorb more completely the attention of the U.S. Supreme Court.

b. *Internationalist Federalism: Preventing War, Promoting Free Trade, and Exploiting Economies of Scale*. So far, I have focused on the advantages of American-style small-state federalism in defusing centrifugal devolutionary tendencies, alleviating majority tyranny, and accentuating crosscutting social cleavages. But what about the advantages of international federalism; what are the ad-

50. The argument here is the same as the general argument for geographical districting over proportional representation. The one accentuates social fault lines, the other blurs them over. This argument is presently occurring in an especially poignant form with respect to racial gerrymandering under the Voting Rights Act. See Daniel D. Polsby & Robert D. Popper, *Ugly: An Inquiry Into the Problem of Racial Gerrymandering Under the Voting Rights Act*, 92 MICH. L. REV. 652 (1993).

51. All these federations would benefit greatly from having more states. Imagine a Canadian federation with 50 provinces, 15 of them French-speaking. The collective action problem thus created would raise greatly the costs of separatist agitation while preserving the benefits of federalism for Canada's French-speaking minority.

vantages of consolidating states into larger federal entities, as happened in North America in 1787 or in Europe in 1957?

A first and obvious advantage is that consolidation reduces the threat of war. Because war usually occurs when two or more states compete for land or other resources, a reduction in the number of states also will reduce the likelihood of war. This result is especially true if the reduction in the number of states eliminates land boundaries between states that are hard to police, generate friction and border disputes, and that may require large standing armies to defend. In a brilliant article, Professor Akhil Amar has noted the importance of this point to both to the Framers of our Constitution and to President Abraham Lincoln.⁵² Professor Amar shows that they believed a Union of States was essential in North America because otherwise the existence of land boundaries would lead here — as it had in Europe — to the creation of standing armies and ultimately to war.⁵³ The Framers accepted the old British notion that it was Britain's island situation that had kept her free of war and, importantly, free of a standing army that could be used to oppress the liberties of the people in a way that the British navy never could.

These old geostrategic arguments for federalist consolidation obviously hold true today and played a role in the forming of the European Union, the United Nations, and almost every other multinational federation or alliance that has been created since 1945. Sometimes the geostrategic argument is expanded to become an argument for a multinational defensive alliance, like NATO, against a destabilizing power, like the former Soviet Union. In this variation, international federalism is partly a means of providing for the common defense and partly a means of reducing the likelihood of intra-alliance warfare in order to produce a united front against the prime military threat. Providing for the common defense, though, is itself a second and independent reason for forming international federations. It was a motivation for the formation of the U.S. federation in 1787 and, more recently, the European Union.

A third related advantage is that international federations can undertake a host of governmental activities in which there are significant economies of scale. This is one reason why federations can provide better for the common defense than can their constituent parts. Intercontinental ballistic missiles, nuclear-powered aircraft

52. See Akhil Reed Amar, *Some New World Lessons for the Old World*, 58 U. CHI. L. REV. 483 (1991).

53. See *id.* at 486-91.

carriers and submarines, and B-2 stealth bombers tend to be expensive. Economies of scale make it cheaper for fifty states to produce one set of these items than it would be for fifty states to try to produce fifty sets. This is true even without factoring in the North American regional tensions that would be created if this continent had to endure the presence of fifty nuclear minipowers, assuming that each small state could afford to own at least one Hiroshima-sized nuclear bomb. Important governmental economies of scale obtain in other areas, as well, however, going well beyond national defense. For example, there are important economies of scale to the governmental provision of space programs, scientific and biomedical research programs, the creation of transportation infrastructure, and even the running of some kinds of income and wealth redistribution programs.

A fourth and vital advantage to international federations is that they can promote the free movement of goods and labor both among the components of the federation by reducing internal transaction costs and internationally by providing a unified front that reduces the costs of collective action when bargaining with other federations and nations. This reduces the barriers to an enormous range of utility-maximizing transactions thereby producing an enormous increase in social wealth. Many federations have been formed in part for this reason, including the United States, the European Union, and the British Commonwealth, as well as all the trade-specific "federations" like the GATT and NAFTA.

A fifth advantage to international federations is that they can help regulate externalities that may be generated by the policies and laws of one member state upon other member states. As I explain in more detail below, these externalities can be both negative and positive,⁵⁴ and, in both situations, some type of federal or international action may sometimes be appropriate. A well-known example of a problematic negative externality that could call for federal or international intervention occurs when one state pollutes the air or water of another and refuses to stop because all the costs of its otherwise beneficial action accrue to its neighbor.⁵⁵

54. See *infra* text accompanying notes 90-92.

55. For a very interesting discussion of differing federal approaches in the United States and Germany to environmental issues, see Susan Rose-Ackerman, *Environmental Policy and Federal Structure: A Comparison of the United States and Germany*, 47 VAND. L. REV. 1587 (1994).

Sixth and finally,⁵⁶ an advantage to international federation is that it may facilitate the protection of individual human rights. For reasons Madison explained in the *Federalist Ten*,⁵⁷ large governmental structures may be more sensitive than smaller governmental structures to the problems of abuse of individual and minority rights.⁵⁸ Remote federal legislatures or courts, like the U.S. Congress and Supreme Court, sometimes can protect important individual rights when national or local entities might be unable to do so.⁵⁹ As I have explained elsewhere, this argument remains a persuasive part of the case for augmented federal powers.⁶⁰

Some of the best arguments for centripetal international federalism, then, resemble some of the best arguments for centrifugal devolutionary federalism: in both cases — and for differing reasons — federalism helps prevent bloodshed and war. It is no wonder, then, that we live in an age of federalism at both the international and subnational level. Under the right circumstances, federalism can help to promote peace, prosperity, and happiness. It can alleviate the threat of majority tyranny — which is the central flaw of democracy. In some situations, it can reduce the visibility of dangerous social fault lines, thereby preventing bloodshed and violence. This necessarily brief comparative, historical, and empirical survey of the world's experience with federalism amply demonstrates the benefits at least of American-style small-state federalism.⁶¹ In light of this evidence, the United States would be foolish indeed to abandon its federal system.

56. There are many other advantages of international federations beyond these six, but the ones discussed are enough for my brief illustrative purposes here.

57. THE FEDERALIST No. 10, *supra* note 29, at 77-84.

58. See Calabresi, *supra* note 30, at 1404-10; see also SHAPIRO, *supra* note 46, at 50-57.

59. See also THE FEDERALIST No. 43, at 277 (James Madison) (Clinton Rossiter ed., 1961) (explaining why the Union and union entities should umpire disputes between two states).

60. See Calabresi, *supra* note 30, at 1404-10; *infra* text accompanying notes 93-97.

61. As I explained above, Canadian- or Czech-style federalism is not as beneficial because it creates useless social conflict and gridlock in much the same way that proportional representation creates useless social conflict and gridlock in Western Europe, Israel, and Japan.

Let me emphasize here that I am *not* saying that all social conflict is useless or that it is always better to make social divisions less visible. What I am saying is that some social divisions are so explosive and so likely to lead to useless violence and bloodshed that their unnecessary visibility becomes a constant threat to social happiness and ultimately to progress itself. As a general matter, I do not believe that anything useful ever has come out of social institutions that routinely and woodenly accentuate racial or linguistic or religious differences and separateness. On the other hand, social movements or institutions that call attention to particular injustices done to individuals because of their race, linguistic background, or religion are highly useful, and the furthering of such movements and institutions is one of the highest callings one can pursue.

B. *Economic and Political Science Arguments for Federalism*

We have seen that both historical and contemporary experience teach us that federalism, under certain circumstances, is valuable in practice. What theoretical explanations can be produced, then, to add analytical rigor to the normative case for federalism in the United States? Two of the social sciences, economics and political science, provide help here. Let us look at the case, drawn from both of these disciplines, for American federalism. Section 1 considers the normative case for state government in this country. Section 2 considers the normative case for the U.S. national government. And, section 3 considers the case for our joint state-national federal structure as an integrated and working whole.

1. *The Argument for the States*

As a matter of pure theory, why should we not abolish the fifty states tomorrow? What purposes do they serve after 200 years given that we have grown together as a nation and as a people? The answers to these questions are suggested in three wonderful recent publications written by Professor David Shapiro,⁶² Professor Michael McConnell,⁶³ and by Mr. Jacques LeBoeuf, assisted by my colleague Tom Merrill,⁶⁴ as well as in a burgeoning, if overly ab-

62. See SHAPIRO, *supra* note 46, at 58-106. Professor Shapiro's important and outstanding book grows out of his 1994 Rosenthal Lectures at the Northwestern University School of Law. In the dialectical fashion once used to great effect by his Harvard predecessor, Professor Henry Hart, Professor Shapiro first sets forth the case for strong national authority, then sets forth the case for federalism as a constraint on national authority, and, finally, discusses how to strike the balance. In the process, he produces a first-class masterpiece on the economics of federalism.

63. See Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484 (1987). McConnell offers a powerful summary of the case for decentralized political decisionmaking by state governments. His pithy account of what constitutes great constitutional scholarship is worth noting for the inspiration of all who write in the field:

Great constitutional scholarship is . . . attentive to the details of the document and true to its sources. But it also does something more (and this something is what makes constitutional law a worthwhile scholarly enterprise): it makes the Constitution a window through which we learn about humankind as a political creature. The United States Constitution inspires reverence not just because it was drafted and ratified by our forefathers, who were an uncommonly clever lot, but because it is the most successful attempt in history to construct a polity consistent with both the baser passions and the higher aspirations of its citizens. Studying the Constitution has some of the same intellectual delight as reading Aristotle: it opens the mind on a subject of the first importance.

Id. at 1486. McConnell's article qualifies as "great" under this definition.

64. See Jacques LeBoeuf, *The Economics of Federalism and the Proper Scope of the Federal Commerce Power*, 31 SAN DIEGO L. REV. 555 (1994) (article written by a recent graduate of Northwestern under Professor Merrill's supervision). This article does a superb job of presenting and treating the subject of the economics of federalism.

stract, literature on the economics of federalism.⁶⁵ Let me recount the familiar but fundamental steps of the argument for state power:

a. Responsiveness to Local Tastes and Conditions. The opening argument for state power is that social tastes and preferences differ, that those differences correlate significantly with geography, and that social utility can be maximized if governmental units are small enough and powerful enough so that local laws can be adapted to local conditions, something the national government, with its uniform lawmaking power, is largely unable to do.⁶⁶ Consider here the following example offered by Professor McConnell:

[A]ssume that there are only two states, with equal populations of 100 each. Assume further that 70 percent of State A, and only 40 percent of State B, wish to outlaw smoking in public buildings. The others are opposed. If the decision is made on a national basis by a majority rule, 110 people will be pleased, and 90 displeased. If a separate decision is made by majorities in each state, 130 will be pleased, and only 70 displeased. The level of satisfaction will be still greater if some smokers in State A decide to move to State B, and some anti-smokers in State B decide to move to State A.⁶⁷

As McConnell's example shows, federalism can produce, at least in some admittedly abstract situations, a net gain in social utility. This lends credence to the argument made above that federalism sometimes can alleviate the problem of raw majority rule, the key problem generated by democratic government.

b. The Tiebout Model and Competition Among Jurisdictions. The second argument for state power follows ineluctably from the first. If social tastes and preferences differ and if states are allowed to exist and take those differences into account in passing laws, then the states will compete with one another to satisfy their citizens' preferences for public goods. An advantage to federalism then is that

while unitary governments may have no means of determining their citizens' preferences for public goods, decentralized systems [do]. The necessary 'market type' preference-revelation mechanism was the citizens' ability to move freely among local jurisdictions. . . . [S]ocial welfare can be maximized by allowing citizens to choose from among a number of jurisdictions, each of which provides a different bundle of public goods.⁶⁸

65. Professor Shapiro summarizes and discusses the highpoints of this literature and offers a useful selected bibliography. See SHAPIRO, *supra* note 46.

66. See McConnell, *supra* note 63, at 1493; see also SHAPIRO, *supra* note 46, at 91-94; LeBoeuf, *supra* note 64, at 558-59.

67. McConnell, *supra* note 63, at 1494.

68. LeBoeuf, *supra* note 64, at 560; see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).

Because it often may be unclear what bundles of public goods are desirable at what cost, competition among jurisdictions holds out the potential for a market mechanism that can provide an empirical answer to the most important questions of governance.⁶⁹ This argument has built into it two crucial assumptions: first, that the policies adopted by the states do not generate significant externalities, a point I come back to; and second, that there be free movement of capital and labor across state borders with no important residency requirements of any kind. Obviously, a right of exit is crucial to any competition among jurisdictions because it is that right that allows market discipline of those jurisdictions that provide less desirable bundles of public goods.⁷⁰ Without a right of exit, a situation of jurisdictional monopoly prevails like that which exists under all unitary national governments.

Jurisdictional monopoly is conducive not only to a low-quality bundle of public goods; at the extreme, it could be said also to lead to the denial of fundamental individual liberties. Jurisdictional competition, then, is also beneficial because it leads to the protection of liberty. If I dislike the laws of my home state enough and feel tyrannized by them enough, I always can preserve my freedom by moving to a different state with less tyrannous laws. Some may think this liberty argument for federalism is just another form of the argument already made that federalism leads to competition in the provision of public goods. And, of course, if one wrongly believes that fundamental private liberties are "provided" by government as a public good, then these two points indeed do collapse into each other. In fact, however, it turns out that fundamental private liberties are actually antecedent to government,⁷¹ and, therefore, the protection of those liberties through jurisdictional competition is a great and *additional* benefit of federalism.

69. See SHAPIRO, *supra* note 46, at 78; LeBoeuf, *supra* note 64, at 559-61; see also McConnell, *supra* note 63, at 1498-500. Competition among states is limited importantly, however, by the fact that citizens must choose between bundles of public goods that are tied together. A citizen of New Hampshire who likes that state's tax rates but dislikes its criminal procedural rules may have to choose which issue matters more to him. The bundling of public goods together into only 50 packages limits the potential degree of personal choice and competition. Nonetheless, a choice among 50 bundles is still much better than only the option of one nationally uniform bundle which is all that is available to citizens of a centralized nation-state.

70. See Richard A. Epstein, *Exit Rights Under Federalism*, 55 LAW & CONTEMP. PROBS. 147 (1992).

71. See, e.g., THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. — That to secure these rights, Governments are instituted among Men, deriving their just powers from the Consent of the governed . . .").

c. *Experimentation.* The possibility of competition among jurisdictions creates incentives for each jurisdiction to provide bundles of goods that will maximize utility for a majority of the voters in that jurisdiction. These bundles will not be the same, of course, because we have stipulated already that jurisdictional tastes and preferences differ, and, therefore, jurisdictional utility curves differ as well. Many jurisdictions will seek to maximize utility by trying to gain the tax dollars of residents and industry from other states. Some jurisdictions conceivably might put less emphasis on this particular goal so as to maintain a higher quality of life for current residents.

In any event, the possibility of competition will lead inexorably to experimentation and product differentiation.⁷² In a competitive situation, state governments, as competing sellers of bundles of public goods, must strive constantly to improve the desirability of their bundle lest they lose out. The end result is an incentive for state governments to experiment and improve. This is the point of Justice Brandeis's famous statement that:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.⁷³

Competition leads inexorably to innovation and improvement.

d. *Improved Quality of Governmental Decisionmaking and Administration.* Decentralized governments make better decisions than centralized ones for reasons additional to the whip they feel from competition. Decentralization ensures that "those responsible for choosing a given social policy are made aware of the costs of that policy."⁷⁴ This helps ensure a more informed weighing of costs and benefits than often occurs at the national level where taxpayers often may be less cognizant of the social costs of particular legislation.

In addition and just as importantly, governmental agency costs often may be lower at the state level than at the national level be-

72. See SHAPIRO, *supra* note 46, at 85-88; LeBoeuf, *supra* note 64, at 561-63; see also McConnell, *supra* note 63, at 1498.

73. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). For a nice discussion of the laboratory perspective and how federalism structures competition in the political market, see Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233-40 (1994).

