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Federalism in the United States

D. Brooks Smith*

I. INTRODUCTION

In recent years, I have had the privilege of participating in my capacity as a federal judge in various judicial training programs and symposia throughout Central and Eastern Europe. One of the greatest challenges I have faced in describing the administration of justice in the United States to audiences of judges from other countries has been to find a coherent explanation of "our federalism." Perhaps that is because federalism is neither mentioned nor defined in the United States Constitution. Perhaps it is because notions of federalism are largely historical; federalism finds its roots in the existence of thirteen independent states whose separate identities preceded the existence of a national government, and historicity alone usually is not regarded as sufficient justification to preserve a political order. Or perhaps it is because federalism forces upon our polity a continuing tension — a dynamism that means that the American people and their government are constantly redefining federalism, even without knowing it at the time.

I must hasten to add that the inadequacy I have so often felt in describing my country's federal system may, of course, be nothing more than a function of my own poor powers of description. I view myself not as a legal scholar, but as a quintessential American pragmatist, someone whose origins could accurately be described as a "country lawyer," who has gone on to serve as a judge on three different courts — one state and two federal. It is that experience, I would suppose, rather than any pretension to scholarship on my part, that led Professor Barker to invite me to present the United States model at this symposium.

It is impossible to convey a sense of what federalism means to the institutions of government, and to the entire polity in the United States, without some recognition of the history from which

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* Judge of the United States Court of Appeals for the Third Circuit. This paper is adapted from a November 12, 2004 presentation at the Federalism in the Americas Seminar at the Duquesne University School of Law. I thank Professor Robert S. Barker for inviting me to participate, and the other seminar presenters and commentators for their remarks and collegiality.
federalism arose. Our first experience with national government began not with our hallowed Constitution, but with the failed Articles of Confederation. That document could not have been more explicit in its declaration of supremacy of each individual state over the national government. Article II stated, “Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.” Article III then provided, “The said states hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare . . . .” And therein lay the problem. States were dominant and almost independent; rather than unite, they formed a “league of friendship.” Congress could requisition states for money and men, but Congress could not tax individuals or raise armies directly. State legislatures regularly challenged, and sometimes rejected, congressional authority. With such anemic national authority contained within the Articles of Confederation, they were doomed to failure.

Our national founders tried again. But despite the failure of the Articles, those who continued efforts to forge a national government still did not think of themselves primarily as Americans. They were first and foremost Pennsylvanians and Virginians, New Yorkers and South Carolinians. They remained reluctant to cede power, which had for years resided closer to home, to an untried and inchoate national government. The physical reality of those times was that states were sparsely populated, making local governmental rule most effective and reliable. As Pierce Butler, a delegate from South Carolina to the Constitutional Convention, asked rhetorically: “Will a man throw afloat his property and confide it to a government a thousand miles distant?” The architects and advocates of the United States Constitution believed a priori

1. ARTICLES OF CONFEDERATION, art. II.
2. ARTICLES OF CONFEDERATION, art. III.
3. See 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 19 (Max Farrand ed., 1911) [hereinafter Farrand, RECORDS] (Statement of Edmund Randolph) (noting as a defect of the Articles “that the confederation produced no security against foreign invasion; congress not being permitted to prevent a war nor to support it by their own authority.”).
5. 1 Farrand, RECORDS 173. Note Butler’s use of the word “property;” while federalism is more often addressed in terms of power, property rights were very much on the minds of the Founders.
that their fellow citizens had, as James Madison wrote at the time, a "Natural Attachment" to their states.6

In reciting this passage of our country's history, I repeat that the term "federalism"—like "separation of powers" and "checks and balances"—does not appear propositionally in the text of the Constitution. This is not to say, of course, that federalism does not exist in the American polity. Rather, it is to say that the doctrine of federalism emerges from the structure of the governing institutions that the document erects. Article I vests Congress with "[a]ll legislative powers herein granted," and then enumerates seventeen specific powers, among them the power to establish rules of naturalization and bankruptcy, raise and support armies and navies, regulate commerce among the states, and constitute courts inferior to the Supreme Court. In explaining and urging ratification of the Constitution, Madison wrote:

The powers delegated by the proposed Constitution to the Federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and foreign commerce; with which last the power of taxation will, for the most part be connected. The powers reserved to the several states will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.7

Madison and other founders intended that the Constitution guarantee the autonomy of the states, with the result being a kind of "dual sovereignty." This scheme of dual sovereignty was to guarantee the authority of the national government in those areas of governance enumerated in the Constitution, while the states remained regnant in areas that had not been specifically delegated to the national government.

