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# Note: The Lesson of Lopez: The Political Dynamics of Federalism's Political Safeguards

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## THE LESSON OF *LOPEZ*: THE POLITICAL DYNAMICS OF FEDERALISM'S POLITICAL SAFEGUARDS

Apart from the limitation on federal authority inherent in the delegated nature of Congress' Article I powers, the principal means chosen by the Framers to ensure the role of the States in the federal system lies in the structure of the Federal Government itself.<sup>1</sup>

With one fateful sentence in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>2</sup> the Supreme Court gave institutional credence to a strand of federalism theory whose fortunes had waxed and waned since the Constitution's inception.<sup>3</sup> *Garcia* marked the end of a two-decade-long struggle by the High Court over how best to protect state governments from excessive congressional regulation.<sup>4</sup> The majority alluded to the views of the Framers, suggesting that "the structure of the Federal Government itself was relied on to insulate the interests of the States."<sup>5</sup> This familiar notion was perhaps best captured thirty years earlier by Professor Herbert Wechsler's ethereal phrase "The Political Safeguards of Federalism."<sup>6</sup> Although Professor Wechsler and his disciples have proven unable to articulate what precisely those safeguards are and how they protect the states,<sup>7</sup> the notion that the states somehow occupy a special position in our federal system

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<sup>1</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985).

<sup>2</sup> 469 U.S. 528.

<sup>3</sup> See generally THE FEDERALIST NOS. 45-46 (James Madison) (Clinton Rossiter ed., 1961); 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).

<sup>4</sup> See, e.g., Nat'l League of Cities v. Uesery, 426 U.S. 833 (1976); Fry v. United States, 421 U.S. 542 (1975); Maryland v. Wirtz, 392 U.S. 183 (1968).

<sup>5</sup> *Garcia*, 469 U.S. at 551.

<sup>6</sup> See Wechsler, *supra* note 3.

<sup>7</sup> See, e.g., *Garcia*, 469 U.S. at 565 n.9 (Powell, J., dissenting) ("Professor Wechsler . . . predicated his argument on assumptions that simply do not accord with current reality. . . . Not only is the premise of this view clearly at odds with the proliferation of national legislation over the past 30 years, but 'a variety of structural and political changes occurring in this century have combined to make Congress particularly *insensitive* to state and local values.'" (quoting ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, REGULATORY FEDERALISM: POLICY, PROCESS, IMPACT AND REFORM 50 (1984))). Even some modern-day champions of "political safeguards" recognize that "few of those who cite [Wechsler's] piece approvingly today have actually read or thought about it very carefully" and that "[m]any of the arguments are, as Wechsler's critics have long insisted . . . , flawed and unpersuasive." Larry D. Kramer, *Putting the Politics Back into the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 218 (2000). Professor Kramer's "restoration" of the political safeguards of federalism has attracted criticism of its own, as discussed *infra* p. 617.

continues to serve as Exhibit A in the struggle against judicial enforcement of federalism.<sup>8</sup>

*Garcia* could be considered the high-water mark for political safeguards' proponents due to its explicit refusal to engage in substantive judicial review, hinged upon a blind faith in the political process to cure infringements of states' rights.<sup>9</sup> But its revolution was short-lived. The *Garcia* dissent's warning of "[t]he hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power"<sup>10</sup> proved prophetic. Without the realistic prospect of judicial review to rein in Congress, the next decade saw federal power grow at the expense of the states, up to and beyond Congress's constitutional limits. Not until 1995 did the Court emphatically reenter the field of substantive judicial review with its decision in *United States v. Lopez*,<sup>11</sup> which invalidated the Gun-Free School Zones Act of 1990<sup>12</sup> for reaching beyond Congress's commerce power and into the sphere of regulation constitutionally reserved to the states.<sup>13</sup>

*Lopez* is a powerful rejoinder to those who believe the constitutional division of power between Washington and the states is adequately protected by the political process alone. The majority recognized that judicial enforcement of federalism principles "may in some cases result in legal uncertainty," but that any benefit gained by the elimination of judicial review "would be at the expense of the Constitution's system of enumerated powers."<sup>14</sup> In this sense, *Lopez* suggests a more nuanced understanding of the holding in *Garcia*: When the legislation in question is clearly within Congress's enumerated powers, the political process may be the appropriate mechanism to determine whether the issue is best dealt with at the federal or state level. But

<sup>8</sup> See, e.g., JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175 (1980) ("The federal judiciary should not decide constitutional questions respecting the ultimate power of the national government vis-à-vis the states; rather, the constitutional issue of whether federal action is beyond the authority of the central government and thus violates 'states' rights' should be treated as nonjusticiable, final resolution being relegated to the political branches — i.e., Congress and the President."); Jesse H. Choper, *The Scope of National Power Vis-à-Vis the States: The Dispensability of Judicial Review*, 86 YALE L.J. 1552, 1556-57 (1977).

<sup>9</sup> Cf. Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 932 (1986) ("Our traditions would suggest an independent institutional problem with the federal judiciary as a primary lawmaker. Our system has been that the balance between the states and the federal government is to be adjusted primarily through Congress, where state interests are represented, and not through the politically insulated federal judiciary." (citing *Garcia*, 469 U.S. 528)).

<sup>10</sup> *Garcia*, 469 U.S. at 565 (Powell, J., dissenting) (alteration in original) (quoting *INS v. Chadha*, 462 U.S. 919, 951 (1983)) (internal quotation mark omitted).

<sup>11</sup> 514 U.S. 549 (1995).

<sup>12</sup> Pub. L. No. 101-647, § 1702, 104 Stat. 4844.

<sup>13</sup> See *Lopez*, 514 U.S. at 552.

<sup>14</sup> *Id.* at 566.

the political process alone is an inadequate sentry to guard the *constitutional* boundary established by Article I.

This Note explores that truth in greater detail by analyzing critically the role of political safeguards at the frontier of constitutional power. It seeks to shed light on an oft-ignored but vital aspect of the political safeguards debate: the process by which the political branches enact legislation. By examining the structure of the political branches and the incentives affecting actors in the national political process, one can understand more completely how concerns about federalism enter political debate, and the power these concerns wield relative to the myriad other interests exacting concessions from Washington lawmakers. This Note attempts to show that the political struggle for power between the federal and state governments is insufficient to keep Congress from exceeding the constitutional limits on its power established by Article I. To trust the political process alone to guard that boundary would be to abandon the notion that ours is a government of enumerated powers.

The argument unfolds in four parts. Part I discusses the theoretical underpinnings of the political safeguards argument and demonstrates that many of its foundational assumptions do not apply to the modern political environment. Moreover, the political safeguards model conflates the protection of states' interests with the preservation of federalism. Although the two concerns often converge, it is far from inevitable that the states will rally to oppose every instance of unconstitutional federal action.

Playing upon that theme, Part II examines the avenues by which federalism concerns enter national policy debates. Federalism acts through three primary proxies in the political process: national political actors who are beholden to federalism for ideological or instrumental purposes; the intergovernmental lobby, federalism's natural and primary ally; and other lobbies that deploy federalism arguments strategically to further substantive policy goals. Each of these groups is motivated by a distinct incentive structure that determines whether it will defend federalism principles in any given policy debate. And even when one or more of these proxies chooses to defend federalism, the legislative process imposes structural impediments that can thwart its success.