74. LeBoeuf, *supra* note 64, at 563.

cause monitoring costs may be lower where fewer programs, employees, and amounts of tax revenue are involved. The smaller size of the state governmental jurisdictions thus makes it far easier for citizens to exercise a greater and more effective degree of control over their government officials.⁷⁵ For this reason, it often makes sense to lodge dangerous and intrusive police powers over crime and over controversial social issues in the states where government officials may be monitored more easily by the citizenry.

Conversely, state governments also may find that they are able to enforce criminal laws and regulations of social mores less coercively than the national government because of the lower costs and greater ease of monitoring citizen behavior in a smaller jurisdiction.⁷⁶ Indeed, ideally small jurisdictional size will lead to less populous state legislative districts, thus producing a greater congruence between the mores of the legislators and of the people than can exist in a continental-sized national republic that necessarily must have enormously large legislative districts and other units of representation.⁷⁷ The greater congruence of mores between citizens and representatives in state governments in turn may produce greater civic mindedness and community spirit at the state level.⁷⁸ This might ameliorate the highly corrosive decline of public spiritedness at the national level that has occurred as a result of the current perception that there exists a discongruence of mores between members of Congress and the public.

Finally, decentralization improves the quality of governmental decisionmaking by improving the information flow from the populace to the relevant government decisionmakers. Centralized command and control decisionmaking is often economically inefficient beyond a certain point in all social organizations. This point holds true for the military, for corporations that contract out for many goods and services, and for government as well. Large, multi-layered bureaucracies cannot process information successfully.⁷⁹ Decentralization alleviates this crucial problem by leading to better informed decisionmaking. As our society and economy grow in complexity, the amount of information that government must pro-

75. See McConnell, *supra* note 63, at 1504.

76. See *id.* at 1508-09.

77. See *id.* at 1509-10.

78. See *id.* at 1510.

79. This sort of difficulty was at least partially instrumental in the breakdown of the large centralized government of the former Soviet Union.

cess increases as well.⁸⁰ This is why overly centralized, top-down command and control mechanisms are even less desirable in today's complex modern economy than they were during the Model-T era of Franklin Roosevelt's New Deal. Ironically, the decentralized federalism of the horse-and-buggy era is better suited to the needs of our information economy than is the overly centralized, outmoded nationalism of the New Deal.

e. Prevents State and Local Attempts To Benefit One Region at the Expense of Another. One of the gravest dangers that could beset any large nation, particularly one as large and populous as the United States, is that one region or state or alliance of states might try systematically to gain benefits for itself while imposing the costs on other states or regions. Nothing could destroy more surely any large country over time than the tolerance of this type of internal redistributive robbery. Nation-states all over the world are plagued by tensions that are created when one region concludes that this type of internal redistributive robbery is going on: indeed, tensions of this very type led to the dissolution of Czechoslovakia because the Slovaks believed they had been systematically abused in this way.⁸¹

Federalism greatly raises the costs of this type of regional redistribution by forcing the states or regions to put together large and unstable coalitions that include the representatives of other states and regions if they wish to redistribute, in geographically targeted ways, the national treasure. Moreover, as to a large range of issues left at the state governmental level, no such redistribution is even possible at all. Federalism thus protects against one of the chief dangers and sources of instability that any large government will face. By creating collective action problems, it makes more costly mutually disadvantageous attempts by communities to take advantage of their neighbors.⁸²

2. *The Argument for the National Government*

Lest we all conclude that the Union should be dissolved forthwith, consider now the very powerful economic and political science

80. See generally THOMAS SOWELL, *KNOWLEDGE AND DECISIONS* (1980) (arguing that decentralized social orders process dispersed information better than centralized social orders); 1 FRIEDRICH HAYEK, *LAW, LEGISLATION, AND LIBERTY* (1973) (same); 2 *id.* (1976) (same); 3 *id.* (1979) (same).

81. See Langerova, *supra* note 41.

82. See SHAPIRO, *supra* note 46, at 83-85; McConnell, *supra* note 63, at 1494-98.

arguments for the normative desirability of our national government.

a. Economies of Scale. As already mentioned, there are many vital government activities that are characterized by the existence of increasing economies of scale.⁸³ The provision of nuclear weapons and national defense is an obvious and much-mentioned example, but other such examples abound. Negotiation of trade agreements with foreign nations, ambassadorial and foreign policy apparatuses, large-scale transportation infrastructures, programs of space exploration and basic scientific and medical research, and programs to redistribute social wealth — all of these and more are examples of government-provided public goods that are cheaper when purchased in bulk than when purchased in smaller increments.

The point is so easily and well understood that it need not be belabored. These vital public goods, public goods that we all have come to expect from government and that have contributed to enormous human progress,⁸⁴ would be underproduced seriously by smaller governmental regimes, thereby reducing general social utility.

b. Costs of Decentralization. Second, centralization and uniformity, under some circumstances, can reduce social costs. A single national currency is cheaper to use than would be fifty state currencies. As a result, more exchanges occur causing enormous utility gains. A uniform national gauge for railway tracks similarly may produce general utility gains with minimal losses to the people of any one state. Sometimes variety is not the spice of life; as to some items it may be a downright nuisance and an expensive one at that. National government eliminates these potential deadweight social costs with general gains in social utility as a result.⁸⁵

In theory, of course, state governments always can negotiate over these issues with the goal of producing a uniform law code whenever the savings achieved by uniformity seem as if they would be great.⁸⁶ In practice, however, it is costly for fifty state governments to negotiate such codes and costlier still to keep them up to

83. See SHAPIRO, *supra* note 46, at 46-50; LeBoeuf, *supra* note 64, at 565-66; see also McConnell, *supra* note 63, at 1494.

84. For example, the extraordinary expansion in human knowledge and wealth that has occurred from 1492 to the present would not have been possible without the central government financed exploration and scientific research.

85. See SHAPIRO, *supra* note 46, at 46-50.

86. For a discussion of the uniform law model, see Henry M. Hart, Jr., *The Relations Between State and Federal Law*, 54 COLUM. L. REV. 489 (1954).

date. Here again, centralization promotes general utility gains by eliminating those negotiation costs. Absent such costs, more uniform national laws will exist, and the presence of such laws may encourage greatly both commercial activity and leisure activity by making it cheaper to engage in.⁸⁷

Particularly where government planning and wealth redistribution is involved, centralized government becomes an essential cost saver. State redistribution and planning are frustrated constantly by exit and competition;⁸⁸ this is the flip side of the claim that federalism preserves liberty. Thus, critics of federalism complain that it always produces a race to the bottom: the states end up competing with each other to impose the most minimal tax levels possible for the provision of vitally needed public goods. Thus, we are presented with a classic collective action problem. All states would agree to pay for these goods if they could be sure that by doing so they would not impoverish themselves to the benefit of their neighbors, but, because they cannot be sure, they all end up with a suboptimal bundle of public goods. This is precisely the bind the thirteen original states found themselves in under the Articles of Confederation.⁸⁹ Absent a central government, public goods were being underprovided because it was too costly for any one state to spend what was needed given the policy choices being made in other states. For this reason, a national role often will be appropriate where redistribution concerns predominate.

c. Externalities. The need for a national role in wealth redistribution points to another powerful argument for centralized government: the existence of externalities resulting from state governmental activity. Many important social benefits may be obtained, with major net gains in utility, as a result of national regulation that eliminates the external effects of state governmental activity.⁹⁰ As Jacques LeBoeuf notes, "The problem of interjurisdictional spillovers was assumed away by Tiebout in his model of

87. A more complicated example is a uniform army, in place of 50 state militias. Not only are there increasing economies of scale here, there is also the cost saving that results from the fact that 50 armies might fight one another instead of a common enemy, whereas one army usually will not consume itself.

88. But see Richard Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race-to-the-Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (disproving the race-to-the-bottom thesis in environmental law); Ralph K. Winter, *Private Goals and Competition Among State Legal Systems*, 6 HARV. J.L. & PUB. POLY. 127 (1982) (disproving the race-to-the-bottom thesis in corporate and commercial law).

89. See generally LeBoeuf, *supra* note 64, at 592-607.

90. See SHAPIRO, *supra* note 46, at 39-44; LeBoeuf, *supra* note 64, at 567-74; see also McConnell, *supra* note 63, at 1495.

interjurisdictional competition, but it is a pervasive feature of reality."⁹¹ Externalities exist for present purposes whenever a state governmental policy, law, or activity imposes costs or confers benefits on residents of other states. Imposition of costs is a negative externality; conferral of benefits is a positive externality. Absent a national government, the states will overindulge in activities that produce negative externalities and underindulge in activities that produce positive externalities.

A few quick examples make this point clear. State A will produce too much air pollution if the costs of that pollution are borne significantly by the residents of State B while all the benefits of the polluting activity accrue to its own residents. A national government perceiving this dilemma might intervene and bring State A's costs more nearly in line with the total social costs of the activity. Absent a national government, however, State A either will continue to produce excessive amounts of pollution or it will extract an unjustified rent from State B for ending the pollution or the situation will escalate to a conflict of a potentially violent sort if the residents of State B are aggrieved sufficiently to make that worth their while.

As to positive externalities, consider the following case. State A invests heavily in education, a public good, only to find that the beneficiaries of that education routinely move out of state in disproportionate numbers to escape its high tax rates which taxes pay for the education. State B, a low-tax state, benefits from this jurisdictional flight as well-educated residents of A relocate to B. Reluctantly, State A concludes that it must cut back on its investment in public education because, due to federalism, it is unable to reap the full benefits of its investment, many of which are accruing to the freeloading residents of State B. State A thus ends up underinvesting in education, a public good, because federalism prevents it from recouping on its investment.⁹²

91. LeBoeuf, *supra* note 64, at 567 (citation omitted).

92. This hypothetical illustrates vividly the importance of time framing in determining whether a state policy has a substantial effect on interstate commerce. If your time frame is broad enough, then, as in my education example, there is an effect. Similarly, in *Lopez*, Justice Breyer used a very expansive time frame to justify his conclusion that schoolyard violence was a federal problem. See *United States v. Lopez*, 115 S. Ct. 1624, 1659-62 (1995) (Breyer, J., dissenting). Breyer's argument does not work on the facts of *Lopez*, however, where the proximate effects are local in place and current in time and where control over local schoolyards and local crime implicates policy areas traditionally reserved to state government. All this shows is that it matters a lot where we start the story and where we end it. For a discussion of time framing in criminal law, see Mark Kellman, *Interpretive Construction in the Criminal Law*, 33 STAN. L. REV. 591 (1981).

These two classic and well-known situations demonstrate the normative value in many contexts of national lawmaking. The national government can prevent serious negative externalities caused by state governmental action by adopting policies that force the states generating those externalities to pay for the associated costs. Alternatively, in cases in which that is too difficult to do, the national government simply may occupy the field altogether and take over, itself, the provision of the relevant service or activity. Similarly, the national government can subsidize state programs that generate positive externalities to ensure that they are provided at nationally optimal levels. Or it can provide those public goods itself, using national resources.

In both situations, the normative case for the national government is powerful and, in this instance, stronger than it was in 1937 or 1787. The enormously greater size and complexity of the state economies and government and the added number of public goods needed today means that state lawmaking generates more positive and negative external effects than ever before. Moreover, there are today fifty state governments whose laws can have external effects, whereas in 1787 there were potentially only thirteen. In this respect, at least, the normative case for centralization has grown stronger.

Nonetheless, it should be noted that not every external effect of state lawmaking can justify national intervention. Otherwise, the competition among states, with all its beneficial effects, would have to come to an end. Competition among states can work only if there are winners and losers, and this in turn means that, in some circumstances, it is legitimate for there to be external effects of one state's policies on other states.

The answer, I think, is to acknowledge a national role in suppressing external effects to further necessary redistributive concerns, to prevent discrimination against minority groups, to prevent damage to the property or environment of other states, and to further distinctively national interests stimulated by foreign policy or uniform law coordination concerns. A national role is not appropriate, however, where the external effects of state laws are the result of the desire of state citizens to have their own social, cultural, and community fabrics or where state citizens seek to maintain a close local hold on local law enforcement functions. A national role also is not appropriate in implementing and administering redistributive programs if the result is to produce a large and unresponsive

bureaucracy. In these circumstances, national block grants administered by the states may work much better.

d. Protection of Minorities. Lastly, there is the powerful argument that a large and populous national government may protect unpopular minority groups more effectively than will a small homogeneous state government.⁹³ This famous argument, made by James Madison in *Federalist Ten*, already has been thoroughly explained, so there is little more for me to say about it here.⁹⁴ Consider though, in passing, how the accuracy of Madison's predictions reinforce the truth of his arguments. Although Madison was writing about state majoritarian oppression of the rich,⁹⁵ his arguments of 200 years ago describe with pinpoint accuracy our whole subsequent history of race relations in this country from the Civil War era, to the era of legal apartheid, and right on down to the present when we find most pressure for affirmative action coming from the federal level.

The Madisonian argument for nationalism has proven true, as much as any argument from political science ever can. Indeed, it has proven so true that some reasonably question whether certain undeserving factions and minorities are *too well* protected at the federal level.⁹⁶ In Europe and around the world, we consistently observe international courts and quasi-legislative entities paying more attention to human rights concerns than do national courts and legislatures. The need to protect minority fundamental rights, then, constitutes an important component of the normative case for national power.

3. *Why Federalism Is Normatively More Appealing than Either Nationalism or Disunion*

The case for federalism over nationalism or disunion begins first with the observation that it may allow us to obtain the benefits of both worlds. There are plainly some decisions that are made best in a decentralized fashion and some that are made best in a centralized fashion. This is a truism of *all* forms of social activity, from the

93. See SHAPIRO, *supra* note 46, at 50-56; McConnell, *supra* note 63, at 1501; Calabresi, *supra* note 30, at 1403-10.

94. See *supra* notes 57-60 and accompanying text.

95. See THE FEDERALIST NO. 10, *supra* note 29, at 84 ("A rage for paper money, for an abolition of debts, for an equal division of property, or for any other wicked project, will be less apt to pervade the whole body of the Union than a particular of it, in the same proportion as such a malady is more likely to taint a particular county or district than an entire State.").

96. See SHAPIRO, *supra* note 46, at 79-81; McConnell, *supra* note 63, at 1495-98.

corporate world to the military to our own daily family lives.⁹⁷ Federalism acknowledges this fundamental reality of human existence and provides institutional forms that *may* allow us, under some circumstances, to achieve at least some of the best of both worlds. This structure, no doubt, is one reason why an institution that grew up out of historical accident nonetheless continues to thrive. There may well be other forms American federalism could have taken, either more nationalist or more localist, but the American people and their elites do not seem very anxious to explore them. This could be simply a failure of imagination, but, more likely, it suggests that, most of the time, federalism gives us at least enough of the best of both worlds so that it is worth the costs of keeping it around.

Those costs, of course, are not insubstantial. They include not only the actual out-of-pocket expense of two sets of government officials, along with their sometimes wacky ideas, but also the costs of coordination and lost accountability that inevitably accompany *any* multiplication in the number of governmental entities. On balance, however, it must be remembered that as a continental-sized nation, we need the benefits of federalism more than a small homogeneous nation like Britain, which may well be moving toward federalism itself. We are both more heterogeneous than Britain and, because of our geographical position, we are more in need of expensive national items with increasing economies of scale. Experience and theory both suggest that American federalism fits this country's needs quite nicely.