Structurally, what emerged was a national government composed of three co-equal branches of government. Article I created a bicameral legislative branch consisting of the House of Representatives and the Senate. The larger House of Representatives would be composed of members directly elected for two-year terms by the people of the several states. The other body, the Senate,

would be made up of two senators from each state who would be chosen by the legislature of their state.\(^8\) The executive power of the United States would reside, under Article II, with the President. Article III placed the judicial power with “one Supreme Court, and in such inferior courts as the Congress may . . . establish.”

Co-existing with this national government were the existing governments of the states, each with its own executive, legislative, and judicial branches. Thus began the experiment of federalism that continues today. Yet the current roles of the national and state governments are not what they were at the time of the nation’s founding. Indeed, one cannot credibly gainsay — regardless of his or her position on the ideological spectrum — that our national government now dominates policy making, not only in traditional areas like war and peace, but also on issues pertaining to social welfare.

I will discuss some of the shifts in power from the states to the federal government, and some of the issues of federalism which to this day continue to occupy the attention of courts and scholars. It is not for me to take sides, but simply to describe as accurately and dispassionately as I can the tensions within American federalism. I will avoid the issue of the founders’ intent. It does not seem relevant for our purposes here, and it is a thicket that, in any event, I prefer to avoid. It is enough that my discussion be both historical and structural, laced with liberal doses of the Supreme Court jurisprudence that nourishes our notions of federalism. Yet I do adhere to the view of an American legal scholar who is now a colleague of mine, serving as a judge on the United States Court of Appeals for the Tenth Circuit. As Michael McConnell wrote some years ago, “Whatever the founders’ intentions, the rules they wrote are skewed in favor of national power.”\(^9\)

My approach will be to select a handful of clauses from the Constitution that have marked the moving frontier between the national government and those of the states. This list is in no way exclusive, but even if the discussion does not fully capture American-style federalism, at least it should be illustrative of the evolv-

\(^8\) The selection process for senators would eventually yield to popular election through ratification of the Seventeenth Amendment in 1913. See supra text accompanying note 44.

The expounding of the founders’ rules occurs on the backdrop of the Supremacy Clause written into Article VI of the Constitution. It declares, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the Supreme Law of the Land . . . .” The import of this provision is that only those laws that are consistent with the Constitution are supreme. The federal Constitution is the polestar. If a federal law comports with the Constitution, to the extent that it contradicts a state law, the federal law will trump. And it is the federal judiciary—a branch of the national government—that has the role of resolving those disputes when they arise.

II. COMMERCE CLAUSE

It is impossible to undertake any detailed discussion of federalism in the United States without reference to what is known as the “Commerce Clause,” language in the Constitution granting that “The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States . . . .”10 To understand the force that the Commerce Clause has had on American life and law, it is necessary to briefly survey its invocation by our Supreme Court over the past 180 years or so.

At the time of the Articles of Confederation, commerce between the States in the predominantly mercantile economy of the day was often burdened by artificial trade barriers erected by protectionist-minded states.11 Only national control of some kind would be able to break down those barriers. Giving Congress the power under the Constitution to regulate commerce became the answer.

Yet the main purposes for which the Commerce Clause has been invoked have been markedly distinct throughout our history. For the first ninety years or so following ratification of the Constitution, Commerce Clause jurisprudence served the purpose of determining just how burdensome state regulations on interstate commerce could be before they trench on the federal power to regulate. In 1824, the Supreme Court had its first opportunity to define Congress’s commerce power in the case of Gibbons v.

11. Jesse H. Choper, Taming Congress’s Power Under the Commerce Clause: What Does the Near Future Portend?, 55 ARK. L. REV. 731, 756 (2003). States also engaged in protectionist trade battles with foreign countries, which the states, with their fledgling industries, were ill-equipped to win. Id.
Ogden, which invalidated a New York law granting an exclusive right to individuals to use steamships on New York’s navigable waters.\textsuperscript{12} This was a strong enunciation of federal power by one of the greatest American jurists, Chief Justice John Marshall. But Marshall’s ruling did not suggest that the federal power enumerated in the Constitution to regulate commerce was absolute. Indeed, language in the opinion foreshadowed constitutional battles to come by making explicit that what was not enumerated was “the exclusively internal commerce of a State.”\textsuperscript{13}

A Supreme Court decision in 1853, \textit{Veazie v. Moor}, reviewed a state-created steamboat monopoly which regulated wholly internal commerce.\textsuperscript{14} \textit{Veazie} upheld a statute adopted in the State of Maine which granted exclusive licenses to steamboat operators along a section of the Penobscot River.\textsuperscript{15} This reasoning was followed in 1867, in \textit{The License Tax Cases}, when the Supreme Court declared:

> Over [the internal commerce and domestic trade of the States] Congress has no power of regulation, nor any direct control. This power belongs exclusively to the States. No interference by Congress with the business of citizens transacted within a State is warranted by the Constitution, except such as is strictly incidental to the exercise of powers clearly granted to the legislature.\textsuperscript{16}

And in \textit{The Daniel Ball}, an 1871 ruling, the distinction between what was “between states” versus “within state” was made even clearer: “[W]hen ever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has commenced.” But this movement does not begin until the articles have been shipped or started for transportation from the one State to the other.\textsuperscript{17}

Judicial review in these cases concerned the sovereignty inherent in statehood, and the reach of that sovereignty. Those decisions were not concerned with the authority of Congress to legislate. That is, the Supreme Court was addressing only the power

\textsuperscript{12} Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824).
\textsuperscript{13} \textit{Id.} at 195.
\textsuperscript{14} \textit{Veazie v. Moor}, 55 U.S. (14 How.) 568 (1853).
\textsuperscript{15} \textit{Id.} at 575.
\textsuperscript{16} License Tax Cases, 72 U.S. (5 Wall.) 462, 470-71 (1867).
\textsuperscript{17} \textit{The Daniel Ball}, 77 U.S. (10 Wall.) 557, 565 (1870).
of the Commerce Clause to negate state laws, not assessing its scope as a font of the national government's regulatory authority.

The Industrial Revolution forced profound economic changes upon the United States. From 1860 to 1894, the United States went from being the fourth largest manufacturer in the world to the largest. The productive capacity of the nation expanded in steel, coal, and oil. Rail transportation flourished. And new inventions were introduced, such as electric lighting, telephone and telegraph, and the automobile. The changes were not just economic, they were also cultural. There was massive immigration, mostly from Europe, with attendant population shifts. In 1860, the U.S. had only eight cities with a population of over 100,000. By 1900, cities of that size numbered thirty-eight.

In 1887, Congress passed the Interstate Commerce Act, which provided the model for regulating interstate common carriers and public utilities.\(^{18}\) In 1890, Congress passed the Sherman Antitrust Act, prohibiting monopolies and businesses from engaging in anti-competitive behavior.\(^{19}\) That law was followed by the Federal Trade Commission Act,\(^{20}\) and later the Clayton Act,\(^{21}\) both of which regulated business practices and were designed to restrain unfair competition. Thus began a period of robust legislative activity in which Congress flexed its collective muscle in furtherance of its Commerce Clause power. Yet Supreme Court review under the Commerce Clause in the late Nineteenth and early Twentieth centuries was not characterized by doctrinal clarity. Recall that up to this point, the Commerce Clause power had been invoked in its negative sense to prohibit states from forming regimes intended to give that state advantages in interstate trade. Now Congress was beginning to use the Commerce Clause as a positive power to regulate.

In the early cases of this new industrial era, the Court continued to hold that Congress could not regulate production or manufacture. That is, the Court strictly cabined Congress's power to regulate commerce to exchanges of goods in the interstate marketplace. Yet as Chief Justice Rehnquist observed in his *Lopez* opinion in 1995 — a case I will refer to shortly — on mixed questions, "where the interstate and intrastate aspects of

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\(^{19}\) 26 Stat. 647 (1890).

\(^{20}\) 38 Stat. 717 (1914).

\(^{21}\) 38 Stat. 730 (1914).
commerce were so mingled together that full regulation of inter-
state commerce required incidental regulation of intrastate com-
merce, the Commerce Clause authorized such regulation."22

So we see that in 1895, in *United States v. E.C. Knight*, the
Court held that the Sherman Act did not apply to the Sugar Trust
because "manufacture" preceded, and was not itself, "commerce."23
In *Carter v. Carter Coal*, the Court held that Congress could not
regulate coal mining labor at the local level because mining was
not commerce.24 The rationale of that decision? "Mining brings
the subject matter of commerce into existence. Commerce dis-
poses of it."25 Yet, between *E. C. Knight* and *Carter Coal*, the
Court in the *Shreveport Rate Cases* rejected the railroads' argu-
ment that because they engaged in intrastate transportation as
well as interstate transportation, Congress could not regulate
them.26 The Supreme Court declared,

Wherever the interstate and intrastate transactions of carri-
ers are so related that the government of the one involves the
control of the other, it is Congress, and not the State, that is
entitled to prescribe the final and dominant rule, for other-
wise Congress would be denied the exercise of its constitu-
tional authority and the State, and not the Nation, would be
supreme within the national field.27