Part III adds an empirical gloss to this theoretical discussion by analyzing in depth the political processes underlying the enactment of the Gun-Free School Zones Act. The legislative history of the bill struck down in *Lopez* illustrates how institutional incentives combine to broaden Congress's power at the expense of the states, despite clear and well-articulated federalism concerns of state and federal authorities. The case study shows that national political actors may seek to advance federalism yet may prove unable to intervene effectively to protect state autonomy. In addition, although the intergovernmental

lobby affords the states at least some power, the states are not always interested in exercising that power to defend federalism. Finally, even if some states are interested in protecting federalism, they are not always able to do so. Collective action problems and the costs of opposing politically popular bills may hamstring the intergovernmental lobby in its attempt to curb congressional excess.

Finally, Part IV concludes with a brief discussion of the judiciary's advantages as a backstop to federalism's political safeguards. The judiciary is well-positioned to compensate for the weaknesses of the political branches when examining federalism principles: Whereas the President and Congress encounter potential threats to federalism bundled within larger legislative packages, the judiciary has the ability to excise offending provisions without invalidating Congress's entire legislative scheme. And the protections afforded by Article III insulate judges from daily politics, allowing them to strike down laws that are politically popular but which violate the Constitution. Judicial oversight creates a mutually reinforcing dynamic with the judiciary acting when the political process fails, and in turn providing the constitutional guidelines within which politics defines the boundary between federal and state power.

## I. THEORETICAL UNDERPINNINGS OF FEDERALISM'S POLITICAL SAFEGUARDS

On its surface, the political safeguards of federalism argument is deceptively simple. As one commentator has noted, "[t]he title essentially says it all."<sup>15</sup> When the Framers designed our system of dual sovereigns, they did not rely solely on formal limits on federal power to protect the states from the national government; they also assigned the states a "strategic role in the selection of the Congress and the President," a role that gives the states tremendous "political power to influence the action of the national authority."<sup>16</sup> In eighteen brief pages, Professor Wechsler outlined how these political safeguards operate, spinning an argument that justified the Supreme Court's post-New Deal abdication of judicially enforced federalism while reassuring federalism's proponents of the states' continuing political viability.<sup>17</sup>

In many ways, Professor Wechsler's paradigm-setting observations were merely a modern gloss on an argument first posited by James Madison. In the *Federalist Papers*, Madison argued that the states are well-positioned to protect themselves from federal encroachment, because of both the role they play in the federal structure and the special

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<sup>15</sup> Kramer, *supra* note 7, at 218.

<sup>16</sup> Wechsler, *supra* note 3, at 544.

<sup>17</sup> See Kramer, *supra* note 7, at 217.

place they occupy in the hearts of their residents.<sup>18</sup> Madison's argument is rooted in the notion that "[t]he State governments may be regarded as constituent and essential parts of the federal government."<sup>19</sup> Because (under the original constitutional scheme) the state legislatures chose the composition of both the Senate and the Electoral College and defined those eligible to elect the House of Representatives, the federal government "must consequently feel a dependence" upon the states for its very being that would protect the states from excessive regulation.<sup>20</sup> In addition, Madison argued, because "[t]he powers delegated by the proposed Constitution to the federal government are few and defined,"<sup>21</sup> American citizens are far more likely to interact with state government than federal government in their everyday lives.<sup>22</sup> As a result, they are more likely to identify with and to feel a greater loyalty to their states than to the federal government.<sup>23</sup>

The Antifederalists challenged the notion that the states would wield substantial power over the federal government through the political process; fresh from the battlefields of the American Revolution, they were loath to replace one tyrannical central government with another. Brutus, the persuasive Antifederalist from New York, asserted baldly that "[i]t appears . . . that there is no need of any intervention of the state governments, between the Congress and the people, to execute any one power vested in the general government."<sup>24</sup> He also doubted the efficacy of the textual limits on congressional power:

It is true this government is limited to certain objects, or to speak more properly, some small degree of power is still left to the states, but a little attention to the powers vested in the general government, will convince every candid man, that if it is capable of being executed, all that is reserved for the individual states must very soon be annihilated, except so far as they are barely necessary to the organization of the general government.

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<sup>18</sup> See THE FEDERALIST NOS. 45-46, *supra* note 3.

<sup>19</sup> THE FEDERALIST NO. 45, *supra* note 3, at 291.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 292.

<sup>22</sup> See *id.* at 291.

<sup>23</sup> See *id.* at 291-93 (asserting that federal law would be "exercised principally on external objects, as war, peace, negotiation, and foreign commerce," leaving to the states "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people").

<sup>24</sup> Brutus I, N.Y. J., Oct. 18, 1787, reprinted in THE ANTI-FEDERALIST 108, 110 (Herbert J. Storing ed., 1985). The essays of Brutus are widely attributed to Robert Yates, although that attribution is far from unquestioned. See *Essays of Brutus*, in THE ANTI-FEDERALIST, *supra*, at 103, 103.

... The powers given by [Article I, Section 8] are very general and comprehensive, and it may receive a construction to justify the passing [of] almost any law.<sup>25</sup>

Thus the states were not immune from Brutus's conclusion that "it is a truth confirmed by the unerring experience of ages, that every man, and every body of men, invested with power, are ever disposed to increase it, and to acquire a superiority over every thing that stands in their way."<sup>26</sup>

Although the Federalists won the day in 1787,<sup>27</sup> by 1954, many proponents of decentralized government feared that, with the New Deal, the Antifederalists's worst fears had come to pass.<sup>28</sup> Professor Wechsler sought to address this concern in his seminal article. Channeling Madison into modern language, Professor Wechsler erected a two-tiered argument that federalism receives adequate protection from the political process alone.

First, Professor Wechsler noted that, contrary to Antifederalist predictions, the states continue to exist as political entities.<sup>29</sup> The Constitution was grafted onto a preexisting body of law rooted in the states, which retained plenary power over matters not specifically granted to the federal government. As a result, even when Congress seeks to act clearly within an enumerated power, "those who would advocate its exercise must none the less answer the preliminary question why the matter should not be left to the states."<sup>30</sup> If there is no nationwide demand for a unified response to a particular problem, "[t]he political logic of federalism" leaves the issue to the states, which are closer to the specific population affected.<sup>31</sup>

Second, Professor Wechsler argued that the states retain tremendous influence over the course of federal legislation through "their crucial role in the selection and the composition of the national authority."<sup>32</sup> At the outset, "the composition of the Senate is intrinsically calculated to prevent intrusion from the center on subjects that

<sup>25</sup> Brutus I, *supra* note 24, at 110, 112.

<sup>26</sup> *Id.* at 112-13. Brutus was hardly alone in his critique of the political safeguards Madison proposed. See, e.g., Agrippa VI, MASS. GAZETTE, Dec. 14, 1787, reprinted in THE ANTI-FEDERALIST, *supra* note 24, at 238, 239 ("[T]he states are annihilated in reality upon receiving this constitution — the forms will be preserved only during the pleasure of Congress."). Historians have widely concluded that Agrippa was James Winthrop. See *Letters of Agrippa, I-XI*, in THE ANTI-FEDERALIST, *supra* note 24, at 227, 227.