Second, there is another important advantage to American federalism. With two levels of government, the citizenry, to some extent, can play each level off against the other with concomitant reductions in the agency costs of government. History teaches that government agency costs, even in a democracy, can become quite high. It is thus no accident that Americans have thought from the time of the founding onward that liberty would be preserved by having two levels of government that could serve as checks on one another.⁹⁸

We have seen already that national government cannot be expected to process all dispersed social knowledge as if it were omniscient. Similarly, it cannot be expected to exercise total governmental power as if it were benign. "Power corrupts and ab-

97. See *supra* note 80 and accompanying text.

98. See McConnell, *supra* note 63, at 1504-07.

solute power corrupts absolutely.”⁹⁹ A national government unchecked by state power would be more rife with agency costs and more oppressive than the national government we have. The existence of the states as constitutionally indissoluble entities provides a vital bulwark from which citizens can organize against tyranny. As Andrzej Rapaczynski brilliantly has shown, the existence of state governments helps citizens solve the collective action problem of organizing against tyranny.¹⁰⁰ The states do help preserve freedom because they can rally citizens to the cause of freedom, helping to overcome the free rider problems that otherwise might cause national usurpations to go unchallenged by the “silent” majority of unorganized citizens.¹⁰¹

Conversely, the national government can organize a “silent” majority of citizens against state oppression — as it did in 1861 or 1964 — more effectively than could a loose confederation, military alliance, or free trade association. Constitutionally indissoluble national government *also* helps citizens to overcome collective action problems in fighting usurpation or tyranny at the state level. The success of the American Union in fighting might be contrasted here with Europe’s inability to police Bosnia. It turns out that there is a great deal to be said for having “an indestructible Union, composed of indestructible States.”¹⁰² Federalism, like the separation of powers, is a vital guarantor of liberty.

I should be very clear that the advantages of federalism differ in this respect from the advantages of decentralization. Professors Edward Rubin and Malcolm Feely have challenged the recent Supreme Court renaissance of federalism by arguing that all the real benefits of what we call federalism are in fact benefits of decentralization.¹⁰³ They claim that a decentralized system with no constitutional protection for state power and with redrawn state lines would yield the same benefits as the proponents of federalism claim

99. Letter from Lord Acton to Bishop Mandell Creighton (Apr. 5, 1887), *quoted in* GERTRUDE HIMMELFARB, *LORD ACTON: A STUDY IN CONSCIENCE AND POLITICS* 160-61 (1952).

100. See Andrzej Rapaczynski, *From Sovereignty to Process: The Jurisprudence of Federalism After Garcia*, 1985 SUP. CT. REV. 341.

101. For a thoughtful description of some other ways in which states can preserve liberty, see Amar, *supra* note 73, at 1240-49.

102. *Texas v. White*, 74 U.S. (7 Wall.) 700, 725 (1968). For an argument that the Guarantee Clause constitutionally protects the structures and autonomy of state government, see Deborah Jones Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1 (1988).

103. See Edward L. Rubin & Malcolm Feely, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903 (1994).

for federalism. In so arguing, Rubin and Feely completely overlook the difference between our *constitutionally mandated* system of decentralization and a system like France's where decentralization is merely a policy option easily reversed — a matter of temporary national legislative grace.

Rubin and Feely's argument is wrong, however, more fundamentally because it also totally overlooks the value of the states in helping citizens resolve the serious collective action problems that must be overcome to halt national usurpation. Admittedly, the state militias pose much less of a check on the U.S. Army than they did in 1787 or 1861, but, nonetheless, the tremendous constitutionally protected dispersion of political, law enforcement, and military resources in this country does check national power. Movements for social change and even U.S. presidential campaigns usually commence from some regional or state base and then spread across the country. This phenomenon should not surprise us. The constitutionally indestructible states do play a useful role in lowering the costs of organizing to fight for change or to resist tyranny.¹⁰⁴ Federalism is about more than constitutionally mandated decentralization, as important as it is that decentralization be mandated constitutionally and not merely an act of grace from our national overlords in Washington. Federalism is also about the fear of concentrated national power and the grave abuses of individual and minority rights to which that power can be put. This is why the advocates of federalism, ancient and modern, always have defended it as preserving liberty and protecting against tyranny. The advocates of federalism are right, and Rubin and Feely are wrong.

Finally, it might be objected that the arguments for state and national power listed above all cancel each other out — that each is just the flip side of the coin from the other. From this, it could be said that American Federalism is intellectually incoherent — that it is a mishmash of arguments invoked on behalf of policies favored for other reasons. Again, I respectfully must disagree. Broadly speaking, I think history, political science, and economics suggest a powerful case for national control over defense, foreign policy, free trade, minority protection, redistribution to keep the social peace, and certain environmental spillover effects. Conversely, I think history, political science, and economics suggest a powerful case for state control over social, cultural, educational, and community issues, over nonredistributive aspects of domestic law, over law en-

104. See Rapaczynski, *supra* note 100.

forcement, and over the administration and adjudication of most questions of national and state law. There is a role in "Our Federalism" for both the national and the state governments to play. The proper line of distinction between the two levels may not always be easy to discern, but it does exist.

C. *Assessing the Historical and Normative Case for Federalism*

We now have considered in sections A and B both the historical, empirical case for federalism and the normative, economic case for federalism. How should we assess the weight of these arguments? What conclusions are we led to with respect to the importance of federalism as a structural component of the American system of government? A few brief observations should seem almost obvious at this point.

First, and probably counterintuitively, I should say that I think the historical case for American federalism is *stronger* than the economic case. The economic case is more analytically rigorous, a feature that commends it to academics, but it rests on countless artificial assumptions that turn out to be highly relevant if not dispositive. The historical case, by contrast, rests on experience, and, while the past fortunately is not always predictive of the future, it remains the best predictor to which we mortals have ready access. Let us pause for a moment here to consider one key overlooked assumption in the economic model that history has shown is of dispositive importance.

The normative economic case for federalism takes no account of geography. The normative case made for state government would work just as well if the "state entities" were initially segmented not territorially but by race, religion, or social class. Thus, one could hypothesize a regime in which people initially were assigned to one such "state" and freely could exit it and join other "states." Therefore, virtually all of the economic benefits alleged to flow from state government still should obtain — under this model — absent territoriality.¹⁰⁵ Less absurdly, but still wrongly, the economic case for federalism appears to suggest that federalism will work equally well in Canada or the United States, the former Soviet Union or Switzerland, or Yugoslavia or Australia.

Obviously, as the economists would say, something is missing from the model. The economic model that we reviewed — the

105. See LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*, *supra* note 32, at 43-44 (referring to nonterritorial European federalism based on the personality principle).

standard economic model used by lawyers — fails to mention the importance of territoriality and geography. As our historical exegesis demonstrates, however, federalism works best if there are both many jurisdictions, an economic point, *and* if there is not an extreme territorial segmentation of socially competing and rivalrous groups, a federalism market-structure point. These points would be overlooked and an opportunity to refine the economic model missed, if we did not look first to history to see what actually has happened in practice.

Analytical models are extremely useful, if sometimes daunting in their complexity, but we should not follow them over a cliff. It is vital, in this context as well as in others, that we study social institutions and practices from both a historical comparative point of view and from an analytical social science point of view. Any other course of action is dangerous folly.

Having said this, the historical comparative case and the economic political science case for American federalism seem quite strong. No other feature of our governmental system can be so systematically defended. Our presidential-separation-of-powers, two-party political system has not swept the global marketplace as has federalism.¹⁰⁶ Nor has it been defended in as analytically rigorous a fashion as federalism can be defended, although some of us have tried to remedy this defect.¹⁰⁷

Our Bill of Rights and system of judicial review have attracted more interest from “purchasers” in the global marketplace for public law and governmental institutions. Moreover, many in this country have defended the desirability of those institutional structures in analytically rigorous ways. The problem here is that it is obvious that Bills of Rights and judicial review will go only so far in solving the serious problems of social heterogeneity — the ones that lead to civil war, secession, violence, and even genocide. As to these heavy-duty problems of social conflict, the fact is that territo-

106. See Steven G. Calabresi, *Political Parties as Mediating Institutions*, 61 U. CHI. L. REV. 1479, 1505, 1515-16 (1994).

It might be objected that federalism really has not swept the global marketplace, as I claim, because constitution-makers truly do not favor the halfway house of federalism but merely settle for it when it is the best they can get. Some might say this is what really happened in the United States in 1787 or in Western Europe with the formation of the European Union. This claim, however, overlooks the fact that *peoples* of the United States in 1787 and of Europe today *prefer* a federalism halfway house even though their elites want much more centralization. The fact that the elites have agreed to Federalism as a concession thus does not weaken my argument that Federalism promotes social happiness in circumstances where national centralization would not.

107. See Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23, 34 (1995).

rial federalism or confederalism provides the best hope. Judicial review cannot prevent more Bosnias or Northern Irelands; the creation of national and transnational federal entities can. A brief glance at the record of modern history and at current events suggests that federalism is incomparably more important than judicial review, the Bill of Rights, or the separation of powers, as important as those things may be, and I think they are very important.

The federal character of the American Constitution is thus by far its most important structural feature. The only difficult question is how to make sure that it is enforced vigorously and properly.

II. ENFORCING AMERICAN FEDERALISM: THE CASE AGAINST RELIANCE ON THE POLITICAL BRANCHES

For many years now, it has been the prevailing view both in the Supreme Court and the law schools that constitutional federalism guarantees should not be enforced *judicially*. The proponents of this modern antifederalist position do not deny explicitly that federalism may be normatively beneficial — although they never choose to discuss its possible benefits. Nor do they deny that federalism is firmly if not unalterably rooted in the political structure of what we “still refer to as ‘the Union.’”¹⁰⁸ Rather, they deny that the federal system has “any *legal* substance, any core of constitutional right that courts” can or should enforce.¹⁰⁹

For purposes of this Part, I want to focus directly on the claim of the modern antifederalists that the courts should not enforce the Constitution’s federalism guarantees because the political branches can be relied upon to do that instead.¹¹⁰ This view has its roots, of course, in the nationalism of the New Deal,¹¹¹ but it first reached academic fruition in 1954 in a seminal and still important article by Professor Herbert Wechsler.¹¹² Wechsler argued powerfully that

108. H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633, 633 (1993). Powell recognizes that there is a strong argument for judicial enforcement of federalism on prudential grounds.

109. CHARLES L. BLACK, JR., PERSPECTIVES IN CONSTITUTIONAL LAW 25, 29 (rev. ed. 1970), quoted in Powell, *supra* note 108, at 633.

110. The political science literature does not agree that normal politics can be relied upon to preserve federalist power-sharing bargains. See William N. Eskridge, Jr. & John Ferejohn, *The Elastic Commerce Clause: A Political Theory of American Federalism*, 47 VAND. L. REV. 1355, 1359 (1994) (mentioning briefly the relevance here of the work of William Riker, Paul Peterson, and Samuel Beer).

111. See, e.g., *Wickard v. Filburn*, 317 U.S. 111 (1942) (recognizing essentially no judicially enforceable limits on the commerce power); *United States v. Darby*, 312 U.S. 100 (1941) (expanding greatly the judicially recognized scope of commerce power).

112. See Wechsler, *supra* note 8.

the political process in 1954 provided great protection to the states and state interests. He cited the existence of the U.S. Senate with its then-rigid seniority system, committees, and two-thirds vote requirement to shut off states rights filibusters.¹¹³ He also pointed to the then-malapportioned U.S. House of Representatives, which prior to *Baker v. Carr*,¹¹⁴ overrepresented rural interests and gave state legislatures a free hand in decennial redistricting.¹¹⁵ And, finally, he pointed to the Electoral College, which forces presidential candidates to campaign state by state because of its system of winner-take-all allocation of state electoral votes.¹¹⁶ He concluded, perhaps not unreasonably at the time he was writing, that "the national political process in the United States . . . is intrinsically well adapted to retarding or restraining new intrusions by the center on the domain of the states."¹¹⁷

Professor Wechsler's analysis has been picked up in modern times and greatly elaborated by Professor Jesse H. Choper, whose seminal and very influential work on this subject¹¹⁸ was relied upon ultimately by a majority of the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*.¹¹⁹ Notwithstanding respectful but firm academic criticism,¹²⁰ Professor Choper's views contributed to the climate that led to the overruling of *National League of Cities v. Usery*¹²¹ and to the enshrinement in *Garcia* of the New Deal view that federalism was to be enforced politically and not in the courts.¹²² Professor Choper argued ardently and rig-

113. *Id.* at 547-48.

114. 369 U.S. 186 (1962).

115. See Wechsler, *supra* note 8, at 548-52.

116. See *id.* at 552-58.

117. *Id.* at 558. Some, however, think that even at that time, Wechsler's analysis was outdated. See John C. Pittenger, *Garcia and the Political Safeguards of Federalism: Is there a Better Solution to the Conundrum of the Tenth Amendment?*, PUBLIUS, Winter 1992, at 1, 2 ("Rereading Wechsler's essay thirty-eight years later, one is struck by how many developments, both constitutional and political, had already in 1954 undermined his position . . .").

118. See CHOPER, *supra* note 8; Jesse H. Choper, *Federalism and Judicial Review: An Update*, 21 HASTINGS CONST. L.Q. 577 (1994); Jesse H. Choper, *The Scope of National Power Vis-a-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552 (1977).

119. 469 U.S. 528, 551 n.11, 554 n.18 (1985).

120. See, e.g., Michael Boudin, Book Review, 67 VA. L. REV. 1251 (1981); Henry P. Monaghan, Book Review, 94 HARV. L. REV. 296 (1980); Lawrence G. Sager, *Constitutional Triage*, 81 COLUM. L. REV. 707 (1981) (book review). A frequent criticism has been that the system of judicial review that Choper defends seems counter to the constitutional text and is not the system we ever have had historically or that we have today. See REDISH, *supra* note 8, at 6-20, 23-61; Martin H. Redish & Karen L. Drizin, *Constitutional Federalism and Judicial Review: The Role of Textual Analysis*, 62 N.Y.U. L. REV. 1, 15-23 (1987).

121. 426 U.S. 833 (1976).

122. See *Garcia*, 469 U.S. at 550.

ously for his federalism proposal — a proposal that explicitly would confine the federal courts to adjudicating *only* individual rights cases so as to harbor judicial prestige for use in this category of cases in which the federal courts are supposedly most needed. Choper noted the longstanding tradition that our Constitution is enforced by all three branches of the federal government, and he argued that it was most appropriate for the political branches to do the enforcing in federalism cases.¹²³ He also updated Wechsler's arguments on the political safeguards of federalism¹²⁴ and anticipated many of the counterarguments that might be made against his federalism proposal.¹²⁵ It is appropriate that I dwell herein on Professor Choper's views because he is the leading academic theorist and advocate of the academically dominant New Deal approach to federalism cases.¹²⁶ To the extent it can be proved that he has erred, we may be confident that the whole New Deal legal academic tradition is in error as well.

The first problem with the Wechsler-Choper analysis is that it seems wildly out of date in the political world of 1995. Maybe it was plausible for legal realists in the 1940s or in 1954 to look at the Congress and proclaim the existence of a state-dominated institution that only grudgingly approached the outer boundaries of national power. Not having been born at the time, I am perfectly willing to concede that in 1954, they may have had a point. But, today, in 1995, the realities of our political system look very different. Cloture is now available in the Senate by a three-fifths vote on most matters, not two-thirds. Rural districts are no longer over-represented in the U.S. House because the rule of one person, one vote for thirty years has forbidden this type of malapportionment.¹²⁷ State legislatures have far less power over representatives under redistricting than they did in 1954 because the national courts, for various reasons, often take the lead in redistricting. Indeed, two thoughtful analysts of American politics attribute the 1994 Republican sweep of the Congress, in part, to the effects of

123. See *CHOPER*, *supra* note 8, at 235-40.

124. See *id.* at 176-90.

125. See *id.* at 211-58.

126. As I have said already, this view is overwhelmingly dominant among law professors. See, e.g., Sotirios A. Barber, *National League of Cities v. Usery: New Meaning For the Tenth Amendment?*, 1976 SUP. CT. REV. 161 (criticizing *National League of Cities*); see also BLACK, *supra* note 109 (noting that federalism is not legally enforceable); MICHAEL J. PERRY, *THE CONSTITUTION IN THE COURTS: LAW OR POLITICS?* 89, 196 (1994) (advocating a minimalist judicial role in federalism cases).