In the 1930s, this country's New Deal era, the Supreme Court
began to change its view of the Commerce Clause. Over a mere
two year period, the Court would begin to apply a wholly new test
in its review of congressional actions taken pursuant to the Com-
merce Clause. In 1935, in the case of *Schechter Poultry v. United
States*, the Court struck down national hours and labor regula-
tions governing the employment of individuals in intrastate busi-
ness because the activity being regulated related to interstate
commerce "only indirectly."28 By 1937, this "direct vs. indirect"
distinction had been abandoned. In *NLRB v. Jones & Laughlin*

23. *United States v. E.C. Knight*, 156 U.S. 1, 13 (1895). "The fact that an article is
manufactured for export to another State does not of itself make it an article of interstate
commerce, and the intent of the manufacturer does not determine the time when the article
or product passes from the control of the State and belongs to commerce." *Id.*
25. *Id.* at 304.
27. *Id.* at 351-52.
Steel, the Supreme Court upheld the National Labor Relations Act, holding that where intrastate activities "have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."\(^{29}\) Commerce Clause jurisprudence was on a new path, a path that would follow a fairly straight line for most of the remainder of the Twentieth Century.

The new era was one of considerable deference to Congressional action. In *United States v. Darby*, we see the Supreme Court for the first time inquiring into whether intrastate activity — the manufacture and production of goods which formerly were viewed as preceding commerce — "so affect[s] interstate commerce" as to make Congressional regulation of it appropriate under the Commerce Clause.\(^{30}\) *Darby* held that Congress indeed had the authority to prohibit interstate shipment of lumber manufactured by workers who fell outside the federal minimum wage and maximum hours regulations.\(^{31}\) And in the famous — and sometimes maligned — case of *Wickard v. Filburn*, Congress's power to regulate the production and use of homegrown wheat was upheld because, as the Court reasoned, when viewed in the aggregate "it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"\(^{32}\)

I leave the subject of the Commerce Clause by noting two recent Supreme Court decisions which departed from the longstanding deference to Congress which, as I have said, characterized more than half of the last century. In 1995, the Supreme Court handed down *United States v. Lopez*, holding that the "affecting commerce" language did not authorize Congress to pass the Gun Free School Zone Act, a law which made it a crime to possess a gun within 1000 feet of a school.\(^{33}\) The Court reasoned that regulating guns near schools does not have a sufficient nexus to economic activity to fall within Congress's Commerce Clause power.\(^{34}\) And five years later, in *United States v. Morrison*, the Court again struck down an act of Congress, a portion of the Violence Against

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31. Id. at 122.
34. Id. at 559-61.
The Court declared that the Commerce Clause did not give Congress authority to provide a federal civil remedy to victims of gender-motivated violence because the statute did not involve economic activity or interstate commerce.36

Were Lopez and Morrison the beginning of a new era of less deference to Congress, and greater scrutiny by the Court, of Congress’s actions taken pursuant to the Commerce Clause? Or were they merely a rear-guard action against the ineluctable movement toward a more powerful national government? My purpose here is descriptive and not predictive. Furthermore, I do not claim to know the answer. It must be pointed out that these cases were decided by a sharply divided Court, and doctrinal trends will be determined through controversies presented to a Supreme Court whose membership may change significantly in the coming years.

III. SEVENTEENTH AMENDMENT

There is more, of course, to our federalism-defining Commerce Clause jurisprudence than time or my abilities will permit me to discuss. I turn to an event in our constitutional and political history that represented a major re-allocation of power between the states and the national government: the ratification of the Seventeenth Amendment. We have just witnessed a national election in which the People, and the States, elected a President and Vice President. I refer to both the People and the States because the People vote in their respective states, and then a state’s electors — equal to the number of representatives to Congress from that state and its two senators — assemble and vote for President. By tradition, all the electors from a state vote for the candidate who wins the popular vote of that state.37 A state speaks with a single, undiluted voice in presidential elections, thus combining democracy and federalism with neither trumping the other.