<sup>27</sup> This victory, however, depended upon the important concession of the Bill of Rights, including the Tenth Amendment's reservation of an enclave of regulatory authority to the state governments. See U.S. CONST. amend. X.

<sup>28</sup> See, e.g., Edward S. Corwin, *The Passing of Dual Federalism*, 36 VA. L. REV. 1, 23 (1950).

<sup>29</sup> See Wechsler, *supra* note 3, at 544.

<sup>30</sup> *Id.* at 545.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 546.

dominant state interests wish preserved for state control.”<sup>33</sup> Because seats are apportioned by state, the twenty-five smallest states could unite to stop federal action despite representing only nineteen percent of the U.S. population; even fewer could stop treaties or constitutional amendments.<sup>34</sup> State legislatures also exercise some power over the House, by controlling state voter qualifications (at least, within the confines of the Fourteenth, Fifteenth, and Nineteenth Amendments) and congressional districting.<sup>35</sup> Professor Wechsler seemed less sure of the power of the states to influence the President through their participation in the Electoral College; although his essay drifts off on a lengthy tangent on Electoral College reform,<sup>36</sup> he ultimately settles on the notions that “the mode of [the President’s] selection and the future of his party require that he . . . be responsive to local values that have large support within the states” and that “his programs must, in any case, achieve support in Congress” where the states exercise more direct influence.<sup>37</sup>

Although persuasive at first glance, Professor Wechsler’s analysis suffers from a fatal flaw: the confusion of two analytically disparate concepts, state interests and state institutions.<sup>38</sup> As Professor Larry Kramer notes, the ability of a handful of senators, representing a small fraction of the American populace, to hamstring federal legislation may “ensur[e] that national lawmakers are responsive to geographically narrow *interests*.”<sup>39</sup> But this is very different from the purpose of federalism, which is to protect “the integrity and authority of state political institutions” from federal preemption or other attempts to “displace” state government.<sup>40</sup> Farming interests may, for instance, control a sufficient number of Midwestern state congressional delegations to protect ethanol subsidies and limit federal regulation of farm equipment, but their influence does not answer whether the Constitution permits Congress to regulate in either field (nor does it answer the analytically distinct question whether ethanol is best regulated at the federal level while farm equipment is best left to individual states). Fur-

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<sup>33</sup> *Id.* at 548.

<sup>34</sup> *Id.* at 547. These numbers were accurate as of 1954 and are not appreciably different today — according to the most recent Census Bureau estimates, the smallest twenty-five states comprise sixteen percent of the population. See POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE POPULATION FOR THE UNITED STATES AND STATES, AND FOR PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2004 (2004), <http://www.census.gov/popest/states/tables/NST-EST2004-01.pdf>.

<sup>35</sup> Wechsler, *supra* note 3, at 548–52.

<sup>36</sup> See *id.* at 553–57.

<sup>37</sup> *Id.* at 558.

<sup>38</sup> Kramer, *supra* note 7, at 221–22.

<sup>39</sup> *Id.* at 222.

<sup>40</sup> *Id.* at 225–26.



thermore, the lure of congressional funding can incentivize the states to welcome federalization of ever greater areas of the law, even if Article I clearly marks the subject of the funding as beyond Congress's regulatory power.

Because state interests do not always coincide with the protection of state government, Professor Wechsler's carefully constructed model collapses. Especially following the Seventeenth Amendment, the Senate becomes at most a vehicle for a minority of private interests to forestall legislative action.<sup>41</sup> Similarly, the fact that the Electoral College forces the President to consider the demands of several local constituencies does not necessarily protect state institutional interests.<sup>42</sup>

Modern legal developments exacerbate Professor Wechsler's analytical flaw. Professor Wechsler himself recognized that the Fourteenth Amendment limits the states' indirect control over the House of Representatives by imposing restrictions on the states' ability to set voter qualifications.<sup>43</sup> Further federalization and constitutionalization of voting rights since Professor Wechsler's time lead Professor Kramer to conclude that it is "impossible to think of anything a state could do to protect itself with this power today that would not be either unlawful or ineffective."<sup>44</sup> Similarly, congressional and Court action have "mopped up any lingering significance [of redistricting] for federalism."<sup>45</sup> The collapse of the claim that the states have a structural power over Congress also invalidates the claim that the President's dependence upon Congress gives the states some advantage within the executive branch.

Commentators have written ad nauseam about the flaws inherent in Professor Wechsler's model, leading some scholars to consider whether political safeguards might be rooted in elements other than the formal structural relationship between the states and the federal government. Professor Kramer, who serves simultaneously as Professor Wechsler's chief critic and intellectual heir, finds the political safeguards of federalism in American political parties. Because American political parties are decentralized and lack discipline, national political officials "will need to help state officials either as a matter of party fellowship or in order to shore up the willingness of state officials to offer

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<sup>41</sup> Cf. *id.* at 224-25.

<sup>42</sup> See *id.* at 225-26 ("But while this geographical dispersion may have benefits (and costs) when the President sits down to define a national mandate, it does nothing to help state governments fend off preemptive federal legislation.").

<sup>43</sup> See Wechsler, *supra* note 3, at 549.

<sup>44</sup> Kramer, *supra* note 7, at 226.

<sup>45</sup> *Id.* at 227 (citing Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000); *Shaw v. Reno*, 509 U.S. 630 (1993); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982)).

support in the future.”<sup>46</sup> Consequently, “by linking the fortunes of officeholders at different levels,” political parties create “a mutual dependency that induce[s] federal lawmakers to defer to the desires of state officials and state parties,” thus “protect[ing] the states by making national officials politically dependent upon state and local party organizations.”<sup>47</sup> Professor Kramer’s theory, in turn, has attracted a number of critics, who allege that the mutual dependency at the heart of his analysis is more appropriately described as a one-way street in which power and respect flow away from the states toward national political organizations.<sup>48</sup>

The efforts of Professor Kramer and others to resurrect Professor Wechsler’s largely discredited hypothesis stem from some intuition that although Professor Wechsler’s analysis may not have been sound, there is something special about the states that gives them an advantage in the political process. Indeed, despite the incredible growth in the power of the federal government in the modern era, both absolutely and relative to state power, Professor Wechsler is right that the states have been preserved as “separate sources of authority and organs of administration,”<sup>49</sup> a fact that is “so immutable a feature of the system that [its] importance tends to be ignored.”<sup>50</sup> Most of the first-year law school curriculum, including property, torts, contracts, and criminal law — “[t]he law that most affects most people in their daily lives” — is still “overwhelmingly state law.”<sup>51</sup>

Furthermore, from time to time, the political process functions precisely as Professor Wechsler predicts, with the political branches of the national government acting independently to protect against the usur-

<sup>46</sup> *Id.* at 279.

<sup>47</sup> *Id.* at 278.