127. See *Baker v. Carr*, 369 U.S. 186 (1962).

Reagan-Bush *judicial* redistricting of the U.S. House of Representatives!¹²⁸ The once legendary congressional seniority system lies in tatters in the House and is under attack in the Senate. Finally, even presidential elections seem more plebiscitary and less state centered today because of the ubiquity of national television, the rise of independent personality-driven third parties, the collapse of traditional state-party political machines, and the substitution of primaries for state caucuses at the nomination stage.¹²⁹ Just at the most superficial level, then, the Wechsler analysis seems positively quaint today, whatever its validity may have been in 1954.¹³⁰

These preliminary observations seem confirmed when we note that many, although not all, Americans seem stunned by the range of issues the national government now routinely chooses to legislate upon: speed limits on state and local roads;¹³¹ setting a national drinking age, even though the Constitution explicitly gives the states exclusive power over the regulation of alcohol;¹³² Republican proposals in the Senate to make every crime committed with a gun a national offense;¹³³ Democratic proposals to use midnight basketball games in deterring teenage crime;¹³⁴ and indiscriminate Republican proposals to federalize all of state tort law.¹³⁵ All of these things and more suggest to many Americans a complete collapse of the ability of our national politicians to distinguish *at all* between state and federal matters, and both political parties are thoroughly to blame.

Both analytically and impressionistically, the Wechsler-Choper view seems at least a little odd in the political world of today — an historical anomaly that no longer quite seems to fit. But, the flaw

128. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1996, at xxxi (1995).

129. In 1960, when John F. Kennedy was nominated there were only seven states that held primaries. See JAMES W. CEASER, *PRESIDENTIAL SELECTION* 237 (1979). Today, a mere 35 years later, the overwhelming majority of states hold primaries instead of caucuses.

130. I should say here, as I think is obvious, that these particular changes have been a good thing for the country overall, whatever their significance for the Wechsler-Choper theory of the political safeguards of federalism.

131. See Stephen Chapman, *Should Congress Be Telling You How Fast to Drive?*, *CHI. TRIB.*, June 4, 1995, at C3.

132. See *South Dakota v. Dole*, 483 U.S. 203 (1987). Surprisingly, two friends of state government are thoroughly to blame for this particular atrocity. This law was signed by President Ronald Reagan and upheld as constitutional by William H. Rehnquist.

133. See William J. Eaton & Robert L. Jackson, *Major Crime Bill Ok'd by Congress*, *L.A. TIMES*, July 29, 1994, at A1.

134. See Daniel J. Kelly, *Crime Bill Failure*, *CHI. TRIB.*, Aug. 19, 1994, at N22.

135. There may be a proper federalist case for some national regulation of product liability law, see McConnell, *supra* note 63, at 1499. Many proposals discussed today, however, go well beyond this.

with their analysis is far graver than these first impressions may suggest. In three very important respects, the Wechsler-Choper view is hopelessly out of touch with the realities of the modern political process. First, it fails to take into account the influence of our campaign-finance system on the political process. Second, it fails to consider realistically the incentive structure national politicians face. And, third, it fails to consider the possibility that the state governments have been corrupted systematically to the point that they now would sacrifice their self-interest if they did *not* favor a normatively undesirable expansion of national power. I take up each of these points in turn.

First, the Wechsler-Choper analysis assumed a world in which senators primarily represent states and congressmen primarily represent their districts. Because of the political party system, state governments were powerful entities in the politics of most states¹³⁶ and had great say over the composition of congressional districts. That particular world has collapsed totally in the last twenty years, not only because of the weakening of the party system¹³⁷ and the role of the national courts in redistricting, but also — and more importantly — because of our current system of financing national political campaigns. National political campaigns have become very expensive mainly because of the costs of paid advertising on television and the tremendous impact that advertising seems to have on modern voters. Under current law, the best source of money to pay for that vital television advertizing comes from political action committees (PACs), which usually are linked to some wealthy and nationally prominent special interest or faction.¹³⁸

Modern national political campaigns, then, require that the candidate spend a tremendous amount of his time raising money from national special interest PAC's. In fact, candidates spend *most* of their campaigning time doing precisely this, and they generally have achieved a very high reelection rate, by historical standards, as a result. Even in a revolutionary year like 1994, the overwhelming majority of incumbents who ran for reelection won.¹³⁹ The cultivation of PAC constituencies and the pursuit of PAC money have become an all important feature of modern national politics. State

136. See Calabresi, *supra* note 106, at 1517-21; Steven G. Calabresi, *Some Structural Consequences of the Increased Use of Ethics Probes as Political Weapons*, 11 J.L. & POLITICS 521, 526-28 (1995).

137. See Calabresi, *supra* note 106, at 1517-21.

138. See Michael J. Malbin, *Campaign Financing Reform and the "Special Interests,"* PUB. INTEREST, Summer 1979, at 21 (discussing the role of PACs in campaign finance).

139. See Charles M. Madigan, *The Historic Shakeup*, CHI. TRIB., Nov. 10, 1994, at 1.

and local constituencies still count, of course, because that is where all the television advertising dollars ultimately must be spent to get their votes. But, the sad truth is that modern senators and representatives really *represent* two constituencies: a national special interest PAC constituency and their state or local district.

This fact has major implications for the Choper federalism proposal because national special interest PACs have *no* interest in federalism. Indeed, they positively dislike federalism to the extent it interferes with their narrowly conceived special interest goals. Union PACs, business PACs, feminist PACs, trial lawyer PACs, environmental PACs, and health care PACs all will favor or disfavor federalism precisely to the degree that it suits their substantive agenda in any given case. They have *no* institutional reasons to favor federalism and every incentive to scour the country looking for local congressional districts or small state Senate seats that can be "bought" cheaply so that they will have an advocate in Congress. This is why, as Walter Dellinger has pointed out to me, we have a Claude Pepper, who is the congressman from the AARP, a Don Edwards, who is the congressman from the ACLU, and so on.¹⁴⁰

The first and most serious problem, then, for the Choper federalism proposal is that it is totally unrealistic in a national political culture in which special interest groups and PACs are as important a constituency as state and local voters. That this political culture is despicable goes without saying. Ironically, its growth has been fueled *mainly by the very expansion of national power that Choper would be loath to prevent!* As the share of national GNP distributed by the federal government has gone up, it has become more and more vital for special interests to form national PACs to try to recover some portion of that share to promote their goals and self-interest.

A second problem for the Choper federalism proposal, which is related to the first problem, is that it takes inadequate account of the incentive structure of Members of Congress and of the President. Choper rightly assumes that these national officers will be interested in reelection, but he wrongly assumes that their self-interest will lead them to be attentive to federalism concerns voiced by state and local officials. Even leaving the pervasive influence of PAC money to one side,¹⁴¹ this analysis is wrong because it overlooks the powerful personal stake that Members of Congress

140. See Calabresi, *supra* note 107, at 64 n.105.

141. There are a few PACs that attend to state and local government interests but they are dwarfed by the size of the national special interest PACs.

always will have in expanding national power. Every increase in national power and money is an increase in the size of the pool of resources or "pork" that the federal government gets to hand out. Because handing out "pork" goes over very well with the voters, expanding the size of the federal "pig" serves the personal, re-electoral self-interest of every single Member of Congress, Republican and Democrat alike.

This point applies not merely to the expansion of national spending programs or the spending of national money borrowed from future citizens too young presently to vote.¹⁴² It applies just as surely to programs that test the outer limits of Congress's enumerated powers. 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* a new television spot in one's campaign for reelection. How, in contrast, is a congressman helped by defending state and local prerogatives at the urging of a state or local official? Does *that* sound like the stuff of a good, snappy fifteen-second commercial or television news soundbite? Obviously, not.

This congressional incentive to expand federal power *is* mitigated to some extent by an incentive to duck some tough questions by leaving them to the states or more often to the federal courts. In this fashion, Congress often avoids controversy and enhances the reelectoral prospects of its members. Nonetheless, this buck-passing tendency may do little to protect state power because there is no likelihood that congressional buck passing will coincide in its results with the constitutional allocation of power. Indeed, Congress well may choose to invade state prerogatives and engage in buck passing all at the same time.

Third and finally, the Choper federalism proposal assumes that the political power that state and local governments have in the national political process will be used mainly to defend their state and local constitutional prerogatives. It assumes, in other words, that the self-interest of state and local officials can be harnessed toward a constitutionally useful end. Unfortunately, this assumption too breaks down upon analysis.

142. These voters constitute, of course, the ultimate politically powerless group. See JOHN HART ELY, *DEMOCRACY AND DISTRUST* (1980) (calling for heightened judicial scrutiny of laws that disfavor politically powerless groups, a proposal that, in this context, becomes an argument for the Balanced Budget Amendment).

However valuable federalism may be for the citizenry at large, it is not always of value to state and local officials. To begin with, it is sometimes in the interest of state and local officials for *them* to pass the buck on the hardest problems of government by deferring to the folks in Washington, D.C. The exercise of power brings with it accountability and enemies, and politicians interested in reelection have no interest in being any more accountable than they have to be. While the exercise of power may have its gratifying moments and while many politicians may be motivated to some degree benignly or otherwise by the desire to exercise power, the costs of exercising power are often very high. State governors and legislators may be very happy to let the national government have more power over education or tort law or criminal law, if, by doing so, they can pass the buck on these politically intractable problems to someone else.¹⁴³ The Wechsler-Choper analysis fails to consider that state power in the national political processes will not always be used to protect the constitutional distribution of powers. In an important category of cases, it may well be used to *undermine* that distribution of powers rather than to reinforce it.¹⁴⁴

This problem becomes *especially* acute with respect to the modern federal government, which redistributes enormous amounts of money daily both in the form of direct cash grants and in the form of allocated regulatory and statutory benefits and costs. In this dismal real political world, the name of the game is *not* the preservation of state prerogatives. The name of the game is who can do the best job of siphoning off national treasure and resources for the benefit of state and local constituencies.¹⁴⁵ The possibility of using national power to create state and local benefits, the costs of which are borne nationally, sets off a destructive competition for national resources in which everyone ends up with a higher than optimal level of national spending *and power*. No single state can stop this competition, however, for fear that all the others will continue to play a game that *in toto* is destructive to all concerned. The fifty state governments thus face a ferocious collective action problem

143. See, e.g., Jonathan R. Macey, *Federal Deference to Local Regulators and the Economic Theory of Regulation*, 76 VA. L. REV. 265 (1990).

144. See Kaden, *supra* note 8, at 867-68 (detailing the relationship between state and federal public administrators and the process through which "a state's views are increasingly represented by public officials with a direct stake in ever-expanding national programs, even if expansion entails greater regulation").

145. See McConnell, *supra* note 63, at 1494-98. There may be serious risks to state officials who waste political capital on trying to preserve state power or control over money, instead of focusing on how to get a bigger share of the federal pie that is being distributed. Such efforts may trigger the enmity of those who control distribution of the federal pie.

that leaves them with little incentive but to advocate many undesirable increases in national spending, regulation, and power. The political power that Wechsler and Choper say the states have over national politics often will not be used to promote constitutional federalism. Indeed, just the opposite may well be the case.

These concerns help to explain why a thoughtful and important attempt to modernize the Wechsler-Choper thesis also fails to persuade. In a recent article, Professor Larry Kramer has argued that an assortment of unplanned structures have grown up over the past 200 years that link the fortunes of state and national officeholders.¹⁴⁶ These unplanned structures include political parties and the interdependent structure of the post-New Deal bureaucracy at the state and national levels. In Professor Kramer's view, these structures give state officeholders power and influence over the national political process. In his view, they significantly substitute for the failed constitutional structures that the Framers thought — wrongly — would suffice to protect state power.

Much of what Professor Kramer describes seems quite accurate, and he makes an important contribution to our understanding of American federalism. But, the problem again at the end of the day is the same one that exists with the Wechsler-Choper thesis. There is every reason to think that state officials will use the power they gain from political parties and cooperative administration to seek *more* national resources and programs that will benefit the citizens of their state. State officials have more of an incentive to obtain federal largesse than they have to preserve the constitutional structure and distribution of power. That structure benefits ordinary citizens a great deal, but it does not necessarily help a state official get reelected. Moreover, to the extent that political parties tie together the fortunes of national and state officeholders, the effect may be as often to infuse national issues into state races as it is the other way around. In 1994, for example, Democrats lost scores of state legislative seats and many gubernatorial seats because of voter dissatisfaction with the performance in *national* office of President Clinton and former House Speaker Tom Foley.

Professor Kramer is right that political parties create a very loose tying arrangement between national and state politicians. He overlooks, however, the fact that the national government is today the senior partner in this arrangement because it has the most power and money. Accordingly, the predominant effect of the

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

political parties' state-federal tie is to make national issues more important in state races and not the other way around.¹⁴⁷

In sum the Wechsler-Choper thesis is wrong, at least in today's political world, insofar as it assumes that national elected officials safely can be made the exclusive enforcers of constitutional federalism guarantees. It turns out that once again Madison was right after all: "No man [should be] allowed to be a judge in his own cause."¹⁴⁸

III. ENFORCING AMERICAN FEDERALISM: THE CASE FOR JUDICIAL REVIEW

We have seen in Part I of this article that American federalism is enormously desirable as a normative matter. We also have seen in Part II that, contrary to the view of Professor Choper, we cannot rely upon the national political branches to enforce constitutional federalism guarantees. We thus are presented with the urgent question of whether there is *any* institutional mechanism that will allow us to reap the enormous benefits that constitutional federalism promises. If there is not such an institution in the present Constitution — and there may well not be¹⁴⁹ — then the promise of federalism is truly an empty one, barring a constitutional amendment.

The historical perception of the general citizenry always has been that constitutional federalism guarantees are enforced by the U.S. Supreme Court — backed up by the lower federal courts and state courts.¹⁵⁰ Well-known and much discussed U.S. Supreme

147. I know of no good way to prove this assertion empirically, and Professor Kramer's somewhat contrary assertion seems to me, as yet, unproved also. I do rely here, however, on my personal experience working in government and on presidential, senatorial, and congressional campaigns.

148. THE FEDERALIST NO. 10, *supra* note 29, at 79; see also Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POLY. 1 (1993) (discussing the importance Madison placed on harnessing self-interest toward publicly interested ends).

149. See *infra* section III.C discussing the weaknesses of the national courts in this regard.

150. Several of the Framers, including Madison, made statements to this effect, and, although they also anticipated that Congress would enforce federalism guarantees and be sensitive to federalism concerns, they did not think that absolved the Court from also being obligated to enforce enumerated powers. Chief Justice John Marshall, bitterly attacked for being an extreme nationalist in his day, never was so bold as to suggest that the Court should just abstain in federalism cases because after all the political branches were the first line of the federalism defense. Chief Justice Marshall's famous federalism opinions in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), are merits decisions on the proper scope of the Sweeping Clause and the Commerce Clause. Moreover, as Richard Epstein powerfully has demonstrated, a return to Marshall's vision in *Gibbons* today would be revolutionary indeed. See Richard A. Epstein, *The Proper Scope of*

Court decisions like *McCulloch v. Maryland*,¹⁵¹ *Gibbons v. Ogden*,¹⁵² *United States v. E.C. Knight Co.*,¹⁵³ *Hammer v. Daggenghart*,¹⁵⁴ and *United States v. Darby*¹⁵⁵ all have helped to create this impression and, even if we lawyers know that the Court's record has been spotty at best, the popular impression lingers. What then of the case for federal judicial umpiring of the balance of federal and state power? I take up this problem in three parts. Section A considers the institutional competence of the national courts to decide federalism cases. Section B considers whether we need ever fear a crippling national judicial activism in this context directed against the national government. And, lastly section C considers the problem of whether national judicial enforcement of federalism guarantees is likely always to be so pathetically weak that we might do better having no *pretense* of federalism enforcement at all.