Prior to ratification of the Seventeenth Amendment in 1913, a similar combination of democracy and federalism also applied to representation in Congress.38 Members of the House of Represen-

36. Id. at 617.
37. Forty-eight states and the District of Columbia use the winner-take-all system. Only Maine and Nebraska split their presidential electors; the majority vote-getter in each congressional district gets the vote of that particular district. See ME. REV. STAT. ANN. tit. 21-A, § 805 (2) (West 1993); NEB. REV. STAT. § 32-714 (1998).
38. To be sure, Congress retains the tension between pure democracy and principles of federalism. All members of Congress represent their states. However, as I will endeavor to show, the Seventeenth Amendment muted the ability of states to articulate state preroga-
tatives have always been directly elected by the People. The vot-
ers in each congressional district of a state elect their Representa-
tive to the House. In the original plan of the founders, state legis-
latures, speaking for the States as distinct entities, selected the
senators. This assured that both the People and the States them-
selves would be represented in Congress. Here is how James
Madison described the plan:

The house of representatives will derive its powers from
the people of America, and the people will be represented
in the same proportion, and on the same principle, as they
are in the Legislature of a particular State. So far the
Government is national not federal. The Senate on the
other hand will derive its powers from the States, as
political and co-equal societies; and these will be
represented on the principle of equality in the Senate,
as they now are in the existing Congress. So far the
government is federal, not national.

A state legislature’s power to appoint senators was intended to
be to federalism what the separation of powers was to the national
government, which is to say, a check on state or federal encroach-
ment by one on the other. State legislatures are better posi-
tioned than the general electorate to watch out for federal en-
croachment. After all, when Congress preempts state laws under
the Supremacy Clause, it is the power of the state legislators
themselves that is diminished. Before the Seventeenth Amend-
ment, it was common for state legislatures to instruct the senators
they appointed how to vote. If a senator chose to disobey the legis-
late, he was likely to have a difficult time getting reelected.

Ratification of the Seventeenth Amendment stripped state legis-
latures of their monitoring function. As a consequence, Congress
became free to legislate more preemptively. It is interesting to

41. Several of these observations on the Seventeenth Amendment are drawn from the
superb academic work of Jay S. Bybee, who is now a judge on the Ninth Circuit. See Jay S.
Bybee, Ulysses at the Mast: Democracy, Federalism, and the Sirens’ Song of the Seventeenth
42. See id. at 517-28 (discussing mechanisms by which state legislatures ensured that
their senators remained accountable to them).
note that the impact upon federalism did not figure prominently in the national debate over ratification of the Seventeenth Amendment. The driving force behind the amendment was the Populist movement of the 1890s and the "good government" objectives of the Progressive Era. Accounts of senators purchasing their seats from legislatures, delays in selection of senators, and the perception of the Senate as a tool of corporate power all contributed to the adoption of the Seventeenth Amendment.

Today, election of United States Senators by the legislatures of their states seems an anachronism. But it would be difficult to overstate the importance of the Seventeenth Amendment in reordering the balance of power between the states and the national government.

IV. GENERAL WELFARE CLAUSE

Another source of tension for our federalism is the Constitution's General Welfare Clause, or the so-called Spending Clause, of Article I, Section 8. It is a grant to Congress of authority to "lay and collect Taxes, Duties, Imposts, and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States." A good case can be made that a certain historic parallelism has been at work with both the Commerce Clause and the Spending Clause. That is to say, the robustness that each has enjoyed has been in direct relation to the decline of the states as the locus of power in the American polity.

Historically, the Spending Clause was largely dormant. There is no evidence of which I am aware to suggest that the founders intended for Congress to have "near plenary power of the purse." And yet no textual restraint was placed on Congress to limit its power to define "general welfare" broadly. Today, Congress's spending power is virtually unfettered, and has not been challenged seriously by the Supreme Court since the 1936 decision in United States v. Butler. In fact, the Court has questioned whether the definition of "general welfare" is even a justiciable issue.

43. Id. at 538.
44. Id. at 539-40.
46. 297 U.S. 1, 78 (1936) (rejecting the notion that the General Welfare Clause gave Congress unrestricted power to effect through its taxing and spending powers what it is otherwise prohibited from regulating).
Justice O'Connor, a frequent exponent of federalism, has written:

If the spending power is to be limited only by Congress' notion of the general welfare, the reality, given the vast financial resources of the Federal Government, is that the Spending Clause gives "power to the Congress to tear down the barriers, to invade the states' jurisdiction, and to become a parliament of the whole people, subject to no restrictions save such as are self-imposed."\textsuperscript{47}

Justice O'Connor then concluded, "This, of course, as Butler held, was not the Framers' plan and it is not the meaning of the Spending Clause."\textsuperscript{48}

Justice O'Connor's view has not prevailed. These quotes are from her dissent in \textit{South Dakota v. Dole}, a 1987 decision in which the Court held that even if Congress lacks the power to impose a national minimum drinking age directly, it could nonetheless accomplish that objective indirectly by instructing the Secretary of Transportation to withhold five percent of a state's federal highway funds if the state's minimum drinking age was below twenty-one.\textsuperscript{49} And therein lies the tension between Congress and the states, as well as a challenge for federalism.