<sup>48</sup> See, e.g., Lynn A. Baker, *Putting the Safeguards Back into the Political Safeguards of Federalism*, 46 VILL. L. REV. 951, 958–61 (2001) (arguing that political safeguards are insufficient to prevent “vertical aggrandizement” by the federal government); Lynn A. Baker & Ernest A. Young, *Federalism and the Double Standard of Judicial Review*, 51 DUKE L.J. 75, 112–17 (2001) (claiming that Professor Kramer’s safeguards — specifically the national government structure and political parties — are insufficient to prevent “vertical aggrandizement”); Saikrishna B. Prakash & John C. Yoo, *The Puzzling Persistence of Process-Based Federalism Theories*, 79 TEX. L. REV. 1459, 1480–89 (2001) (arguing that political parties are unable to fill the role of protecting federalism).

<sup>49</sup> Wechsler, *supra* note 3, at 543.

<sup>50</sup> *Id.* at 544.

<sup>51</sup> H. Geoffrey Moulton, Jr., *The Quixotic Search for a Judicially Enforceable Federalism*, 83 MINN. L. REV. 849, 891 (1999) (alteration in original) (quoting Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485, 1504 (1994) (internal quotation marks omitted)); see also H. Geoffrey Moulton, Jr., *Federalism and Choice of Law in the Regulation of Legal Ethics*, 82 MINN. L. REV. 73, 126 (1997) (noting that despite dramatic changes following the Civil War and the New Deal, “[f]ederal law remains . . . ‘generally interstitial in its nature’” (quoting PAUL M. BATOR, DANIEL J. MELTZER, PAUL J. MISHKIN & DAVID L. SHAPIRO, HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 533 (3d ed. 1988))).

pation of state autonomy. For example, in 1987 President Reagan signed Executive Order 12,612,<sup>52</sup> which required executive agencies to abide by certain enumerated principles when pursuing “policies that have federalism implications”<sup>53</sup> and mandated that the states be consulted “[t]o the extent practicable” before any action that would “limit the policymaking discretion of the States.”<sup>54</sup> When President Clinton revoked this order in 1998,<sup>55</sup> Congress and the intergovernmental lobby acted quickly to restore state power. The House held hearings on the effects of this new order under the politically charged title “Clinton-Gore v. State and Local Governments.”<sup>56</sup> Representative Bob Barr also sponsored the State Sovereignty Act of 1998<sup>57</sup> that would have required agencies to continue abiding by Executive Order 12,612.<sup>58</sup> Across Capitol Hill, Senator Fred Thompson introduced the Federalism Enforcement Act of 1998,<sup>59</sup> which sought the same end.<sup>60</sup> Neither bill passed, but the furor from Congress forced President Clinton to reinstate most of the Reagan-era federalism protections.<sup>61</sup>

The willingness of Representative Barr and Senator Thompson, both national political figures, to protect state interests from executive usurpation suggests that the political safeguards of federalism are alive and well, despite the academy’s inability to define them precisely. And the continued existence of the states as the sources of “the law that most affects most people in their daily lives” provides strong support for trusting those political safeguards to protect state interests within the confines of Congress’s enumerated powers.

But the stakes rise substantially, and the sole dependence on political safeguards becomes much more risky, when the focus shifts from congressional lawmaking that is clearly within Article I to legislation at the outer limits of Congress’s authority. For it is a substantial leap

<sup>52</sup> 3 C.F.R. 252 (1987).

<sup>53</sup> *Id.* § 2, 3 C.F.R. at 253–54.

<sup>54</sup> *Id.* § 3(a), 3 C.F.R. at 254.

<sup>55</sup> Exec. Order No. 13,083, § 7(c), 3 C.F.R. 146, 149 (1998). See generally Brian E. Bailey, Note, *Federalism: An Antidote to Congress’s Separation of Powers Anxiety and Executive Order 13,083*, 75 IND. L.J. 333 (2000).

<sup>56</sup> *Clinton-Gore v. State and Local Governments: Hearing Before the Subcomm. on Nat’l Econ. Growth, Natural Res. & Regulatory Affairs of the H. Comm. on Gov’t Reform and Oversight*, 105th Cong. (1998).

<sup>57</sup> H.R. 4196, 105th Cong. (1998).

<sup>58</sup> *Id.* § 2(a).

<sup>59</sup> S. 2445, 105th Cong. (1998).

<sup>60</sup> See *id.* pmb. (stating that the bill’s purpose was “[t]o provide that the formulation and implementation of policies by Federal departments and agencies shall follow the principles of federalism”).

<sup>61</sup> See Exec. Order No. 13,132, 3 C.F.R. 206 (1999), reprinted in 5 U.S.C. § 601 (2000); David S. Broder, *White House To Rewrite Federalism Order, Now with State-Local Input*, WASH. POST, July 29, 1998, at A19.

from the observation that some form of political safeguards exists to the conclusion that they should foreclose any judicial review of the principles of federalism, as many of Professor Wechsler's disciples have advocated.<sup>62</sup> To assess the analytical strength of this position, this Note now turns to examining the paths by which federalism concerns are injected into the legislative process.

## II. PATHWAYS OF FEDERALISM'S POLITICAL SAFEGUARDS

The academy struggles to identify and explain federalism's safeguards partially because its scholars focus their attention in the wrong place. As Professor Elizabeth Garrett has deftly noted, most scholarship examines the structures affecting national elections (the inputs) and laws affecting the states (the outputs), while "largely ignoring the process that transforms the inputs into legislation."<sup>63</sup> A thorough understanding of the political process is key to assessing the efficacy of federalism's political safeguards. The states do not simply wave the talisman of federalism to ward off any threat from national policy-makers. Rather, federalism must be advocated by proxies who have seats at the national lawmaking table. Federalism as a national political policy rests precariously upon three such proxies: elected national officials, the intergovernmental lobby, and other lobbyists. These actors' reasons for deploying federalism arguments, and the strengths and weaknesses of their positions in the struggle to create federal policy, shed light on the potency of federalism's political safeguards.

### A. National Political Actors

As the executive order saga shows, at times both executive and legislative officials show concern for advancing the cause of federalism. Their interests could stem from a genuine ideological devotion to decentralization and a belief in the values underlying the federalism doctrine,<sup>64</sup> or they might represent more instrumental invocations to

<sup>62</sup> See, e.g., Choper, *supra* note 8; Kramer, *supra* note 7.

<sup>63</sup> Elizabeth Garrett, *Enhancing the Political Safeguards of Federalism? The Unfunded Mandates Reform Act of 1995*, 45 U. KAN. L. REV. 1113, 1115 (1997).

<sup>64</sup> See, e.g., Jay D. Wexler, *Darwin, Design, and Disestablishment: Teaching the Evolution Controversy in Public Schools*, 56 VAND. L. REV. 751, 765-66 (2003) (explaining that the eight Senators voting against a nonbinding Senate endorsement of teaching about the evolution-creation controversy "did so on federalism grounds rather than because of any substantive disagreement with the amendment[, as] . . . [t]hose Senators were simply opposed to dictating educational policy to states and localities"). Professor Kramer suggests that because many national political officials have state government experience, they carry some federalism sympathies into national office. Kramer, *supra* note 7, at 285. But see Michael B. Berkman, *Former State Legislators in the U.S. House of Representatives: Institutional and Policy Mastery*, 18 LEGIS. STUD. Q. 77, 95-96 (1993) (indicating more research is necessary to understand the effect of prior state government experience on national political officials' attitudes toward federalism).

support specific policy objectives.<sup>65</sup> The strengths and weaknesses of the two branches dictate the power that federalism wields when deployed by these national political actors.