A. *The Institutional Competence of the National Courts To Decide Federalism Cases*

It is frequently said that the federal courts lack the institutional competence to decide federalism cases of the enumerated power sort.¹⁵⁶ As an initial matter, this is a very surprising assertion. We had such enforcement for 150 years prior to 1937 and until the somewhat unique crisis of the New Deal the system seemed to work in predictable, if not universally acclaimed, ways. While the New Deal Court crisis was very damaging both to the Supreme Court and probably also to President Roosevelt's post-1938 political program, we need not conclude that one of the main preoccupations of the Supreme Court from the founding until the 1930s involved something that the Court institutionally was unable to do at all. This conclusion is certainly possible, but it seems less likely than other possible conclusions, such as that the 1930s Court erred in

the Commerce Power, 73 VA. L. REV. 1387 (1987); see also Richard A. Epstein, *Constitutional Faith and the Commerce Clause*, 71 NOTRE DAME L. REV. (forthcoming 1995).

151. 17 U.S. (4 Wheat.) 316 (1819).

152. 22 U.S. (9 Wheat.) 1 (1824).

153. 156 U.S. 1 (1895).

154. 247 U.S. 251 (1918).

155. 312 U.S. 657 (1941).

156. Federal judicial enforcement of *national* prerogatives against the states, pursuant to the Supremacy Clause, is universally accepted. It is only when *state* prerogatives are at issue that federal judicial competence suddenly comes into question.

some important cases but that fact does not excuse New Deal excesses like *Wickard v. Filburn*.¹⁵⁷

The assertion of judicial incompetence in enumerated power federalism cases is also surprising because when we look closely at modern judicial doctrine we see that the Court routinely protects many federalism interests in a whole host of both controversial and largely uncontroversial ways. Professor David Shapiro provides a useful listing of these ways in his new book on federalism.¹⁵⁸ Consider here the rule of *Murdock v. Memphis*¹⁵⁹ that the state courts are the final arbiters of state law; the *Erie*¹⁶⁰ decision governing diversity cases; the abstention doctrine of *Younger v. Harris*;¹⁶¹ the growing willingness in recent years of the Court to limit federal habeas;¹⁶² the Court's continuing broad construction of the Eleventh Amendment so as to protect the states from federal judicial scrutiny;¹⁶³ the Court's hesitancy to conclude that Congress has pre-empted state law;¹⁶⁴ the guarantee of *Texas v. White*¹⁶⁵ that ours is an indestructible union of indestructible states; the guarantee of *Coyle v. Smith*¹⁶⁶ holding that the states had residual powers as to a few questions on which their sovereignty is predominant; and, finally, the guarantee of *New York v. United States*¹⁶⁷ that state law-making functions cannot be drafted into service for purposes of federal lawmaking.

These rules and cases and a host of others all provide instances in which the Court widely is considered to be perfectly competent to protect and adjudicate the national-state balance of power. Some of the doctrines alluded to above are highly controversial; others are not controversial at all. But one thing surely seems clear. It is simply not true that the national courts generally are perceived as lacking the institutional competence to take federalism into account and to help preserve the national-state balance of power. That perception may arise in Commerce Clause cases but it does

157. 317 U.S. 111 (1942).

158. See SHAPIRO, *supra* note 46, at 1-3.

159. 87 U.S. (20 Wall.) 590 (1874).

160. *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938).

161. 401 U.S. 37 (1971).

162. See SHAPIRO, *supra* note 46, at 2 & n.9 (collecting cases).

163. See *id.* at 2 & n.10 (collecting cases).

164. See *id.* at 3 & nn.11-12 (discussing Supreme Court preemption jurisprudence and collecting cases).

165. 74 U.S. (7 Wall.) 700 (1868).

166. 221 U.S. 559 (1911).

167. 112 S. Ct. 2408 (1992).

not arise more generally. Is there then something peculiar about the Commerce Clause or about the list of powers more generally in Article I, Section 8 of the Constitution that suggests that the Court is incompetent to decide issues and cases arising under those parts of the Framers' Constitution?

I submit there is not. Admittedly, the Commerce Clause raises serious interpretive problems, problems that are raised by the taxing and spending power provisions as well.¹⁶⁸ It is difficult to say with exactitude where interstate commerce ends and education or local law enforcement or wholly intrastate commerce begins. Any first-year law student can show by cumulating individually insignificant effects that any given congressional regulation of commerce rationally might be based on the belief that a state activity was generating significant external effects on other states and thus on interstate commerce.

Similarly, it would be easy to run this analysis in reverse and show that all congressional exercises of the interstate commerce power were invalid because they significantly affect the exclusive power of the states over education or tort law or family law or local law enforcement. The New Deal Court was right in *Wickard* that if you follow the chain of causation far enough everything seems to affect everything else.¹⁶⁹ This is not a profound observation or a novel insight. It certainly provides no excuse for the Court's refusal for the past fifty years ever to invalidate even a single tenuous, farfetched exercise of the commerce power even in cases such as *Lopez* in which Congress was bearing down very close to the reserved power of the states over education and local law enforcement.

There was no plausible claim in *Lopez* that external effects justified a national law. To the contrary, the effects of gun carrying within 1000 yards of a school are overwhelmingly local, which is why over forty¹⁷⁰ states have laws against this practice. Carrying guns near a school is undoubtedly a *national* problem, as Justice Breyer argues powerfully in the dissent.¹⁷¹ But, it is not a *federal* problem.¹⁷² It is a problem that generates serious local costs and

168. Professor McConnell offers an intriguing suggestion on the proper scope of the spending power. See McConnell, *supra* note 63, at 1497-98. He suggests that the power may allow spending for more than the enumerated purposes so long as it is for the *general* welfare of the country as a whole and not for the benefit of only one state or region.

169. See *Wickard v. Filburn*, 317 U.S. 111, 123-25, 128-29 (1942).

170. See *United States v. Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring).

171. See 115 S. Ct. at 1659-61.

172. I am indebted to Akhil Amar for this point.

that only experimentation and innovation will help solve. The external effects on other states are minor when compared to the in-state effect.

Nothing in the exhaustive historical or economic case for federalism canvassed in Part I above suggests that this is a problem that we need federal action to solve. On the other hand, there is much in that historical and normative case that suggests that education and local law enforcement are functions that we do well to leave to the states. There *may* be a case for federal subsidization of education and local law enforcement through general appropriations bills because education and local law enforcement are public goods that the states may underprovide for various reasons. But, there is nothing to be gained and much to be lost from allowing the federal behemoth to get involved in matters as overwhelmingly local in their impact as the ones involved in *Lopez*. The historical and normative arguments against a federal law here are overwhelming: the value of experimentation among differing jurisdictional approaches to fighting juvenile crime; the danger to liberty of a national criminal law; the peculiar value of state control over the content of education, both as a vehicle for reflecting cultural diversity and for fear of what a national power might do with education; the absence of serious negative externalities; the absence of any showing of increasing economies of scale; and on and on. The only thing that is surprising about *Lopez* is that it was a five-to-four decision. This is an incredibly easy case of sloppy congressional usurpation of power.

Well, what about the next case one might ask? If the Court starts down this road again, where should it stop? Do we follow Justice Thomas and Professor Epstein, who would restore the case law of 1937?¹⁷³ Is that case law at all likely to work in modern circumstances, and, if it does not, what intermediate positions are there?

One institutionalist judicial response might be the one that four out of five members of the *Lopez* majority adopted, which is to preserve the form of the New Deal doctrine, at least initially, but apply it with more bite. Under this approach the Court could strike down clear excesses like *Lopez* or *Wickard*, if it came up *de novo* today, while preserving such cases as *Heart of Atlanta*¹⁷⁴ or *Mc-*

173. See *Lopez*, 115 S. Ct. at 1648-51 (Thomas, J., concurring); see also Epstein, *The Proper Scope of the Commerce Power*, *supra* note 150.

174. *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).

*Clung*¹⁷⁵ or *Darby*,¹⁷⁶ which provided the foundation for much of the modern national law that regulates intrastate activities that generate severe external costs on the residents of other states. Does anyone doubt that the pre-1964 southern practice of racial discrimination generated severe negative externalities while benefitting the white majorities in the South? Of course not! Was it necessary and desirable as a practical matter to expunge that system so that any federal law targeted against it applied nationally and not only in the South. Yes, again. Reasoning analogically, on a case-by-case basis as first-year law students are taught to do, is there even the remotest resemblance between the severity of the negative externalities generated in *Heart of Atlanta* or *Darby* and those generated in *Lopez* or *Wickard*? Of course not.

We do not need a whole grand and unified theory of the scope of the commerce power to decide *Lopez* or to overrule *Wickard*, something the *Lopez* Court explicitly, conspicuously, and foolishly refused to do.¹⁷⁷ It is enough to say that *Lopez* is not remotely a close case and that we will worry about the close ones when they come up and when a new body of Commerce Clause case law, informed by the teachings of history and economics set forth in Part I of this article, has been assembled. If we still are worried, then we will defer to Congress because excessive restraint is less dangerous than excessive activism. But there was no reason for deference on the facts of *Lopez* and no reason for the Court's extreme show of respect for atrocities such as *Wickard*. Some assertions of the federal commerce power are truly beyond the pale, and this was one of them.

In fact, the line-drawing and fact-finding problems here are no more difficult than they are in the context of determining what constitutes an impermissible endorsement of religion or when an abortion law violates the doctrinally recognized right to privacy or when unprotected obscenity becomes protected pornography. In these and a whole host of other similar situations, the Court does not think twice about promulgating nationally binding rules, minute in their detail, and concerning cultural, social, and religious matters on which people can and do quite validly and sincerely disagree. One would think it is on some of these contentious social issues that the Court should hesitate before it draws necessarily arbitrary and controversial lines. One would think it is on these issues that the Court

175. *Katzenbach v. McClung*, 379 U.S. 294 (1964).

176. *United States v. Darby*, 312 U.S. 100 (1940).

177. *See Lopez*, 115 S. Ct. at 1630.

might show some deference to the fact finding of democratic state legislatures, which are close to the people and attuned to their needs and preferences.

This is all the more true when we remember that the Court routinely enforces the Commerce Clause in its negative "dormant" aspect, the aspect that is judicially enforceable against the states. Here the Court has no trouble invalidating state laws that generate significant negative externalities while upholding those that do not.¹⁷⁸ Never in this context does the Court worry that it may have gone beyond its institutional competence by weighing and assessing the significance of the external effects of state laws.

Why then should the Court worry about its competence to make precisely the same determination as a basis for deciding whether Congress has a Commerce Clause rationale that would support a national law? It seems to me, as it has to others,¹⁷⁹ that the Court's dormant Commerce Clause case law belies the cries of judicial incapacity here. The contexts are different and the case is strong for giving Congress deference where there is doubt, but still the parallel is useful.

Moreover, in this context, the commerce power is being used to nationalize state criminal law, a decision that is fraught with danger and controversy. This process of nationalization, which is rapidly gathering steam, threatens to have severe adverse consequences for liberty and for the crowded dockets of the federal courts, a matter on which the Supreme Court has special claims to institutional competence. For this reason, too, the Court should not worry about its competence to decide cases like *Lopez*. What national entities know more about the costs and benefits of federalization of the criminal law than do the national courts?

There is no very good argument to support the claim that the Court lacks institutional competence to enforce enumerated powers limitations against Congress. Indeed, this was one of its most visible activities for a long time, and it is an activity that many other federations expect their supreme courts or constitutional courts to play.¹⁸⁰ The German Constitutional Court has no trouble enforcing

178. For fascinating discussions, see Eskridge & Ferejohn, *supra* note 110; Farber & Hudec, *supra* note 24; Donald H. Regan, *The Supreme Court and State Protectionism: Making Sense of the Dormant Commerce Clause*, 84 MICH. L. REV. 1091 (1986).

179. See, e.g., LeBoeuf, *supra* note 64, at 609-15.

180. Historically, Canada and Australia, for example, have judicially enforced their analogues to the Commerce Clause quite vigorously. See RICHARD E. JOHNSTON, *THE EFFECT OF JUDICIAL REVIEW ON FEDERAL-STATE RELATIONS IN AUSTRALIA, CANADA, AND THE UNITED STATES* 233-78 (1969).

enumerated powers.¹⁸¹ Indeed, it appears that judicial review and federalism often go hand in hand all over the world. *A major impetus in the global spread of judicial review has been the need for central judicial umpiring of federalism guarantees.*¹⁸² It is ridiculous to pretend that reasons of judicial capacity make the decision of cases like *Lopez* difficult. Whatever difficult interpretive problems the Commerce Clause raises, *this* is not one of them.

B. *Why the Fear of Judicial Activism Is Misplaced*

A fear that often is stated in this context is that national judicial enforcement of the Constitution's federalism guarantees will lead again to a crisis like the one that the Supreme Court narrowly escaped in 1937.¹⁸³ Such a crisis presumably could occur on either one or both of the following two dimensions. It might involve a national judicial crippling of the vital functions and role of the national government, thereby seriously harming the interests of the United States. Alternatively, or additionally, it might involve as well the destruction or the permanent damaging of the Supreme Court's power of judicial review due to some fatal or near-fatal collision with the political branches. Either of these concerns could present a reason for total judicial abstention in constitutional federalism cases, if they had any basis in reality.

To begin with, it seems unlikely in the near future that the Court again would get itself into as serious a bind as it found itself in 1937. Presumably, the Justices have learned from that experience and would be more deferential about repeatedly invalidating the popular program of a popular president during a major national crisis. In addition, no such major crises seem to be remotely on the horizon anytime soon nor are we likely soon to have a President, backed up by a Congress of his own party, who is determined to take on the Court. History may repeat itself sometimes but rarely does it do so mechanically, and "generals" who assume such mechanical repetition of history usually are accused disparagingly of "fighting the last war." There is no *prima facie* reason to think that judicial enforcement of constitutional federalism inevitably will produce a train wreck any more than we should assume that judicial

181. See DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 69-120 (1989).

182. See MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 10-11 (1979); see also ALLEN R. BREWER-CARIAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* (1989) (discussing contemporary trends toward constitutionalism, judicial review, and federalism).

183. See, e.g., *United States v. Lopez*, 115 S. Ct. 1624, 1652 (1995) (Souter, J., dissenting).

enforcement of the Due Process Clauses inevitably will produce a train wreck.¹⁸⁴

This being said, what are the chances that the national courts will seriously incapacitate the national government, preventing it from performing its vital constitutional functions? As Professor McConnell accurately has pointed out, "Of the two classes of judicial error — striking down constitutional legislation and upholding unconstitutional legislation — the former is more dangerous since the political corrective is so much more difficult."¹⁸⁵ This is especially true in this context because, as we have seen, there is a powerful normative case to be made for national governmental power in situations in which there are economies of scale or in which state laws produce seriously disruptive externalities or in which minority rights are threatened. Improper or frequent Supreme Court invalidation of such vital national laws arguably might be worse, given the difficulty of correcting judicial errors, than adoption of Professor Choper's federalism proposal. Fortunately, there is absolutely no likelihood that this will happen.

The implausibility of this scenario is made clear if we stop and think for even a moment about the incentive structure faced by Supreme Court Justices and by federal judges in general. These powerful and prominent government officials are officers of the *national* government. They are picked essentially by the President or his aides, again *national* officers, and usually are confirmed in a *pro forma* fashion by the Senate.¹⁸⁶ They receive very large national appropriations for their office space and staff, which can be reduced at any time by Congress. They work in Washington, D.C., live nearby, and have long since given up riding circuit, a practice that at least had the virtue of getting the Justices out of the Capital City. The Justices are accountable to liberal national journalists who cover the national courts and confer gushing praise on any jurist who does their bidding and biting scorn and sarcasm on those who refuse to go along. Their opinions are dissected in detail in national law reviews by law professors and law students at elite national

184. *But see* Planned Parenthood v. Casey, 112 S. Ct. 2791 (1992).

185. McConnell, *supra* note 63, at 1487.

186. Very rarely, the Senate will reject a nominee, usually when there is an important vacancy on the U.S. Supreme Court, but sometimes also when there is an important lower court vacancy as well. The Senate usually recovers from these exertions swiftly and confirms the next nominee post haste. This course of action allows a majority of the senators to be both against and in favor of whatever was controversial about the first nominee. Thus, for example, a majority of the Senate was both against Judge Bork and in favor of Justices Kennedy and Thomas.

schools from which they also must hire their law clerks. Should they ever hope to be promoted or receive a pay increase, they must look again to the national government from whence that promotion or pay raise must come.