Is a state that receives condition-laden federal dollars voluntarily accepting the conditions laid down by the national government, or is it simply yielding to coercion? The question is not susceptible to an easy answer. Funds from the national fisc are at issue. One can argue quite correctly that if states want the benefit of such assistance, then they must be willing to adhere to reasonable standards that are made conditions of such acceptance. Yet the counter to that argument is that "when the federal government offers the states money, it can be understood as simply offering to return the states' money to them, often with unattractive conditions attached."\textsuperscript{50} The import of this point is that because the states can only tax the income and property remaining to their citizens after the federal government has taken its annual share, what the federal government is really offering the states is noth-

\textsuperscript{48} Dole, 483 U.S. at 217 (O'Connor, J., dissenting).
\textsuperscript{49} Id. at 211-12.
\textsuperscript{50} Baker, supra note 45, at 214.
ing more than funds they could have obtained themselves through
direct taxation – and without the conditions.\textsuperscript{51}

And so we see the impact of another Constitutional amendment
on one of the enumerated powers granted to Congress. The Six-
teenth Amendment gave Congress power to tax income. Most im-
portantly, this Amendment gave Congress the means to broaden
its definition of the “general welfare” and to redistribute income in
its furtherance. The Sixteenth and Seventeenth Amendments
were ratified within months of each other, and it can be argued
that these amendments have worked in tandem to give the na-
tional government a much greater role in the formulation of pol-
icy, and concomitantly to reduce the power of state governments.\textsuperscript{52}

An anecdote from recent political history serves to suggest a
nexus between the Commerce Clause, the Spending Clause, and
the two amendments I have chosen to discuss. Not long after the
\textit{Lopez} decision striking down the Gun Free School Zones Act on
grounds that Congress had exceeded its authority under the
Commerce Clause, President Clinton announced his continued
determination “to keep guns out of our schools.”\textsuperscript{53} Certainly, no
one can take issue with such a salutary policy goal. What is inter-
esting for purposes of this discussion is President Clinton’s pro-
sposed solution. He declared that Congress could “encourage states
to ban guns from school zones by linking Federal funds to enact-
ment of school-zone gun bans.”\textsuperscript{54} So while the Commerce Clause,
according to the Supreme Court, was insufficient authority for the
national government to address the issue of gun crime around
neighborhood schools – an issue that traditionally would have
been considered local in nature – a popular President was com-
fortable in suggesting that Congress, using its Spending Clause
authority, might still take up the cause.

\textbf{V. ADVANTAGES OF FEDERALISM}

At this point, enough constitutional history; enough constitu-
tional text. A more comprehensive overview of federalism would
include, at a minimum, discussion of the Tenth, Eleventh, and

\begin{itemize}
\item \textsuperscript{51} Id. at 213.
\item \textsuperscript{52} Ratification of the Sixteenth Amendment was completed on February 3, 1913, the
Seventeenth Amendment on April 8, 1913.
\item \textsuperscript{53} Baker, \textit{supra} note 45, at 221 n.83 (quoting Todd S. Purdum, \textit{Clinton Seeks Way to
\item \textsuperscript{54} Baker, \textit{supra} note 45, at 222 n.87 (quoting Todd S. Purdum, \textit{Clinton Seeks Way to
\end{itemize}
Fourteenth Amendments; more of our Nation's history and the societal changes it has seen; and constitutional interpretations by the other branches of government. In any event, constitutional history is, by itself, insufficient to convey the impact of federalism on American political life. I will turn to what some see as the practical advantages of federalism. Justice O'Connor capsulized these advantages quite well in her opinion in *Gregory v. Ashcroft*:

This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government; and it makes government more responsive by putting the States in competition for a mobile citizenry.55

Let us examine Justice O'Connor's list one item at a time. Are state governments more sensitive to diverse needs? I would suggest that this is certainly not the conventional wisdom. Indeed, modern United States history has placed the national government at the forefront of protecting the rights of minorities, and the federal courts as the forum for vindicating those rights. Often the states and their laws have been the source of restrictions on individual rights. But let me provide a hypothetical, proposed by then-Professor McConnell, that supports Justice O'Connor's argument.56 Imagine a nation of two states, Virginia and Pennsylvania, each with a population of 100 citizens. In Virginia, 30% of the population wishes to ban smoking in restaurants; yet, in Pennsylvania, 80% wants such a ban. A single national rule made applicable to both states — a ban based on majoritarian preference — makes 110 people happy but 90 people unhappy. Under state rulemaking based on the preferences of the state's citizens — resulting in no ban in Virginia and a ban in Pennsylvania — 150 people are happy and only 50 are unhappy. And if the result is sufficiently important to the unhappy folks, they are, of course, free to move to the other state to take advantage of their preferred rule.