Because of his position in the legislative process, the savvy congressman can raise issues of state autonomy and limits on congressional power during debate, forcing other congressmen to consider such issues when casting their votes. But each individual congressman is just one in a multitude of legislators; preserving federalism requires forging a consensus with other lawmakers, either through shared federalism norms or by enlisting support through vote trading. Furthermore, federalism is only one of the myriad policy concerns factored into any individual bill, many of which are pushed by the special interests that fund congressional campaigns. Since federalism is an intangible policy objective,<sup>66</sup> it can lose out when pitted against more concrete goals. As a result, although an individual congressman might strongly support a bill due to federalism concerns, structural barriers could prevent him from forging a pro-federalism majority.

By comparison, the President is a unitary actor, capable of taking direct action and unencumbered by the coordination problems that congressmen face. But the President's ability to enforce federalism is hampered by a different structural concern: "The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad."<sup>67</sup> Like the Eisenhower Doctrine of "massive retaliation,"<sup>68</sup> the veto power is a sledgehammer that cannot easily assist in small battles.<sup>69</sup> Congress has learned to avoid vetoes by submitting omnibus bills that combine a variety of legislative provisions but allow only a single, binary presidential decision.<sup>70</sup> These bills have raised the cost of enforcing federal-

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<sup>65</sup> See Matthew Schaefer, *The "Grey Areas" and "Yellow Zones" of Split Sovereignty Exposed by Globalization: Choosing Among Strategies of Avoidance, Cooperation, and Intrusion To Escape an Era of Misguided "New Federalism,"* 24 CAN.-U.S. L.J. 35, 38 (1998) ("While one frequently hears of federalism in political debates, politicians often use federalism as a rhetorical tool to argue for their underlying policy objectives (or perhaps the objectives of special interest groups) rather than in the context of a debate over whether the values of federalism will be promoted by a particular action.")

<sup>66</sup> See Laura E. Little, *Envy and Jealousy: A Study of Separation of Powers and Judicial Review*, 52 HASTINGS L.J. 47, 102 (2000).

<sup>67</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).

<sup>68</sup> Massive retaliation was America's Cold War strategy to rely upon the threat of its nuclear arsenal to achieve foreign policy ends. See John Foster Dulles, U.S. Sec'y of State, *The Evolution of Foreign Policy*, Address Before the Council on Foreign Relations (Jan. 12, 1954), in 30 DEP'T ST. BULL. 107 (1954).

<sup>69</sup> Cf. Saikrishna B. Prakash, *Branches Behaving Badly: The Predictable and Often Desirable Consequences of the Separation of Powers*, 12 CORNELL J.L. & PUB. POL'Y 543, 550 (2003).

<sup>70</sup> See *id.* (describing the process of combining different provisions into one omnibus bill and then daring the president to veto as "nuclear blackmail").

ism: to invalidate one provision on federalism grounds requires the President to pay the political price of rejecting a host of other proposals.<sup>71</sup>

### B. *The Intergovernmental Lobby*

The intergovernmental lobby is a loose coalition of more than sixty organizations dedicated to representing state and local interests in Washington.<sup>72</sup> Prime among these are the "Big Seven": the Council of State Governments, the International City/County Management Association, the National Association of Counties, the National Conference of State Legislatures, the National Governors' Association, the National League of Cities, and the U.S. Conference of Mayors.<sup>73</sup> Since its advent in the mid-1960s, the intergovernmental lobby has proved a useful tool for organizing state and local officials and for promoting their policy interests.<sup>74</sup>

The intergovernmental lobby's primary advantage is its ability to solve the collective action problem that affects state and local interests. The organizations comprising the lobby offer significant benefits to dues-paying members, thereby reducing free-riding by enticing state and local officials to contribute to the common cause of lobbying in Congress.<sup>75</sup> As a result, the interests of their members hold more sway in Congress than if each member were left to lobby Capitol Hill on its own.

Although this advantage seems formidable at first blush, the intergovernmental lobby suffers two drawbacks that hamper its lobbying power: coordination and resources. As Professor Garrett notes, any interest group could find itself unable to act if its members could not agree on a single course of action.<sup>76</sup> The intergovernmental lobby encompasses a wide range of groups that may be dedicated to federalism principles in the abstract but break on specific policies. A federal law enforcement grant to cities may undermine state autonomy yet receive the support of the National League of Cities. Even within the state lobby, a particular policy may affect different states in different ways, hampering the ability of the National Governors' Association to take a

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<sup>71</sup> Cf. Robert Neal Webner, Note, *The Intersession Pocket Veto and the Executive-Legislative Balance of Powers*, 73 GEO. L.J. 1185, 1215 (1985).

<sup>72</sup> See Garrett, *supra* note 63, at 1121.

<sup>73</sup> *Id.*

<sup>74</sup> See Paul Chen, *The Institutional Sources of State Success in Federalism Litigation Before the Supreme Court*, 25 LAW & POL'Y 455, 459 (2003).

<sup>75</sup> See Garrett, *supra* note 63, at 1122.

<sup>76</sup> *Id.* at 1123.

consensus position on an issue.<sup>77</sup> As Professor David Dana explains, “[f]or rich states and localities, the effective cost of an unfunded mandate may be less than the cost of federally funded regulation; for poor states and localities, the converse is true.”<sup>78</sup>

Even when the intergovernmental lobby can unite behind a policy, its efforts have no guarantee of success. Although the political safeguards of federalism may give the intergovernmental lobby an advantage vis-à-vis other lobbyists, political compromise among a variety of disparate interest groups still determines national policy. The intergovernmental lobby’s success turns upon its ability to offer legislators something valuable in exchange for their support, above and beyond what the opposing side offers.<sup>79</sup> Like any other interest group, the intergovernmental lobby must expend limited political capital in a way that maximizes its own interests. When a bill has few practical consequences or enjoys the support of strong lobbies, the intergovernmental lobby may find itself unable or unwilling to fight it, even though the bill might be an egregious violation of the principles of federalism.

### C. Other Lobbies

Occasionally, interest groups have adopted federalism arguments instrumentally to support their substantive policy goals. One prime example is the employment of federalism arguments in opposition to the Brady Bill<sup>80</sup> by the gun rights lobby.<sup>81</sup> Such instrumental arguments can help the cause of federalism by providing ready allies on certain issues. But because their support is issue-specific rather than principled, the power they lend the federalism cause is sporadic and they cannot be counted as consistent allies.

The above analysis raises concerns about a regime that relies solely on the political process to enforce the constitutional limits of congressional power. Although one would expect the states, through the intergovernmental lobby, to advocate strongly for federalism principles, this lobby may find that at times it cannot or will not take a stand on an issue. Even when it does fight for federalism principles, it could lose the battle among lobbyists for influence. Other lobbies might or might not support the federalism cause, depending on the underlying

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<sup>77</sup> Cf. Baker, *supra* note 48, at 955–56 (noting the effects of “horizontal aggrandizement” — the ability of a majority of states to use the federal apparatus to force their policy preferences upon a minority).