In sum, the Justices and judges of the U.S. federal courts are *national* officers in every possible sense of that term. Every good thing they have to hope for and every bad thing that they have to fear will happen to them as a result of some *national* political or social institution. Such Justices and judges are far more nationalistic in their outlooks than Members of Congress or even federal bureaucrats, who may have to deal *personally* with state and local officials on a regular basis. Thus, even national jurists who arrive on the federal bench from a state court soon may end up with a very nationalistic perspective on the world.¹⁸⁷

All of this federal judicial nationalism is not always a horrible thing, although obviously nationalism is an outlook that I do not share. But, it certainly does tend to suggest that the idea that the national courts somehow are going to go wild and cripple the national government is really pretty far-fetched. Why on earth would we expect an institution with a nationalist outlook to behave that way? Certainly not because that is what it usually has done in the past. To the contrary, the Supreme Court's past record is one of ferocious scrutiny of state laws and general deference to national ones. There is absolutely nothing, and I mean nothing, either in history or in the incentive structure faced by the Supreme Court to support the notion that there is any prospect that the Supreme Court is likely to cripple the federal government by construing its powers too narrowly.¹⁸⁸ There is plenty of evidence, however, that if it ever does attempt to do any such thing Congress and the President will bring it to heel quite fast.¹⁸⁹

Consider thus the famous article written by Professor Robert Dahl of the Yale Political Science Department.¹⁹⁰ Professor Dahl argues convincingly that the Supreme Court is powerless to resist the major policy objectives of lawmaking majorities.

187. Without meaning to be critical, I would suggest that Justice Souter, like Justice Brennan before him, presents an example of this.

188. See Eskridge & Ferejohn, *supra* note 110, at 1398 (“[N]ational courts are unlikely to have either the desire . . . or the opportunity . . . to restrain sustained congressional assertions of authority over the states.”).

189. See ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT* 113-20 (2d ed. 1994).

190. See Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

The fact is . . . that the policy views dominant on the Court are never for long out of line with the policy views dominant among the law-making majorities of the United States. Consequently it would be unrealistic to suppose that the Court would, for more than a few years at most, stand against any major alternatives sought by a lawmaking majority.¹⁹¹

According to Dahl, this conclusion follows from the fact that, on average, a President can expect to appoint two new Justices per term in office. “[I]f this were not enough to tip the balance on a normally divided Court, he is almost certain to succeed in two terms.”¹⁹² Given the President’s power to appoint Justices, it is extremely unlikely that the Court ever will stray for very long from the view of national power held by a convinced majority of the national electorate.

Moreover, even when the Court is determined to resist the policy objectives of a lawmaking majority, Dahl demonstrates that “Congress and the president do generally succeed in overcoming a hostile Court on major policy issues.”¹⁹³ Dahl shows that when the Court strikes down a major national policy initiative, Congress and the President typically re-pass the law in defiance of the Court. These arguments, confirmed in recent scholarship,¹⁹⁴ constitute an important rebuttal to those who profess fear that national judicial activism someday might lead to a dangerous weakening of the constitutional powers of the national government.

At most, we are likely to get from the federal courts a federalism second-look doctrine. Under such an approach, the courts might strike down a law the first time Congress passes it only to uphold substantially the same law if Congress passes it a second time. Such a second-look federalism doctrine poses no threat whatsoever to the national government, while holding out the possibility for real benefits by giving constitutional federalism guarantees at least some meaning.

The fact of the matter is that to the extent that we rely for federalism enforcement on the national courts, we are relying on a national umpire to resolve state-national disputes. It should come as no great surprise to anyone that, historically, national judicial um-

191. *Id.* at 285.

192. *Id.* at 284.

193. *Id.* at 288.

194. See Gerald N. Rosenberg, *Judicial Independence and the Reality of Political Power*, 54 REV. POL. 369 (1992); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

piring has favored and is likely to continue to favor claims of national power against the states.

C. *Why the Only Danger Is Excessive Judicial Deference*

The only realistic fear that anyone should entertain about national judicial enforcement of constitutional federalism guarantees is that it may favor claims of national power so consistently as to be worse than no enforcement mechanism at all. This fear arises because the occasional judicial invalidation of some national excess may not do enough good to compensate for the harm that is done by giving the public a false sense of security that the courts really are enforcing the federal-state balance of power when, in fact, they are not doing so.

The very real danger is that the Supreme Court will end up conferring legitimacy on congressional and presidential usurpations of state power that might be resisted more vigorously in the absence of federal judicial review. The advantages of constitutional federalism will not be obtainable if the Court hands down decisions like *Lopez* only once every ten years. National judicial umpiring of federalism boundaries will be useful only if the courts invalidate usurpations with some frequency, thus justifying the public confidence that the judiciary really is doing its duty in this category of cases.

Unfortunately, there is no good way to assess whether judicial enforcement of constitutional federalism guarantees can be made to be worth the costs in this regard. Recent history is not reassuring, and the incentive structure of national judges is less reassuring still. But, as a practical matter, there really is no better alternative out there on the horizon right now. We already have seen in Part II that there is no reason whatsoever to hope for congressional or presidential enforcement of federalism boundaries. The states themselves are powerless to provide enforcement, unless they surprise us all and call a Constitutional Convention under Article V. Accordingly, for the moment at least, the situation we face suggests that it is going to have to be national judicial enforcement of federalism or no enforcement at all. While the question is a close one, I think the better call is to encourage the national courts to do their best, while maintaining a drumbeat of pressure and scrutiny to try to keep them from falling down on the job too badly. That being said, there is no reason for optimism. *Lopez* probably offers little more than a glimmer of hope that the courts actually will resume doing their job in this area.

Real and effective enforcement of constitutional federalism guarantees would require a constitutional amendment that either would alter the composition of the Supreme Court or create some new federalism enforcement entity that was not stacked with national umpires. So long as we must rely upon national umpires to resolve state-national disputes, we will be unable to obtain anything remotely resembling the full normative advantages of federalism outlined above in Part I.

IV. THE INSTITUTIONAL COMPETENCE OF THE SUPREME COURT: IS THE COURT BETTER AT ENFORCING THE FOURTEENTH AMENDMENT THAN IT IS AT ENFORCING CONSTITUTIONAL FEDERALISM?

The conventional wisdom, accumulated over the past sixty years, is that Supreme Court judicial review is most needed and is most valuable in what sometimes misleadingly are called "individual rights cases."¹⁹⁵ Here again, Professor Choper has provided one of the most intellectually rigorous and honest statements of the reigning constitutional orthodoxy — a set of viewpoints shared by virtually all law professors and judges alike.¹⁹⁶ Professor Choper's argument is that judicial review is uniquely valuable in "individual rights cases" but that it is inherently fragile because its use generates intense controversy, thus drawing down the Supreme Court's institutional capital of popular support.¹⁹⁷ Thus, Choper concludes that the Supreme Court should conserve its political capital by deciding "individual rights cases" while leaving enumerated powers limitations to be enforced by the political branches.¹⁹⁸

Professor Choper's claim is one of comparative institutional competence: he thinks the Supreme Court is *better* at deciding "individual rights cases" and is *needed* more in that area than elsewhere. If correct, this argument would provide a powerful

195. This terminology, used by Professor Choper and many others, *see* CHOPER, *supra* note 8, at 169, presumes wrongly that federalism and separation of powers claims raised by individual litigants do not involve claims of individual right. For reasons well developed by others, I disagree. *See, e.g.*, REDISH, *supra* note 8, at 3-6 ("[A]ny purported dichotomy between constitutional structure and constitutional rights is a dangerous and false one."). What Choper and others really mean when they use the label "individual rights claims" is: (1) claims against state entities based on the Fourteenth Amendment or on Article I, § 10, or (2) where, only a federal entity is concerned, claims based on the Bill of Rights or on Article I, § 9 or on some similar provision of the original Constitution.

196. *See* CHOPER, *supra* note 8, at 60-128.

197. *See id.* at 129-70.

198. *See id.* at 169-70.

justification for Choper's proposal that the Court abstain from enforcing all federalism and separation of powers limitations and rules. The claim is *not* correct, at least as stated by Choper.

First, we should reject Choper's general and misleading "individual rights cases" label both because it is inadvertently tendentious and because it overlooks and obscures a crucial and central distinction between claims against the *national* government and claims against a *state* government.¹⁹⁹ I submit, for reasons explained in the margin, that what Professor Choper is really concerned about might more accurately be called "Fourteenth Amendment cases"²⁰⁰ — cases that involve claims of individual right against state government or against state officials.²⁰¹ Adjudication of these Fourteenth Amendment constitutional cases has become the U.S. Supreme Court's central and most visible constitutional law preoccupation since the New Deal. Has this been entirely a good thing? Is Professor Choper right that the Supreme Court is really institutionally better at enforcing the Fourteenth Amendment than it would be at enforcing the boundaries of constitutional federalism?

The answer to these questions depends first on whether it is normatively desirable that we nationalize each and every subject that has been nationalized by the Court in its Fourteenth Amendment case law and, second, on whether the Supreme Court in fact is best suited institutionally to be the national lawmaking agent on these

199. Or, to be more precise: (1) individual rights claims against *federal* entities (based on the U.S. Constitution) and, on the other hand: (2) individual rights claims against *state* entities (based on the U.S. Constitution).

200. I submit that both Professor Choper and I are really only interested in this second *state* category of U.S. constitutional claims for two reasons. First, this category is by far the larger and more important of the two. As everyone knows, the U.S. Supreme Court's "individual rights law" overwhelmingly involves *national* judicial review of *state* laws and practices, in part, because the Court is afraid of Congress and the President but is not afraid to take on the states. Second, I submit the first *federal* category of U.S. constitutional claims are really federalism claims anyway. Claims against the national government that are based on the Bill of Rights or on Article I, § 9 or on other similar provisions of the original Constitution are really claims that the federal government lacks the enumerated power to take some action that bears down harshly on a particular litigant or group of litigants. This was the original understanding of the Bill of Rights, and, although we now think of the matter differently and use a different "rights talk" terminology to describe federal "individual rights" cases, the fact remains that analytically these are claims of "limited and enumerated" federal power just as Mr. Lopez's claim was a claim of "limited and enumerated" federal power.

201. A few U.S. constitutional claims against state government are based not on the Fourteenth Amendment but instead on provisions in Article I, § 10 of the original Constitution. These individual rights claims, however, are not the ones that seem to interest Professor Choper. The "Fourteenth Amendment cases" label, which I use here, describes accurately enough the body of case law that Professor Choper and I are interested in. Remember that all state-level cases dealing with the incorporated Bill of Rights are, in fact, technically Fourteenth Amendment cases.

matters. I take up these questions, respectively, in sections A and B below. I conclude *only* that Professor Choper is wrong when he claims that the Supreme Court has a comparative institutional advantage when it decides Fourteenth Amendment cases instead of enumerated powers cases. I do not mean to suggest, of course, that the Court should stop deciding Fourteenth Amendment cases nor would I deny that, on balance, the Court's Fourteenth Amendment case law has done far more good than bad.

A. *Have the Correct Subjects Been Nationalized Under the Fourteenth Amendment Given the Theoretical Case for Federalism Developed Above?*

For purposes of my argument here, I will assume that the legal materials of the Fourteenth Amendment are open-ended and indeterminate and that the Court therefore has substantial discretion to make national law while telling the public that it is interpreting the Constitution. I do not myself actually believe that the Amendment is this open-ended nor do I think that if it were that would constitute a license for national judicial lawmaking.²⁰² Nonetheless, I think it useful in this context to assume that the Court is so empowered, as so many wrongly believe, and to ask whether, in light of this, the Court has used its power to nationalize issues wisely. I propose to consider this question by reviewing four key areas of Supreme Court nationalization under the Fourteenth Amendment in light of the comparative and economic arguments for and against nationalization developed in Part I.

1. *Political Rights*

Supreme Court decisions under the Fourteenth Amendment have been very successful when they have involved providing federal protection for the exercise of political rights in the states. Federalism theory explains and would predict this result for several reasons. Before I explain further, let me pause here to make clear more precisely what political rights are involved. Basically, they include the right to engage in political speech, publication, assembly, and petition, as well as the right to have electoral districts apportioned according to the rule of one person, one vote. All of these

202. As a matter of legal interpretation, I am largely persuaded that the original meaning of the Amendment is explained accurately in two recent law review articles. See Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385 (1992).

are protected at the state level by a national Supreme Court interpretation of the Fourteenth Amendment.

The normative federalism case for a national rule here is overwhelmingly strong for several reasons. First, state laws that discriminate against political activities or that malapportion electoral districts will tend greatly to entrench some current state majority against competition from current state minorities. In such a situation, it becomes easy, indeed it becomes likely, that the current state majority will discriminate more harshly against the current state minority because the self-dealing majority will be much more thoroughly and permanently entrenched. This situation is likely to cause severe external negative effects on the residents of other states.

First, it is not unlikely that a group that is a minority in one state might be a majority in another. If so, laws that abridge political rights and close off the political process in one state may annoy greatly the citizens of other states who may identify with or be members of the abused minority group. This will create needless tension in the federation — tension that can be avoided if a national rule keeps open the democratic political processes of the states. The negative externalities generated then by state discrimination justify normatively a national rule.

Second, national political process rules ultimately may make it easier to leave more areas of substantive lawmaking to the states. If the state political processes are open and less subject to self-dealing, they should produce better laws of all kinds — particularly better laws that will generate fewer negative external effects for other states. Fewer such laws means less of a need for national preemptive law and more scope for variety and competition in the substance of state laws. Because this is normatively desirable in and of itself, this becomes a separate argument for a national judicial rule protecting political process rights.

Third, such a national rule makes sense because of the Madisonian *Federalist Ten*²⁰³ argument that state political processes are more likely to discriminate against minority groups than are federal processes. Because state discrimination against a minority group that closed up the political processes would be fearsomely difficult to undo, it makes sense to use federal power to keep the political processes of change open at the state level. This core insight from the theory of federalism should help us to appreciate

203. THE FEDERALIST NO. 10 (James Madison).

better why John Hart Ely's theory of federal judicial review of state laws in fact has so much intuitive appeal.²⁰⁴

In sum, the normative case is overpowering for national protection of political speech, of other related political rights, and of fairly apportioned — one person, one vote — legislative districts. This perhaps helps explain why the Supreme Court has found itself always on the most solid ground politically in cases like *Reynolds v. Sims*²⁰⁵ in which it was enforcing rights of political participation against the states.²⁰⁶

2. Antidiscrimination Rights

A second area in which Supreme Court decisions under the Fourteenth Amendment have been very successful involves the Court's enforcement of the antidiscrimination principle of the Fourteenth Amendment. This principle, which is popularly identified with the Equal Protection Clause,²⁰⁷ is used to invalidate state classifications based on race, national origin, gender, illegitimacy, or some other forbidden classification. Great equal protection victories include, of course, *Brown v. Board of Education*,²⁰⁸ *Loving v. Virginia*,²⁰⁹ *Frontiero v. Richardson*,²¹⁰ and many others. Some of the Court's greatest and most historic victories have come in this area.

Here again, the normative federalism theory case for a national rule is quite strong. State laws that discriminate against minority groups will tend to generate severe out-of-state negative externalities. The apartheid laws of the old South raised a big federalism problem, aside from the local and state injustice that was perpetrated. Thus, race relations in the nonsouthern states were affected adversely; enormous waves of political refugees from the South

204. See ELY, *supra* note 142; see also Calabresi, *supra* note 30.

205. 377 U.S. 533 (1964).

206. Ironically, the best legal arguments in support of the Court's case law on reapportionment and its case law on the protection of political rights against the states more generally may be based on the Guarantee Clause of Article IV. See U.S. CONST. art. IV, § 4; see also BORK, *supra* note 18, at 84-87; ELY, *supra* note 142, at 122-23; Vikram David Amar, *Jury Service as Political Participation Akin to Voting*, 80 CORNELL L. REV. 203, 222-42 (1995) (developing a Fifteenth Amendment argument for federal protection from state discrimination against the political right of jury service).