56. This example is taken from McConnell, *supra* note 9, at 1494.
Justice O'Connor also points out that citizens have greater opportunities to participate in the democratic process under a system of dual sovereignty. On this point, she is indisputably correct. One vote has an infinitesimal chance of influencing a presidential election. And this mathematical reality provides a rational disincentive to educate oneself about the candidates. However, this reasoning applies with less force as elections become more local. For example, an energized citizen in a small town can wield significant influence over a school board or a municipal council, either by mustering public opinion or by seeking office herself.

What about innovation and experimentation? More governmental units mean more approaches to issues affecting the public welfare. For example, a desire to attract industry and taxpayers to a locale fosters innovation. Much has been made of a trend in recent political history of members of our national legislature leaving Washington to run for governor of their states. Many believe that the opportunity to wield more influence over policy at the state level has made these offices more attractive. There is a caveat to the innovation and experimentation argument, however. Economists would note that a patchwork of liability rules, which vary from state to state, together with differing zoning regimes and other diverse laws, cause inefficiency. To the extent that economic inefficiencies result from heterogeneous state and local regulatory regimes, costs to consumers across the nation are increased.

How does the federal structure allow “joint sovereigns” to compete for “a mobile citizenry”? Taxation is one way. Florida has no inheritance tax. It is a haven for retirees. New Hampshire has neither a state income tax nor a general sales tax. Massachusetts firms find it easier to recruit people to New Hampshire than to the Bay State itself, and so Southern New Hampshire has become a booming high tech area. In another example, one of my law clerks points out to me that he was living in Washington, D.C. when he decided to go to law school. He moved across the river to

57. To be sure, many retirees seek Florida's warm climate. However, the general point is also made by observing that a disproportionate number of military personnel whose duty stations are frequently changed choose to make Florida their state of residency for tax purposes. See Lt. Colin A. Kisor, Who's Defending the Defenders?: Rebuilding the Financial Protections of the Soldiers' and Sailors' Civil Relief Act, 48 NAVAL L. REV. 161, 172 n.72 (2001).

Virginia where, because of Virginia's generous support of higher education, tuition is low for in-state students. He estimates that he saved about $40,000 while obtaining a law degree and an MBA as a result of that move.

Finally, there is what Justice O'Connor characterized as the "principal benefit of the federalist system" — to provide a "check on abuses of government power." Even if not in perfect equipoise, dual governments will at least exert some check on each other. To the extent that this argument has continuing force, states must not be mere administrative units of a hegemonic national government. They must have some autonomy, and some ability to counter the actions of the national government. Herein lies the field where many of our ideological battles are fought in the United States today. What is the proper role for separate sovereigns? And who decides? Most often over the past century, the arbiter has been the Supreme Court. And just how effective the Court has been in this role is a matter of debate. Ask certain United States Senators in recent years, and they would tell you that the Supreme Court has overreached. On the other hand, then-Professor Bybee has articulated the contrary view as follows: "The Court is simply not an adequate braking mechanism for Congress's own ambitions. Congress, determined to lead, has wrested the whip handle from the states and found itself unrestrained."

If the Court is not up to the task of preserving federalism, and if state governments lack the political heft — and the political will — to assure a continuing role for federalism, then where can an effective counterbalance to the hegemonic tendencies of the national government be found? I would suggest that it must be found in the democratic process. Some observers would regard this as a gloomy assessment. The citizenry, they would say, is more interested in substantive policy outcomes than in ethereal notions of federalism.

Further, they would say that national politicians are interested in sending more federal largesse home to their states

60. Bybee, supra note 41, at 561.
61. Indeed, each of the practical advantages of federalism mentioned by Justice O'Connor in Gregory, if given free rein, could result in substantive outcomes based more on demagoguery than logic. Could a locality's smoking ban extend to one's house? What if it were subsidized low-income housing? Could a school board make astrology part of the science curriculum? At some point, the benefits of regulatory experimentation will have negative economic consequences when viewed from the perspective of a broader political unit. Who is to say state and local experimentation has gone too far?
than the states have sent in taxes to the national government. Why should these politicians consider themselves restrained by notions that power should be shared with state governments on the mere authority of doctrine not made explicit in the Constitution? These are valid points.

But the democratic process, as it plays out at both the national and state levels, is not without vitality. And I would suggest that a democratic process infused with genuine debate over the comparative competencies of the state and national governments to effectively address specific issues affecting American life continues to nourish federalism. The debate may not be termed as explicitly as this, and it may not result in as coherent a federalism as some would like, but it is federalism nonetheless.