<sup>78</sup> David A. Dana, *The Case for Unfunded Environmental Mandates*, 69 S. CAL. L. REV. 1, 26 (1995).

<sup>79</sup> See Garrett, *supra* note 63, at 1124.

<sup>80</sup> Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, tit. I, 107 Stat. 1536 (1993) (codified as amended in scattered sections of 18 and 42 U.S.C.), *invalidated in part* by Printz v. United States, 521 U.S. 898 (1997).

<sup>81</sup> See Garrett, *supra* note 63, at 1130–31.

politics of the issue. And although national elected officials might turn a sympathetic ear to federalism arguments, they may prove structurally unable to uphold state autonomy.

The Gun-Free School Zones Act represents a case when the political process failed to prevent Congress from engaging in extraconstitutional legislation. The next Part examines the progression of the bill, the considerations of national elected officials regarding its effects on state institutions and Congress's limitations under the Commerce Clause, and the limited role played by the intergovernmental lobby and other lobbies in curbing congressional excess.

### III. *LOPEZ* AND THE POLITICAL SAFEGUARDS OF FEDERALISM

States' rights do not get in the way when someone has something he wants to do . . . . Liberal Democrats or conservative Republicans — they just go whoosh.<sup>82</sup>

#### A. *Legislative History*

The Gun-Free School Zones Act of 1990 made it a federal offense for "any individual knowingly to possess a firearm" within one thousand feet of a school zone.<sup>83</sup> It was introduced in response to a "shocking number" of incidents of violence against children within the school environment.<sup>84</sup> In his introduction of the bill, Senator Herb Kohl highlighted three school shootings in the preceding two years, followed by several statistics regarding the number of handguns in schools and a short description of the bill.<sup>85</sup> In the House, Representative Edward Feighan introduced an identical bill; he did not make a speech but inserted into the record a statement similar to that of Senator Kohl.<sup>86</sup>

The Senate held no hearings on the bill.<sup>87</sup> The Subcommittee on Crime of the House Committee on the Judiciary did hold hearings on the House version of the bill, in which a number of special interest groups, government agencies, and professional associations, including the Center to Prevent Handgun Violence, the National Education Association, and the Bureau of Alcohol, Tobacco, and Firearms (BATF), testified regarding the importance of federal action to curb school gun violence.<sup>88</sup> The hearings served primarily to arm congressmen with

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<sup>82</sup> Broder, *supra* note 61 (quoting Rep. Bernard Sanders, a former mayor of Burlington, Vt.) (internal quotation marks omitted).

<sup>83</sup> Pub. L. No. 101-647, § 1702(b)(1)-(2), 104 Stat. 4844, 4844-45.

<sup>84</sup> 136 CONG. REC. 1165 (1990) (statement of Sen. Kohl).

<sup>85</sup> *Id.*

<sup>86</sup> See 135 CONG. REC. 30,665 (1989).

<sup>87</sup> See *United States v. Lopez*, 2 F.3d 1342, 1359 (5th Cir. 1993).

<sup>88</sup> See *Gun-Free School Zones Act of 1990: Hearing on H.R. 3757 Before the Subcomm. on Crime of the H. Comm. on the Judiciary*, 101st Cong. (1990) [hereinafter *Hearing*].



statistics regarding handgun possession and violence in schools — statistics later deployed on the floor to support the bill and other federal crime control measures.<sup>89</sup> Although the hearings were by no means secret,<sup>90</sup> only one representative of state or local government appeared before the committee — the Chief of Police of Cleveland, Ohio — who sought and received an exemption from the bill for police officers whose duties would otherwise cause them to violate the law.<sup>91</sup>

Despite an extensive hearing and numerous statements in both chambers supporting the Gun-Free School Zones Act, the implications of the bill for state autonomy and for the constitutional limits on Congress's authority to legislate under the Commerce Clause attracted very little attention.<sup>92</sup> The only explicit considerations of federalism concerns in the legislative history are an admission by BATF Firearms Division Chief Richard Cook that "the source of constitutional authority to enact the legislation is not manifest on the face of the bill"<sup>93</sup> and an observation by Representative William Hughes to Cook that the bill would be a "major departure from a traditional federalism concept which basically defers to State and local units of government to enforce their laws."<sup>94</sup>

Neither the committee nor either chamber of Congress ever pursued Representative Hughes's point, and the bill was eventually passed as part of the omnibus Crime Control Act of 1990.<sup>95</sup> When the bill was sent to the White House, President Bush noted that the Gun-Free School Zones Act provision "inappropriately overrides legitimate State firearms laws with a new and unnecessary Federal law. The policies reflected in these provisions could legitimately be adopted by the States, but they should not be imposed upon the States by the Congress."<sup>96</sup> Despite these reservations, the President signed the bill

<sup>89</sup> See, e.g., 140 CONG. REC. 24,505 (1994) (statement of Sen. Lautenberg) ("[A]ccording to the National Education Association, more than 100,000 students pack a gun with their school things every morning. Our response was the Gun-Free School Zones Act of 1990 which prohibits the possession of firearms within 1,000 feet of a school.")

<sup>90</sup> See 136 CONG. REC. D1052 (daily ed. Sept. 5, 1990) (announcing the time and location of the Subcommittee on Crime's hearings on H.R. 3757).

<sup>91</sup> See *Hearing*, *supra* note 88, at 24-27 (testimony of Police Chief Edward P. Kovacic); Vicki C. Jackson, *Federalism and the Uses and Limits of Law: Printz and Principle?*, 111 HARV. L. REV. 2180, 2238 & n.251 (1998) (noting that the Gun-Free School Zones Act was modified following Kovacic's testimony to include his requested exception).

<sup>92</sup> See *Lopez*, 2 F.3d at 1359-60.

<sup>93</sup> *Hearing*, *supra* note 88, at 10.

<sup>94</sup> *Id.* at 14; see Barry Friedman, *Legislative Findings and Judicial Signals: A Positive Political Reading of United States v. Lopez*, 46 CASE W. RES. L. REV. 757, 766 (1996) (discussing the exchange between Rep. Hughes and Cook).

<sup>95</sup> Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in scattered sections of 10, 11, 12, 18, 20, 21, 26, 28, 31, 42, 46, and 49 U.S.C.).

<sup>96</sup> Statement on Signing the Crime Control Act of 1990, 2 PUB. PAPERS 1715, 1715 (Nov. 29, 1990).

into law on November 29, 1990.<sup>97</sup> Its enactment then became the subject of a split between the Fifth and Ninth Circuits,<sup>98</sup> the resolution of which in *Lopez* is the stuff of federalism legend.

Assuming that the Court correctly determined that the Gun-Free School Zones Act lay beyond Congress's power to regulate commerce, the central question posed by this legislative history is why the political safeguards of federalism failed to prevent this congressional intrusion into the purview of the states.<sup>99</sup> Only a few national political leaders stopped to question the limits of congressional authority or the proposition that the Act might infringe upon the states, and those who did so failed to correct the problem. The intergovernmental lobby likewise did almost nothing to raise these concerns. The legislative dynamics of the Gun-Free School Zones Act show that political safeguards alone are inadequate to prevent Congress from exceeding its constitutional authority, a finding that suggests the need for judicial patrolling of the outer limits of Congress's enumerated powers.