207. For a clever and persuasive argument that the Supreme Court found the right equality principle but attached it to the wrong clause of § 1 of the Fourteenth Amendment, see Harrison, *supra* note 202.

208. 347 U.S. 483 (1954).

209. 388 U.S. 1 (1967).

210. 411 U.S. 677 (1973).

moved permanently north and west; and national trade, commerce, and the free flow of goods throughout the nation all were severely impaired. To the extent that national equal protection law has helped to override and eliminate the state laws that generated such severe negative externalities, it is not only consistent with but is mandated by the theory of federalism laid out above in Part I. National equal protection law has prevented state majorities from enacting legislation to benefit themselves while imposing huge costs on disenfranchised voters living out of state. It is no wonder, then, that such laws have proved to be very popular.

Southern apartheid also created serious foreign policy problems for the United States during the Cold War era when we were competing with the Soviet Union for the hearts and minds of many leaders of third world countries. It was embarrassing to say the least that emissaries from those countries could not travel freely throughout the United States or even to Washington, D.C. and be assured that they would be able to find a hotel room or eat in a restaurant. This, too, then provided a federalism rationale for national laws against discrimination, including laws against private discrimination.²¹¹

A second normative federalism argument for the Supreme Court's equal protection case law stems obviously from Madison's *Federalist Ten*.²¹² Here again, national judicial protection against state discrimination seems quite consistent with, if not compelled by, the theory of federalism developed above.²¹³

In addition, none of the federalism theory arguments for state power turn out to have much application here. No point is served by state competition in discriminatory laws nor is this an area where one would want to encourage different states to indulge their different illegitimate preferences. Decentralization produces no saving efficiencies but does generate many severe external costs. There is simply no normative case for letting the states have power over the making of suspect classifications, and there is a very strong normative case for national review and invalidation of such classifications. The powerful normative federalist case for the Supreme Court's an-

211. See Mary Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

212. THE FEDERALIST NO. 10 (James Madison).

213. It could be argued that the *Federalist Ten* does not support a national role in combating gender discrimination because women constitute a majority of the population. Given the extent, however, to which women historically were shut out of politics and given the lingering effects of that history, I think it is a mistake to conclude that they are not functionally like a minority group for these purposes.

antidiscrimination case law, at least as it stands to date, no doubt again helps us understand why that case law has been so uniquely popular.

Before closing out this brief discussion of antidiscrimination rights, I should note that *some* national judicial enforcement of the Takings Clause, the Contract Clause, and the bar on regulatory takings may be warranted given the antidiscrimination principle. Those deceptively substantive clauses actually protect a particular social class of property holders from being forced disproportionately to bear general social costs. In this sense, then, Takings and Contract Clause doctrine are simply a particularized *economic* form of broader antidiscrimination doctrine. To the extent, then, that there is a general federalism case for national antidiscrimination doctrine there also might be such a case for Takings and Contract Clause doctrine.

3. *Criminal Procedural Rights*

In the two areas of Fourteenth Amendment law considered so far, we saw that there was a strong case for a national role. We also saw that the Supreme Court as the agent of national control in those areas generally has enjoyed great political success. We turn now to the two areas of Fourteenth Amendment law that have not been such a success, in my judgment, the first of these is constitutional criminal procedure.

The Warren Court is almost entirely responsible for the expansion and nationalization of our law of criminal procedure. With its decisions applying national Bill-of-Rights-derived criminal procedure and sometimes civil procedure to all state proceedings, the Court swept aside numerous conflicting rules and imposed some expansive and nationally uniform rules, many of which have turned out to be both unpopular and of questionable wisdom. Problematic rules, like the exclusionary rule, which had gone unnoticed prior to their imposition at the state level, suddenly became major items of popular controversy. Although a few innovations were received well enough, the bulk of them were resented bitterly and gave the Warren Court its politically lethal image of being "soft on crime."

Putting the merits of both that label and of the Warren Court's procedural innovations aside, there was and is no good reason for a set of uniform, expansive, national rules on state criminal procedure. The normative theory of federalism suggests that nationalization was inappropriate here *except to the extent it was necessary to make sure facially neutral state rules were not being used to achieve*

racially discriminatory results. Because the Warren Court did far more than try to make state criminal procedure nondiscriminatory, it got itself into a great deal of trouble — trouble from which the Court still has not extricated itself fully even after twenty-six years of trying.

There is no normative national case for federalizing all of state criminal procedure through adoption of a very expansive set of rules. No appreciable economies of scale or efficiencies are generated by such a uniform code. While a few law enforcement officers may save time as a result of these nationally uniform rules, these minor savings are offset because criminals probably benefit from the existence of such rules as well. More importantly, state criminal procedure, so long as it is nondiscriminatory, generates few, if any, serious externalities. By and large, the effects of a state's criminal procedure fall within its own borders and upon its own citizens. Consequently, there is little reason to fear in this area that state political processes will be corrupted by some process of imposing out-of-state costs for in-state gains. Most individual criminal defendants either will be state residents or will have committed offenses in-state. It is hard to see how the procedure used to prosecute them could have serious negative external effects, unless they were discriminatory. Out-of-state corporate defendants in theory could be victimized by unfair state criminal procedures, and, if they were, this might necessitate a national rule. But, this was not the problem the Warren Court was addressing, and the criminal procedure problem the Warren Court was addressing was not a national problem.

To elaborate further, the normative arguments for state power are very cogent in the field of state criminal procedure. So long as there is a federal floor requiring that state criminal procedures be fundamentally fair, as there was prior to the Warren Court,²¹⁴ there is every reason in the world for us to encourage some degree of competition among the states in criminal procedure. The law of criminal procedure has been evolving in the common law world and in the civil law world for centuries. The Warren Court foolishly stopped that process by constitutionalizing and nationalizing an unusually expansive set of 1960s-era common law rules that never should have been set in stone. The end result was a body of very rigid and not very sensible law imposed on the law enforcement

214. See *Adamson v. California*, 332 U.S. 46, 67-68 (1946) (Frankfurter, J., concurring).

officers and people of all fifty states; unchangeable even by Congress.

A better solution would have been to recognize that different states have crime problems of different severity. They might wish to respond to these different problems in different ways, which is desirable and logical. Some states even may wish to emulate the criminal procedure of other advanced countries like England, Italy, France, or Germany. There would have been no harm in this, and potentially, much good could have resulted. States with successful responses would have been likely to attract tax revenue from businesses and citizens, thus creating an incentive for other states to follow their lead. Thus, a decentralized competitive market in competing state criminal procedures might have led to greater levels of citizen satisfaction and reduced levels of crime.²¹⁵

Had the Warren Court rules not been so expansive and sweeping, nationalization would have had few undesirable policy consequences. The combination, however, of bad substantive rules *and* nationalization was a mistake. It is a mistake that the public still resents, that the Court still struggles with, and that is resolvable in the end only by cutting back on the scope of the bad and overly expansive national rules. When the Warren Court adopted those rules, the need to protect minorities in the South from hidden discrimination in court well might have justified the costs of overly expansive nationalization. Today that is no longer the case. The costs of our criminal procedure in added crime fall heavily on minority communities and on majority communities alike. The Warren Court's criminal procedure case law should be cut back.

4. *Social and Cultural Rights: Herein of Religion and Substantive Due Process*

I turn now to the final area of Supreme Court national lawmaking under the Fourteenth Amendment. This area involves social and cultural rights, matters of religion and of substantive due pro-

215. Criminal procedure rules often are justified as necessary to protect innocent citizens from overintrusive and oppressive state-law enforcement actions. If the states were allowed to handle these problems themselves, however, citizens could leave states that adopted criminal procedure rules that produce overly harsh results. Thus, the creation of a decentralized competitive market in criminal procedure rules would allow innocent citizens ultimately to shape the development of criminal procedure by voting with their feet.

One noteworthy imperfection in such a market is that state policies on criminal procedure may be "bundled" with many other state policies thus reducing the likelihood of exit due to disagreement with a state's criminal procedure issues. On the other hand, to the extent that state criminal procedure codes generate few externalities, there is little reason to fear a breakdown in the state political processes such that a national rule would be required.

cess. It is in this area, even more than in the area of criminal procedure, that the Supreme Court recently has found itself trapped in a political thicket. Roaring national culture wars have stormed around its substantive due process decisions on matters of social and cultural rights. I wish to try to explain this by examining first, when it is problematic for the Court to make national law in this area, and second, when it is not.

The basic problem the Court runs into in its national lawmaking in this area is hinted at when we remember that most federations around the world tend to reserve precisely these questions for state-level decision. Cultural issues, educational issues, language matters, and religious questions — all of these tend in many federations to be reserved for subnational lawmaking.²¹⁶ The reasons for this are not hard to discern. Any country heterogeneous enough to require a federal government is likely also to be geographically heterogeneous with respect to social, cultural, and religious issues. If so, that geographical heterogeneity is highly likely to manifest itself in a lack of federal consensus on those issues. One common way of handling such a lack of consensus is to create an economic and defense union but leave social, cultural, and religious questions to be decided at the subunion governmental level. This indeed is what the Framers of our own Constitution did with great success until the modern Supreme Court began chipping away at their edifice.

Few things are more divisive in a large heterogeneous federation than national lawmaking on social, cultural, and religious issues. In a society that is heterogeneous enough, such lawmaking may well set off a civil war or an attempt at secession. Social, cultural, and religious national lawmaking is especially likely to become more controversial as it becomes more and more detailed. Such detailed rules will grate on more subcultures and often will produce more resentment. This is especially likely to be the case in situations in which the national lawmaking institution has poor access to information and facts and where it obstinately and rigidly refuses to change its mind when challenged.

The U.S. Supreme Court has faced exactly this problem with *some* of its lawmaking on social and cultural matters and on matters of religion and substantive due process. While some areas of its case law have been a political although not a legal success, others have embroiled the Court and the nation in horrible and often un-

216. For example, § 33 of the Canadian Constitution allows the provinces to control many of these issues. See MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 39 (1991).

necessary disputes. What then does federalism theory suggest about when, if at all, one should nationalize rules on social and cultural matters?

First, the economies of scale and efficiencies gained by national lawmaking on these matters are relatively small, though not insignificant. There is certainly some benefit for some citizens to having one easily known national rule on abortion or on the display of holiday creches. But that benefit exists for some citizens at a very substantial cost for others.

Turning next to external effects, there may be at the margin some serious negative external effects from state laws on culture or religion that differ radically and fundamentally from the national norm. Thus, a law in one state allowing polygamy when all the surrounding states are committed firmly to monogamy might generate such serious external effects that a federalism rationale would exist to suppress it. On the other hand, a law in one state allowing abortion only in the first trimester when many surrounding states allow it all the way through the second, in my judgment, would not generate such problems. That is *not* to say that some negative externalities are not generated; obviously some are. They just are not very severe, at least not compared with the polygamy example mentioned above. Most state social and cultural laws ordinarily will not generate severe negative externalities, unless they deviate in radical and fundamental ways from the national norm.

Some state social and cultural laws may discriminate against religious minorities or against other minorities and thus may violate the antidiscrimination principle. National lawmaking thus may be justified at times in this area on the *Federalist Ten*²¹⁷ rationale. State laws that prohibit the free exercise of religion should fall for this reason, as should any other significant discriminatory state action based on religion or religious affiliation. On the other hand, not every state attempt to preserve and endorse its own social and cultural tradition should be invalidated just because other social and cultural traditions also are not endorsed. Rigid and mechanical application of antidiscrimination principles here would render it impossible for differing states to preserve differing social and cultural traditions. This in turn would make true federalism both impossible and pointless. Imagine the reaction in Quebec or Catalonia or French-speaking Switzerland if differing cultures could not be preserved, celebrated, and recognized without running afoul of equal

217. THE FEDERALIST NO. 10 (James Madison).

protection ideas. On the flip side of the equation, federalism could not be sustained if the Quebecois seriously discriminated against Albertans, for example, in employment or if Catalans did the same thing to Andalusian Spaniards.

The case for nationalizing social and cultural matters is not negligible, but it has its limits. What of the case for denationalizing *some* social and cultural matters? Here the arguments for devolutionary federalism seem quite strong. First, state autonomy may allow respect for important territorial and regional differences. In addition, competition among jurisdictions as to social and cultural issues seems highly likely to generate greater general utility than would a nationally uniform overall rule. For example, many people have differing utility curves with respect to pornography, religious holiday displays, abortion regulation, or sexual mores more generally. On these issues, it seems to me that general utility would be maximized by *not* having uniform national rules.

Throughout history, societies always have tolerated some regional variation on these types of social matters. A very typical and healthy pattern has combined relative rural traditionalism with relative urban hedonism. This pattern, which can be observed in many different cultures on different continents over a period of thousands of years, serves many valuable social purposes. It recognizes that people cannot agree easily on matters of social culture and religious traditionalism, and it allows them to form their own communities within the nation which reflect and enforce differing community values from the traditional to the hedonic. This arrangement not only promotes happiness for many people who would be unhappy if forced to live in a large nation-state under one set of social and cultural rules, it also promotes happiness by equipping a nation with differing sets of options that can compete with one another and check one another in the extreme. Such a competition might help guard against extreme moments either of hedonism or of puritanism. This is not a bad thing for a nation to have as a result of social and cultural pluralism *and* federalism.

As I said at the opening of this subsection, the Supreme Court's national Fourteenth Amendment law on social and cultural issues is a mixed bag from the perspective of normative federalism theory. Some of the antidiscrimination components of that law have a lot to recommend them; some of the more substantive components have created nothing but trouble. The basic problem with the latter is this: in the name of enforcing tolerance of the rights of dissenting individuals on the states, the Supreme Court has exhibited an ex-

treme and almost bigoted intolerance toward the communitarian rights of people who want to live in moral cultures that are free of things like pornography or abortion. This "liberal bigotry and parochialism," for lack of a better term, is contemptuous of federalism and of democracy both. A narrow-minded dictatorship of secular individualists is still a dictatorship.

B. *Is the Supreme Court Institutionally Best Suited To Be the National Lawmaking Body on Each of These Matters?*

As we have seen, the normative case for national lawmaking is strong with respect to protection of political rights and antidiscrimination rights and much weaker with respect to criminal procedure and social and cultural issues. With respect to these two latter categories, we might well benefit by setting a national floor that states could not go below while allowing much more state experimentation and competition than we presently tolerate.

But whatever one concludes with respect to what substantive issues ought to be nationalized and constitutionalized, one still must face the question of the Supreme Court's institutional capacity as a Court qua court. Does the Supreme Court have the right stuff to administer national law in each of these four areas? Let me offer here only a few very brief and tentative conclusions.

With respect to political rights, the Court's expertise seems clear. The Court must enforce such rights against the federal government under the First Amendment, and it has done by and large a pretty good job of this. Importing that doctrine to the state level is relatively easy and the gains from doing so are high. Among the gains are the fact that the large resulting body of state case law becomes a weapon to use against the federal government should it ever try to restrict political rights — a grave and dangerous prospect. The Court, in theory, could become abusive in this area, but it has not happened yet. Moreover, the Court is not likely to become very activist in policing the political process given its many vulnerabilities to attack, particularly by Congress.

The Court also seems institutionally well-suited to enforce the antidiscrimination principle. Treating like cases alike is the heart of the common law method,²¹⁸ and that is all equal protection law is about in the end. Moreover, invalidating state classifications under equal protection still can leave states with a lot of room to respond

218. See generally GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 14 (1982) (discussing this principle and urging, accordingly, that statutes be updated by courts so that they will fit with the rest of the legal topography).

by passing new laws. Finally, such invalidation typically does not require that the judiciary write up its rule or balancing test. All that is required is rejecting the state-made law, a simple task, not formulating a new workable national law, a difficult task.