That debate rages over the role of the national government in combating street crime. I would be the first to concede that Congress’s efforts in recent years have, on this issue, overwhelmed any respectable notions of federalism. Indeed, I could have limited this essay to that issue alone. But while Congress has continued to find it politically popular to legislate against crimes that traditionally were the concern of state governments, opposition to this trend has grown. My voice has been part of that opposition. More importantly, so has Chief Justice Rehnquist’s, as well as groups which oppose such things as mandatory minimum criminal sentences and the explosion in the federal prison population. This debate will continue.

What about welfare reform? We have watched in recent years as President Clinton, a Democrat, signed into law the transfer of substantial discretion back to the states in the administration of the welfare system. The debate continues as to how government can best serve the poor, and which level of government has greater competency to do so.

Or education? A Republican President, George W. Bush, championed the No Child Left Behind law which continues a trend of

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62. See, e.g., William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 VA. L. REV. 1657, 1660 (1992) ("Although legislative efforts are necessary in some areas, simple congressional self-restraint is called for in others, specifically, the federalization of crimes and creation of new causes of action."); Anthony M. Kennedy, Speech at the American Bar Association Annual Meeting, August 9, 2003, available at http://www.supremecourtus.gov/publicinfo/ speeches/sp_08-09-03.html ("I can accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust.").

nationalizing public education, an area which throughout most of our history has been exclusively the province of state and local governments.\textsuperscript{64}

Let me add, parenthetically, that I mention the political affiliation of our last two presidents only because the substantive policy result is not what intuitively would be expected from either of them. Democrats are usually regarded as advocating a larger national government, Republicans as advocating a smaller one. My examples serve, I believe, to underscore my point that debate within the democratic process – and just plain politics – ultimately determines the continuing vitality of federalism.

Same-sex marriage is certainly a hot button issue. Marital law has always been state law. In the last two years, the state of Massachusetts, through its own Supreme Judicial Court, and the City of San Francisco, have given legal sanction to gay marriage.\textsuperscript{65} In the November 2004 elections, the citizens of eleven states voted for amendments to their state constitutions to ban same-sex marriages. Many same-sex marriage opponents, most of whom, it is fair to say, would usually oppose most forms of federal intervention on state prerogatives, are aggressively pursuing a federal constitutional amendment to ban gay marriage. This is the democratic process, and politics, at work – and it reveals the tensions inherent in our federal system, and the passions they arouse.

Medical use of marijuana also found its way onto several state ballots in recent elections. The Bush Administration opposes medical marijuana. But in the last general election, Montana voted overwhelmingly to re-elect President Bush while its citizens also overwhelmingly passed a referendum legalizing medical marijuana.\textsuperscript{66} I do not know that a more dynamic example of present-day federalism can be found.


\textsuperscript{65} See Goodridge v. Dep't of Pub. Health, 798 N.E. 2d 941 (Mass. 2003). The California Supreme Court subsequently abrogated those unions upon its determination that the local officials had exceeded their authority by issuing marriage licenses to homosexual couples. Lockyer v. City and County of San Francisco, 95 P.3d 459, 495 (2004).

\textsuperscript{66} President Bush received 266,000 votes to Senator Kerry's 174,000 votes in Montana. The medical marijuana initiative in that state passed 276,000 to 171,000. The results are taken from the Montana Secretary of State's website. http://sos.state.mt.us/Assets/elections/2004Gen/2004-GenState.pdf. Four other states that voted for President Bush – Alaska, Arizona, Colorado, and Nevada – already had medical marijuana laws. The voters of Colorado and Nevada in 2000, like Montana in 2004, voted for President Bush and passed medical marijuana initiatives.
I earlier expressed my agreement with the proposition that the constitutional rules written by the founders are “skewed in favor of national power.” This can be said, not only about the constitutional rules, but about the Preamble itself. It begins: “We, the People of the United States.” It does not read: “We, the People of the Several States,” or “We, the Citizens of Thirteen Former Colonies.” The Preamble evokes an idea, later captured by President Lincoln while speaking at Gettysburg, that what the founders had done was to bring forth “a new nation.”

The self-governing citizens of that nation remain the font of federalism. Concepts of federalism may be supported with constitutional text and appeals to history and tradition. But the People, acting through the democratic process, remain the force which defines our federalism. I do not believe that this is a romantic notion. I think it is just plain political reality. Federalism will remain a vibrant force in American life and law so long as the People, informed by ongoing debate, believe that states possess certain competencies that the national government simply cannot attain. And in my view, the evidence is overwhelming that the People continue to hold that belief.