### B. National Political Actors

Two theories potentially explain the failure of the national political branches to police the limits of their own power. The first might be dubbed "an act of omission": the notion that the Gun-Free School Zones Act raised constitutional concerns simply did not occur to Congress. Under this view, the pre-*Lopez* Court's willingness to uphold even wholly intrastate noncommercial activity as within the commerce power<sup>100</sup> suggested to Congress that little lay beyond the scope of the clause, and therefore that it was not necessary for Congress to consider seriously whether it had the power to enact the statute. Through this lens, substantive judicial review plays a necessary role in policing the outer boundary of congressional power: decisions like *Lopez* are shots across the bow to remind Congress that it is still a body of enumerated

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<sup>97</sup> Professors Ruth Colker and James Brudney note that "[t]he President did not refer to his concerns as constitutional; given his oath to uphold the Constitution, one can presume he would not have signed the bill if he had genuine constitutional concerns." Ruth Colker & James J. Brudney, *Dissing Congress*, 100 MICH. L. REV. 80, 96 n.75 (2001). Of course, given the political dynamics discussed in this Note, such faith in presidential fortitude may be unfounded.

<sup>98</sup> Compare *United States v. Edwards*, 13 F.3d 291, 292 (9th Cir. 1993) (finding the Gun-Free School Zones Act a permissible exercise of the Commerce Clause power), with *United States v. Lopez*, 2 F.3d 1342, 1367-68 (5th Cir. 1993) (holding the Gun-Free School Zones Act beyond Congress's power to regulate commerce).

<sup>99</sup> Alternatively, if one believes that the Court was incorrect, the fact that *Lopez* was a 5-4 decision suggests that the Act's legality is at least debatable; given that the issue was a close one, it remains noteworthy that the political safeguards of federalism did not force Congress at least to consider seriously whether the Constitution required that the issue be left to the states.

<sup>100</sup> See *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942) (upholding a federal law regulating personal consumption of home-grown wheat).

powers and that it must find a constitutional basis for each statute it enacts.

A second, more cynical theory suggests that Congress consciously chose to disregard state interests and any potential constitutional concerns. Professors Lynn Baker and Ernest Young argue that according to the economic theory of regulation, politicians obtain political support in exchange for providing government benefits and services.<sup>101</sup> Because they seek to maximize their own power, national politicians are therefore likely to view state and local officials as competitors in the market for political contributions.<sup>102</sup> Courts and commentators more disposed to this view have argued that the Gun-Free School Zones Act was little more than an effort to ensure that federal officials got some credit for helping solve a problem weighing on the collective mind of the American public — and the value of that effort to lawmakers outweighed the costs it imposed on state autonomy.<sup>103</sup>

By the time *Lopez* was briefed to the Supreme Court in 1994, forty states had passed laws prohibiting gun possession near schools. Most of these laws had been enacted before Congress took action in 1990, meaning that the Act was in reality little more than a statement of federal encouragement.<sup>104</sup> Following the Court's invalidation of the Gun-Free School Zones Act, President Clinton suggested that Congress should "encourage States to ban guns from school zones by linking Federal funds to enactment of school zone gun bans."<sup>105</sup> Instead, Congress chose to reenact the Gun-Free School Zones Act, with congressional findings addressing the connection between the prohibited act and interstate commerce and with a jurisdictional hook to satisfy the *Lopez* test.<sup>106</sup> As Professor Baker notes, "a conditional grant of federal funds is the only way for Congress to achieve precisely the regulatory effect that it originally sought with the Gun-Free School Zones Act";<sup>107</sup> reenacting the Act with a federal jurisdictional hook would not capture *all* cases falling under the mandate of the original bill. But Congress's goal may have been to ensure that federal prosecutors get credit for convictions — or merely to make a symbolic statement — rather than to prevent all gun possession near schools. In that case, the reenactment of § 922(q) makes more sense despite the

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<sup>101</sup> Baker & Young, *supra* note 48, at 114.

<sup>102</sup> *See id.* at 112–17.

<sup>103</sup> *See id.* at 114–15 (citing *United States v. Morrow*, 834 F. Supp. 364, 366 (N.D. Ala. 1993)).

<sup>104</sup> *See* Brief for Nat'l Conference of State Legislatures et al. as Amici Curiae in Support of Respondent, *United States v. Lopez*, 514 U.S. 549 (1995) (No. 93-1260), 1994 WL 16007619, at \*3 n.2.

<sup>105</sup> The President's Radio Address, 1 PUB. PAPERS 610, 611 (Apr. 29, 1995).

<sup>106</sup> 18 U.S.C. § 922(q) (2000).

<sup>107</sup> Lynn A. Baker, *Conditional Federal Spending After Lopez*, 95 COLUM. L. REV. 1911, 1913 n.8 (1995).

jurisdictional hook preventing the Act from reaching as broadly as the original Gun-Free School Zones Act.<sup>108</sup>

Even the national political actors who neither failed to realize nor consciously disregarded the Act's implications for federalism could not vindicate the political safeguards of federalism. The inability of Representative Hughes and the unwillingness of President Bush to correct what they aptly perceived as glaring constitutional problems are remarkable. The inaction within both branches was rooted in the political realities of the statute. The political and practical cost of imposing the Act on the states was trivial in light of the fact that most states had already outlawed guns in school. By comparison, opposing the Act would have been politically difficult — both the anti-gun lobby and the education lobby had campaigned hard for the measure. For either Representative Hughes or President Bush, the political cost of continuing to argue that less protection of children was preferable to more would have been high.<sup>109</sup>

For President Bush, structural influences raised those costs higher. The Gun-Free School Zones Act was one part of a 180-page bill on crime, a political issue close to voters' hearts. A presidential veto would have invalidated Congress's comprehensive crime control scheme in order to remedy a small provision that was both politically popular and practically harmless. Thus, it is troubling for the theory of federalism's political safeguards yet unsurprising from the perspective of structural and political realities that President Bush signed the bill, casting aside whatever constitutional doubts he harbored.

### *C. The Intergovernmental Lobby*

The political dynamics underlying the Act suggest three potential explanations for the intergovernmental lobby's similar failure to challenge its enactment. First, the states may simply have lacked the interest to challenge the constitutionality of the Gun-Free School Zones Act. As noted above, the overwhelming majority of states had already adopted state laws prohibiting possession of firearms near schools. For those states, sharing jurisdiction with the federal government helps achieve greater compliance with state possession bans without

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<sup>108</sup> The congressional findings in the reenacted version suggest a less self-serving explanation: they assert that "[s]tates, localities, and school systems find it almost impossible to handle gun-related crime by themselves." 18 U.S.C. § 922(q)(1)(H). This line suggests that, notwithstanding federalism concerns, Congress may have felt that this infringement was necessary because state regulation alone was inadequate.