This is not to deny that if it is pushed too hard the antidiscrimination principle can be made to turn into something substantive. Not much is gained if substantive due process rules simply are reformulated as substantive equal protection rules instead. But this simply shows that disingenuous Supreme Court Justices can claim that laws are discriminatory based on criteria that *the federal society at large* does not think are discriminatory as a matter of widely shared consensus. In the end, the federal courts would not get into any trouble in this area if they simply would enforce the existing suspect classifications without recognizing any new ones in the absence of a broadly and widely shared social consensus.²¹⁹ It is only the abuse of equal protection law to make it serve as an engine of social change that is problematic.²²⁰

The Court is not institutionally well-suited to draw up national criminal procedure codes. At first glance, this seems a little surprising since, after all, criminal trials and appeals are the business of the courts, so presumably the Supreme Court might be thought to have some expertise here. Unfortunately, the Court, our highest national appellate court, is way too out of touch with trial practice and the realities of local law enforcement to be a fully effective lawmaker in this field. Moreover, criminal procedure lawmaking requires flexibility and openness to change and revision based on actual real-world experience. This too presents difficulties for the Court, which must “legislate” in the name of the Constitution, a document that, in theory at least, is supposed to be timeless and not easily altered.

Another difficulty for the Court in the criminal procedure area has stemmed from the awkwardness of trying to capture in a rule the factual complexity inherent in many criminal procedure problems. The result of this has been an overreliance on balancing

219. A consensus shared, for example, by three-quarters of the states, see U.S. CONST. art. V. Compare *Stanford v. Kentucky*, 492 U.S. 361 (1989) (Scalia, J.) (using conventionalism to determine the meaning of the open-ended language of the Cruel and Unusual Punishments Clause of the Eighth Amendment).

220. One area where I think equal protection law still should be used to produce social change is in combating racial discrimination. The original meaning of the Clause provides a floor below which the conventional understanding should not be allowed to fall. I still do not believe we have done nearly enough to fulfill the original promise of the Clause to stamp out racial discrimination in law administration and enforcement.

tests and totality of the circumstances tests that do little to provide guidance for state courts and law enforcement officials but preserve the possibility of federal judicial intervention in state criminal procedure. The line-drawing problems thus created make a mockery of the claim of the *Lopez* dissenters that enforcement of the Commerce Clause raises unusually and prohibitively difficult line-drawing issues.²²¹ Whatever the difficulties of the line-drawing issues created by judicial enforcement of the Commerce Clause, they are certainly no worse than the difficulties created by the Court's national rules on what constitutes a reasonable state search and seizure.²²²

Finally and most importantly, what can be said about the Court's institutional capacity to draw up national rules on state social and cultural issues? Here, obviously, the Court suffers from its isolation from the feedback of the democratic processes and from the difficulty of maintaining legislative flexibility when making law in the name of the Constitution. The Court also lacks an institutional structure that is well-suited to the making of national substantive law in a federation on issues that are hotly contested. Unlike Congress, the Court is not divided into two houses, it does not have to present its laws to the President, it is very small, and it lacks mechanisms — like the Senate filibuster — that protect minority rights.

The odd result is that it is much easier for five Justices to make national rules on the minute details of abortion or pornography regulation than it is for a majority of Congress to make national rules on trucking or cable regulation! This is structurally and institutionally absurd. National laws on social and cultural issues tend to be very controversial and divisive. If ever a consensual national law-making mechanism were needed, it would be in this area. The Court is not federally representative of regional diversity²²³ and at

221. See *United States v. Lopez*, 115 S. Ct. 1624, 1663-64 (1995) (Breyer, J., dissenting).

222. Obviously, some of these criminal procedure line-drawing issues remain a problem even absent the application of national criminal procedure to the states through the Fourteenth Amendment. The Bill of Rights raises these issues with respect to national criminal trials, and, for these, the only solution is an amendment-by-amendment reconsideration of the case law. Happily, this project now is being undertaken very well by Professor Akhil Amar. See Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857 (1995); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757 (1994); see also AKHIL REED AMAR, *THE CONSTITUTION AND CRIMINAL PROCEDURE: FIRST PRINCIPLES* (forthcoming 1996).

223. The present Supreme Court is dominated heavily by people who grew up in or have lived in the northeastern, socially liberal part of the country: Justices Breyer, Ginsburg, Scalia, and Souter. The South and the Midwest have one Justice each, Thomas and Stevens, while the libertarian West has three: Kennedy, O'Connor, and Rehnquist. Obviously, not

most can have one Justice from each of nine states. It is structurally a very odd national institution to entrust with power over these areas of our common federal life.

C. Overview

The prevailing wisdom holds that the Court should abstain from deciding enumerated powers cases in order to conserve its political capital for use in individual rights cases, the overwhelming majority of which are based on the Fourteenth Amendment. Federalism theory, however, suggests that we probably now have more national Fourteenth Amendment law than is desirable and that for institutional competence reasons, the Court may not always be the right institution to be making national law in many of the areas in which it is presently engaged. I express no final opinion here about what, if anything, should be done to restructure the Court's Fourteenth Amendment case law. To do so would require a positive legal theory of the proper meaning of the Amendment, something that I presently cannot offer and that is beyond the limited scope of this article. I am sure, however, that I disagree with Professor Choper's claim of comparative institutional competence. Contrary to his view and to the view of most scholars, the Court is *not* serving the country better when it is off enforcing the Fourteenth Amendment and ignoring enumerated powers. Rather, it is serving the country worse.

V. PRECEDENT, RELIANCE, AND LEGITIMATE EXPECTATIONS

The last problem I wish to turn to in this article is the problem of precedent. Whatever the right answer to the Commerce Clause issues raised by *Lopez*, is it too late in the day for us to revisit the New Deal Constitutional Revolution with respect to these matters? After all, sixty years have gone by, and an enormous body of law has grown up around the expanded notion of federal power that was legitimized in the 1930s and 1940s. Huge areas of our national and economic life are affected by that enormous body of law, and people have planned their businesses, careers, and personal lives in reliance on statutes that undoubtedly would have been held to be unconstitutional prior to 1937. Can we ignore these reliance interests and return to the pre-1937 case law, and, if not, what are we to

every Justice shares the social and cultural tastes of the regions from which they hail but enough do so that the Court's 7-to-2 bicoastal majority is regularly dominant on social and cultural issues. See, e.g., *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992).

do given the normative appeal that federalism continues to hold for at least some of us?

First, I do *not* think the federal courts can ignore the powerful reliance interests that have grown up around the statutes enacted during and after the New Deal in reliance on a broader understanding of the Commerce Clause. Congress itself can repeal statutes for federalism reasons, as it is now doing, without worrying about considerations of precedent. The legislative process is such that new laws can be phased in over a period of many years thus accommodating reliance interests quite readily.

The judicial process is much more rigid, however, and sudden mass overrulings would cause social disruption that the Court could do little to soften. The likeliest social reaction, in my view, to a sudden judicial abrogation of the New Deal would be a constitutional amendment formalizing the currently flawed case law understandings of the scope of congressional power. This result wrongly would upset the public while setting back if not destroying the cause of federalism. I therefore think it would be a grave mistake for the Court to overrule abruptly key New Deal precedents, many of which even may be defensible under the functional theory of federalism set out in Part I.

Notwithstanding its rigidity, however, the judicial process does have ways of accommodating evolutionary change back in the direction of a meaningful federalism case law. Chief Justice Rehnquist is well aware of this, and he has crafted ably in *Lopez* an opinion that allows room for doctrinal movement toward the restoration of federalism without any socially disturbing disruption of legitimate expectations. His success in this regard is attested to by the amazingly quiet reaction to his breathtaking opinion — an opinion that has produced much gnashing of teeth among law professors but barely a ripple of protest among the public at large. This success is much more than the success of a judicial politician, as some might critically say. It is the success of someone who understands the nature of the adjudicative process with its reliance-protecting doctrines.

Adjudicative change is facilitated by an opinion like *Lopez*, which separates out past cases the Court has had to decide from those future cases appearing on the Court's docket. The real federalism issue for the Supreme Court is how to address Commerce Clause challenges to newly enacted statutes, not whether *Darby* or *Heart of Atlanta* were decided correctly. Law professors who have to teach those cases may worry — rightly or wrongly — about their

reasoning, but everyone else in society has long since moved on.²²⁴ The issues in Commerce Clause cases are highly fact-specific, and a finding that there was a significant effect on interstate commerce in one area should not preclude a different factual finding in another. I think the Court should just stipulate that the old Commerce Clause precedents on the books are right on the facts and move on.²²⁵ That does not mean that new federal statutes, like the one in *Lopez*, have to be analyzed as deferentially and sloppily as were some of the old New Deal statutes that were upheld.

The fact is that valid and judicially cognizable reliance interests do spring up around old statutes that have been upheld as constitutional.²²⁶ Such interests do not, however, spring up in precisely the same way around old judicial tests like the cumulative effects test or the rational basis test, both of which are critiqued ably by Professor Epstein in his most recent article on the commerce power. The public is totally unaware of these tests, and even the Congress is probably only conscious of them in a very dim way. If they were to be overruled *prospectively* tomorrow or if we were to learn in some future case that *Lopez* signaled their abandonment, what harm to *reliance* interests would be done? There is no public or congressional reliance interest in the continuing use of a judicial test that is both normatively indefensible as a matter of federalism theory and is inconsistent with the original understanding. Let us assume that since 1937 there may have been advances in the understanding of federalism theory, drawn from the insights of comparative law and from the interplay between law and economics. If that is the case, why should we privilege a Model-T New Deal understanding of federalism over our present better understanding when dealing with newly enacted statutes? There is no precedentially compelling reliance interest that should force the Supreme Court to continue to

224. See Epstein, *Constitutional Faith and the Commerce Clause*, *supra* note 150.

225. As I suggested above, the external effects of private racial discrimination in the South were so severe and pervasive that Congress was right, in my judgment, in concluding that the state legal structures that permitted and sanctioned this discrimination acted as a clog on commerce. Similarly, certain labor practices earlier in this century, such as the legality of child labor, should have been seen as being regulable under Congress's Commerce Clause power, again because of the need to suppress practices in certain states that had serious negative consequences on other states and on the nation as a whole. With both Southern apartheid and child labor, there were serious defects in the political process that made it plausible for Congress to conclude that the states were unlikely to remedy the underlying evil.

226. For this reason, I do not favor overruling a whole host of Commerce Clause precedents. An exception should be made for *Wickard* which is so absurd and so exceptional that it usefully and safely could be overruled just to illustrate that the old era of limitless national power is at an end.

use normatively bad rules for deciding new cases. As former Judge Robert Bork urged in this context, we should just say to the Court: "Go, and sin no more."²²⁷

That being said, the new rules announced in *Lopez* by Chief Justice Rehnquist are less than crystal clear about what factors should be weighed in determining when intrastate activity has a significant enough effect upon interstate commerce to support federal legislative intervention. We know that there was not a significant enough effect on the facts of *Lopez* itself, and we know that Justice Rehnquist's opinion does not make a distinction based on whether the subject matter of the federal regulation has to do with economic activity or whether it has to do with education or local law enforcement. But, how then are we to decide what intrastate effects are or are not enough to sustain a finding of federal legislative power?

I submit that consideration of the normative theory of federalism set forth herein in Part I might prove very useful. Concepts like "direct effect on commerce" or "significant effect on commerce" or even "interstate commerce" itself are quite hard to define and understand although they do get at something — certainly there is a difference between "commerce" and "education," for example. But, more functional criteria, like whether an intrastate activity generates appreciable externalities, are not difficult to understand. There may be many close factual questions and perhaps much need to defer to Congress when the facts are in doubt, but there is no inherent difficulty in understanding the concept of a negative externality the way there is in understanding the concept of "a significant effect on interstate commerce."²²⁸ A significant effect on interstate commerce is whatever the Court says it is.²²⁹ An externality is an economically and politically understood term that the Court sometimes may have trouble applying but that it is very used to applying in the dormant Commerce Clause context.²³⁰

Moreover, there are many reasons to think that the Court might be very sensitive to the dangers posed by the federalization of criminal law. Lower federal courts are already swamped with federal criminal cases as the Justices surely must be aware. Yet, their current case load is minuscule compared with what might soon happen

227. BORK, *supra* note 18, at 159.

228. In fact, the Court recognizes and suppresses negative externalities generated by state law all of the time in its dormant Commerce Clause case law. See Eskridge & Ferejohn, *supra* note 110; Farber & Hudec, *supra* note 24; Regan, *supra* note 178.

229. Kind of like an undue burden.

230. See *supra* note 228.

if Congress continues to nationalize state criminal law. The Court thus has both the knowledge and the incentive in this area especially to hold Congress back. Continued federalization of the criminal law is bad for the Court as well as for the country.

I would not pretend that the comparative, historical, and economic theory of federalism set out in Part I solves the problem of how to discern what issues are properly national and what issues are properly local, but it does help a lot. At a minimum, it offers more useful guidance than can be gleaned from the Court's opinion in *Lopez* or than usually can be gleaned from one of the Court's multifactored balancing tests. Applied with deference and judicial humility, the comparative, historical, and economic theory of federalism set out in Part I could provide the basis for the growth of a new Commerce Clause case law, built on the foundational cases decided by the New Deal Court but informed by a better and more sophisticated understanding of the benefits and limitations of federalism. Ironically, such a new doctrine would lead us back closer to the original understanding of federalism and away from the unconstitutional modern misunderstandings. As that greatest of revolutionaries, Thomas Jefferson, once wrote in a letter to James Madison, "The earth belongs to the living."²³¹ Rise up, ye grandchildren of the New Deal! It is time to throw off the chains of a Model-T era of flawed constitutionalism.

CONCLUSION

The prevailing wisdom is that the Supreme Court should abstain from enforcing constitutional limits on federal power for reasons of judicial competence and because the Court should spend essentially all its political capital enforcing the Fourteenth Amendment against the states instead. This view is wrong. First, the rules of constitutional federalism should be enforced because federalism is a good thing, and it is the best and most important structural feature of the U.S. Constitution. Second, the political branches cannot be relied upon to enforce constitutional federalism, notwithstanding the contrary writings of Professor Jesse Choper. Third, the Supreme Court is institutionally competent to enforce constitutional federalism. Fourth, the Court is at least as qualified to act in this area as it is in the Fourteenth Amendment area. And, fifth, the doctrine of *stare*

231. Letter from Thomas Jefferson to James Madison, September 6, 1789, reprinted in *THE POLITICAL WRITINGS OF THOMAS JEFFERSON*, *supra* note 19, at 95, 99.

decisis does not pose a barrier to the creation of any new, prospectively applicable Commerce Clause case law.

The conventional wisdom is that *Lopez* is nothing more than a flash in the pan.²³² Elite opinion holds that the future of American constitutional law will involve the continuing elaboration of the Court's national codes on matters like abortion regulation, pornography, rules on holiday displays, and rules on how the states should conduct their own criminal investigations and trials. Public choice theory suggests many reasons why it is likely that the Court will continue to pick on the states and give Congress a free ride. But, it would be a very good thing for this country if the Court decided to surprise us and continued on its way down the *Lopez* path. Those of us who comment on the Court's work, whether in the law reviews or in the newspapers, should encourage the Court to follow the path on which it has now embarked. The country and the world would be a better place if it did.

We have seen that a desire for both international and devolutionary federalism has swept across the world in recent years. To a significant extent, this is due to global fascination with and emulation of our own American federalism success story. The global trend toward federalism is an enormously positive development that greatly increases the likelihood of future peace, free trade, economic growth, respect for social and cultural diversity, and protection of individual human rights. It depends for its success on the willingness of sovereign nations to strike federalism deals in the belief that those deals will be kept.²³³ The U.S. Supreme Court can do its part to encourage the future striking of such deals by enforcing vigorously our own American federalism deal. *Lopez* could be a first step in that process, if only the Justices and the legal academy would wake up to the importance of what is at stake.

232. Recent efforts in Congress to devolve major powers and responsibilities to the states are not viewed so casually and with good reason. Some major devolution seems likely to be permanent as part of the decentralization that the post-Cold War world seems to be experiencing everywhere. The end of the Cold War is likely to continue to weaken central governments all over the world. War, after all, is the health of the State.

233. See Blumstein, *supra* note 34; Eskridge & Ferejohn, *supra* note 110.