<sup>109</sup> The Gun-Free School Zones Act necessarily provided more protection since it did not purport to preempt state laws against the possession of guns in school zones. Rather, the Act simply made such possession a federal crime as well; it was an exercise of concurrent authority to regulate in this area.

increasing state outlays for law enforcement.<sup>110</sup> From this standpoint, every case prosecuted under § 922(q) is one more gun out of the state's school system, removed at the federal government's expense. Furthermore, those states obviously agreed with the substantive policy underlying the Gun-Free School Zones Act; they had no practical reason to oppose the ban as applied to themselves and might also have seen no problem with foisting it upon noncompliant states.<sup>111</sup> Professor Baker dubs this phenomenon "horizontal aggrandizement" of federal power at the expense of the states.<sup>112</sup> Since a majority of states shared the federal government's interest in keeping guns out of the nation's schools, the intergovernmental lobby was unlikely to check Congress's attempt to act outside the scope of its enumerated powers.

Second, even if the intergovernmental lobby had adequate incentives to combat the Gun-Free School Zones Act, it may have lacked the political capital to do so. It is difficult to imagine a scenario in which the cards are stacked more heavily against the states. The issue of gun violence in schools is itself a politically volatile issue; a strong presumption exists for the position that more protection of children is preferable to less. In addition, two strong national interest groups supported the Act: the anti-gun lobby and the education lobby. The intergovernmental lobby's interests are diffuse, spanning any number of potential congressional acts in a given year. It may have decided to sacrifice any interest it had in maintaining constitutional limits on congressional power in this case, choosing instead to expend its limited political capital on less volatile measures with weaker opposition, so as to maximize its overall influence on federal policymaking.

Finally, one might assert that the intergovernmental lobby did act to oppose the Gun-Free School Zones Act, but simply failed to secure a division between federal and state power equivalent to the Constitution's textual limits. As noted above, Cleveland's police chief lobbied

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<sup>110</sup> Cf. Garrett, *supra* note 63, at 1123 ("Local officials may be united in their concerns about federalism principles, but they will also be concerned with programmatic goals and practical objectives that may clash with such principles.").

<sup>111</sup> The findings included in the post-*Lopez* incarnation of the Gun-Free School Zones Act suggest that states that had school zone bans harbored some animosity toward those that did not: "[E]ven States, localities, and school systems that have made strong efforts to prevent, detect, and punish gun-related crime find their efforts unavailing due in part to the failure or inability of other States or localities to take strong measures." 18 U.S.C. § 922(q)(1)(H). It is not readily apparent how the failure of one state to ban guns in or around schools affects other states' enforcement of their own bans, meaning that this finding is little more than a congressional swipe at states without school zone gun bans.

<sup>112</sup> See Baker, *supra* note 48, at 955-56 ("Here, the federal political process threatens state autonomy insofar as that process is the means by which a majority of states may impose their own policy preferences on a minority of states with different preferences. The federal political process may therefore in certain circumstances threaten the autonomy of only some states, while arguably enhancing the autonomy of other states.").

for and secured an exception to the Act for police officers acting in the course of their ordinary business. Although the intergovernmental lobby lacked the political power to stop the Act entirely, it was able to wield its influence over this narrow area of the Act's enforcement, when the lobby was on strong ground and when the concerns of opposing lobbies were weak. As a result, the intergovernmental lobby was at least able to protect local control of police procedure — a traditionally quintessential function of local government.<sup>113</sup>

Rather than a rigid constitutional barrier, the line drawn by the political process between federal and state power depends largely upon the issue being debated, the array of special interests assembled on each side, and the extent to which federalism concerns coincide with the substantive interests of the intergovernmental lobby. Perhaps the political process can be trusted, despite its potential deficiencies, to determine just how much Congress's *enumerated* powers should be exercised on a given issue. This Note takes no position in that context. But when Congress seeks to enact legislation at the outer boundary of its constitutional power, the political power of the states and their allies in the federal government is insufficient to ensure that Congress does not exceed its constitutional authority.

#### IV. FEDERALISM PROTECTIONS THROUGH JUDICIAL SAFEGUARDS

The failure of the political process to confine Congress to its constitutionally defined powers is unsurprising. American society looks to the political process to determine which policies are wise, and it relies upon the judiciary to ensure that those policies are legal. It is appropriate, indeed vital, for the Court to conduct substantive judicial review of legislative policies to correct the rare instances of congressional overreaching.

The judiciary has precisely the tools that the political branches lack to fight extraconstitutional action like the Gun-Free School Zones Act. Although Congress and the President must consider a potentially unconstitutional provision only as part of a larger bill, the Court can surgically remove the provision from the statutory framework, allowing for an analytically clean review. And Article III's tenure and salary protections insulate the judiciary from political pressure, meaning that considerations whether the provision is politically popular or even objectively good policy need not cloud its constitutional analysis.

What results is a mutually reinforcing division of labor between federalism's political and judicial safeguards. The intergovern-

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<sup>113</sup> See *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976).

mental lobby and sympathetic national political actors catch the most egregious violations of federalism — federal encroachment upon state autonomy that constitutes bad policy and therefore fails to command popular support, or that usurps state power significantly enough to motivate the intergovernmental lobby to take action. Judicial action checks those provisions that slip through the political safeguards because they are too popular or practically harmless. That judicial action, in turn, reinforces the normative assumption that Congress should act only within its enumerated powers, giving the proponents of federalism additional ammunition for the next round of political combat.

Professor Wechsler promised a self-policing federal government that could be entrusted to stay within its constitutional boundaries. But the political realities of the legislative process show that political checks are imperfect at best. And as Justice Powell noted in his *Garcia* dissent, the Court does not trust such political protections of constitutional rights in other contexts:

One can hardly imagine this Court saying that because Congress is composed of individuals, individual rights guaranteed by the Bill of Rights are amply protected by the political process. Yet, the position adopted today is indistinguishable in principle. The Tenth Amendment also is an essential part of the Bill of Rights.<sup>114</sup>

Justice Kennedy has agreed, noting that federalism is “the unique contribution of the Framers to political science and political theory.”<sup>115</sup> Its textual provisions may be difficult to enforce judicially, but “commerce” is no less justiciable than “unreasonable search” or a host of other individual rights that the Court has enforced through elaborately constructed doctrines.<sup>116</sup> *Garcia*’s judicial abdication created a structure whereby the interstate commerce limitation on Congress’s power is effectively defined as the balance of interests between the states and those that would oppose them, with no connection to commerce whatsoever. When the political safeguards fail, such a scheme leaves no recourse to prevent Congress from assuming a general police power at the expense of the Tenth Amendment. The judiciary’s responsibility to “say what the law is”<sup>117</sup> must prevent it from conducting such a dangerous sacrifice of constitutional principles in the name of judicial convenience.

<sup>114</sup> *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 565 n.8 (1985) (Powell, J., dissenting).

<sup>115</sup> *United States v. Lopez*, 514 U.S. 549, 575 (1995) (Kennedy, J., concurring).

<sup>116</sup> Cf. Stephen L. Carter, *Constitutional Improprieties: Reflections on Mistretta, Morrison, and Administrative Government*, 57 U. CHI. L. REV. 357, 365 (1990) (criticizing the Court’s readiness to enforce individual rights but not the separation of powers).

<sup>117</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).